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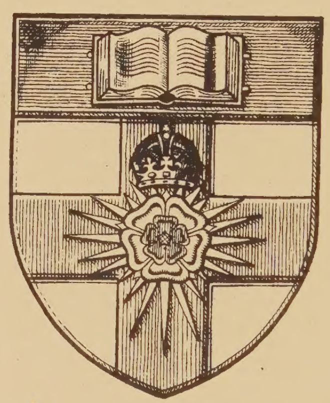

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The reference 2 HALSBURY'S LAWS (3rd Edn.) 20, para. 48, refers to paragraph 48 on page 20 of Volume 2 of the third edition of Halsbury's Laws of England, of which Viscount Simonds is Editor-in-Chief.

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CORRIGENDA

[1956] 1 All E.R.

p. 599. COMMISSIONER OF STAMP DUTIES *v.* NEW ZEALAND INSURANCE CO., LTD. Counsel for the appellant: read " *Neil Lawson, Q.C., J. Byrne* (of the New Zealand Bar) and *T. H. H. Skeet* for the appellant " instead of as printed.

p. 804. DONN *v.* FEINSTEIN. Solicitors: read " *Max Bitel & Co.* (for the plaintiffs); *John Holt* (for the defendants) " instead of as printed.

[1956] 2 All E.R.

p. 70. WILLIAMS *v.* PORT OF LIVERPOOL STEVEDORING CO., LTD. Counsel for the barge owners: read " *R. H. Forrest, Q.C.*, and *R. G. Clover* " instead of as printed.

p. 176. GOODRICH *v.* PAISNER. Line E.5: for " such an evasion " read " such an invasion ".

p. 353. Re MURRAY (*decd.*). Line F.3: for " codicil were more stringent " read " codicil were less stringent ".

p. 764. ABLEY *v.* ABLEY. Solicitors: read " *H. H. H. Wiggett*, agent for *W. A. Finlay* (for the husband); *Official Solicitor* " instead of as printed.

p. 768. Re SONGEST (*decd.*). Solicitors for the first defendant: after " *Cunliffe & Airy* " read " agents for *Shenton, Pain & Brown*, Winchester."

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BROWN *v.* BROWN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), February 20, 21, 23, 24, March 16, 1956.]

Justices—Husband and wife—Adultery—Conduct conducing to husband's adultery—Wife's improper but not adulterous association with another man—Ignorance of husband—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 c. 57), *s.* 11 (1) (3).

Divorce—Conduct conducing—Adultery of husband—Wife's improper but not adulterous association with another man—Ignorance of husband—Wife's conduct not conducing to husband's adultery.

The parties were married in 1953. In March, 1955, the wife, who had been told by the husband that she could go out on her own, began to go out with one M. She did not disclose this fact to the husband, but he noticed a change in her attitude, that she was no longer interested in him and that as regards sexual intercourse she had become cold. The husband sometimes asked the wife with whom she had been out; but he attributed her sexual coldness to her fear of childbirth and took precautions against conception. In August, 1955, the husband committed adultery with a Mrs. A. on two occasions. The husband confessed this adultery to the wife who then told him of her association with M., though she denied that she had committed adultery with him. The wife made a complaint to the justices under the Matrimonial Causes Act, 1937, s. 11 (1), alleging that the husband had committed adultery and applied for an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. The husband by way of defence alleged that she had by her misconduct conduced to his adultery and that by s. 11 (3) she was not entitled to an order. The justices dismissed the complaint. On appeal by the wife,

Held: the wife's association with M. was improper and constituted misconduct to the husband, notwithstanding his ignorance of it (see p. 5, letter H, post) and that association was the cause of her change in attitude to the husband; but, although misconduct which fell short of adultery could amount to conduct conducing, yet whether it did so amount was a question of degree and in the present case, even assuming that the husband suspected more than he knew and was affected by what he suspected, the wife's misconduct did not in law amount to conduct conducing to his adultery (see p. 9, letter C, p. 10, letter D, post), and she was, therefore, entitled to an order.

Cox v. *Cox* (1893) (70 L.T. 200) distinguished.

Appeal allowed.

[**Editorial Note.** It may be noted that in the present case the findings of the justices in their statement of reasons were alternative in form. The result of their being so expressed was that their decision did not amount to a determinate conclusion of fact such as might have rendered the incidence of statutory burden of proof under s. 11 (3) of the Matrimonial Causes Act, 1937, irrelevant (see p. 4, letter D, post), although in the event the burden of proof was not a determining factor.] A B

As to wilful neglect or misconduct conducing to adultery, see 12 HALSBURY'S LAWS (3rd Edn.) 309, 310, para. 618; and for cases on the subject, see 27 DIGEST (Repl.) 422-424, *3530-3547*.

As to adultery as a ground for the grant of relief by a magistrates' court, see 12 HALSBURY'S LAWS (3rd Edn.) 486, para. 1083.

For the Matrimonial Causes Act, 1937, s. 11, see 11 HALSBURY'S STATUTES (2nd Edn.) 866.] C

Cases referred to:

(1) *Churchman* v. *Churchman*, [1945] 2 All E.R. 190; [1945] P. 44; 114 L.J.P. 17; 173 L.T. 108; 27 Digest (Repl.) 379, *3131*.

(2) *Robins* v. *National Trust Co.*, [1927] A.C. 515; 96 L.J.P.C. 84; 137 L.T. 1; Digest Supp. D

(3) *Watt* (*or Thomas*) v. *Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484; 1947 S.C. (H.L.) 45; [1947] L.J.R. 515; 176 L.T. 498; 2nd Digest Supp.

(4) *Symons* v. *Symons*, [1897] P. 167; 66 L.J.P. 81; 77 L.T. 142; 27 Digest (Repl.) 434, *3637*. E

(5) *British Columbia Electric Ry. Co., Ltd.* v. *Loach*, [1916] 1 A.C. 719; 85 L.J.P.C. 23; 113 L.T. 946; 38 Digest 317, *361*.

(6) *Smith, Hogg & Co., Ltd.* v. *Black Sea & Baltic General Insurance Co., Ltd.*, [1940] 3 All E.R. 405; [1940] A.C. 997; 109 L.J.K.B. 848; 163 L.T. 261; 2nd Digest Supp.

(7) *Herod* v. *Herod*, [1938] 3 All E.R. 722; [1939] P. 11; 108 L.J.P. 27; 159 L.T. 530; 27 Digest (Repl.) 360, *2978*. F

(8) *Richards* v. *Richards*, [1952] 1 All E.R. 1384; [1952] P. 307; 116 J.P. 358; 3rd Digest Supp.

(9) *Synge* v. *Synge*, [1900] P. 180; *affd.* C.A., [1901] P. 317; 70 L.J.P. 97; 85 L.T. 83; 27 Digest (Repl.) 446, *3781*.

(10) *Plows* v. *Plows*, (1928), 44 T.L.R. 263; 27 Digest (Repl.) 426, *3565*. G

(11) *Callister* v. *Callister*, (1947), 63 T.L.R. 503; 27 Digest (Repl.) 367, *3036*.

(12) *Weatherley* v. *Weatherley*, [1947] 1 All E.R. 563; [1947] A.C. 628; [1947] L.J.R. 869; 176 L.T. 434; 111 J.P. 220; 27 Digest (Repl.) 338, *2804*.

(13) *Glenister* v. *Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; 27 Digest (Repl.) 367, *3040*.

(14) *Allen* v. *Allen*, [1951] 1 All E.R. 724; 115 J.P. 229; 27 Digest (Repl.) 84, *633*. H

(15) *Evans* v. *Evans & Elford*, [1906] P. 125; 75 L.J.P. 27; 94 L.T. 616; 27 Digest (Repl.) 430, *3598*.

(16) *Cox* v. *Cox*, (1893), 70 L.T. 200; 27 Digest (Repl.) 423, *3544*.

(17) *Constantinidi* v. *Constantinidi & Lance*, [1903] P. 246; 72 L.J.P. 82; 89 L.T. 340; *subsequent proceedings*, [1905] P. 253; 27 Digest (Repl.) 435, *3638*. I

(18) *Wyke* v. *Wyke*, [1904] P. 149; 73 L.J.P. 38; 90 L.T. 172; 27 Digest (Repl.) 435, *3640*.

(19) *Blunt* v. *Blunt*, [1943] 2 All E.R. 76; [1943] A.C. 517; 112 L.J.P. 58; 169 L.T. 33; 27 Digest (Repl.) 429, *3589*.

(20) *Jamieson* v. *Jamieson*, [1952] 1 All E.R. 875; [1952] A.C. 525; 116 J.P. 226; 3rd Digest Supp.

A **Appeal.**

This was an appeal by the wife against an order of the Great Yarmouth justices dated Nov. 2, 1955, whereby they dismissed her application for an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the ground of the husband's adultery.

The facts appear in the judgment.

B *K. B. Campbell* for the wife.

J. D. F. Moylan for the husband.

Cur. adv. vult.

Mar. 16. **LORD MERRIMAN, P.**, read the following judgment of the court: This is an appeal against the dismissal by the justices for the County
C Borough of Great Yarmouth on Nov. 2, 1955, of a wife's complaint that her husband had committed adultery. The complaint was brought by virtue of s. 11 (1) of the Matrimonial Causes Act, 1937 (the Herbert Act), which section remains unrepealed by the Matrimonial Causes Act, 1950. The first sub-section provided as an additional ground on which a married woman could apply to a magistrates' court for an order under the Summary Jurisdiction (Married
D Women) Act, 1895, the fact that her husband has been guilty of adultery, and the corresponding right is given to the husband by sub-s. (2); but by sub-s. (3) it is enacted that on any application made by virtue of this section the court shall not make an order unless it is satisfied, amongst other things, that the applicant has not, by his or her wilful neglect or misconduct, conduced to the adultery. The husband admitted the adultery charged, but he alleged that
E his wife's conduct had conduced thereto. The case has been very well argued by counsel on both sides, and we are satisfied that all the relevant authorities have been cited. If we do not refer to many of these authorities it is because the argument has shown that in many respects there is little difference of opinion.

It is to be observed at the outset that in the Divorce Court throughout the series of Matrimonial Causes Acts, now consolidated in the Act of 1950, conduct
F conducing to adultery has never been more than a discretionary bar to the relief of divorce, and the effect of s. 14 (1) of the Matrimonial Causes Act, 1950, replacing s. 5 of the Act of 1937, is that it also affords a discretionary bar to the relief of judicial separation. In a magistrates' court, on the other hand, conduct conducing to adultery is made, by s. 11 (3) of the Act of 1937, an absolute bar to the making of an order which, if a non-cohabitation clause is included, has
G the same effect as a decree of judicial separation: Summary Jurisdiction (Married Women) Act, 1895, s. 5 (a). Moreover, the onus of satisfying the court that his or her conduct has not conduced to the adultery charged is placed on the complainant, as in the case of the absolute bars to relief on a petition for divorce. In the present case the justices have found affirmatively that the wife's conduct did conduce to the husband's adultery*; but, alternatively, they say that
H even if the evidence would not amount to positive proof that the husband's adultery was conduced to by the wife's conduct, they are

> "very far from satisfied that the applicant had not by her wilful neglect or misconduct conduced to the adultery."

Accordingly, on the advice of their clerk, they held that they were debarred from
I making an order in favour of the wife by s. 11 (3) of the Act of 1937.

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* The justices' statement of reasons included the following passage: "We have no doubt that this evident loss of his wife's affection and interest conduced to the husband's adultery and we are satisfied that it was due to the association of the wife with another man which . . . [see p. 5, letter G, post] . . . was improper, and so (notwithstanding the husband's ignorance of it) constituted misconduct.

"For the foregoing reasons even if the evidence would not amount to positive proof that the husband's adultery was conduced to by the wife's conduct, we are very far from satisfied 'that the applicant had not by her wilful neglect or misconduct conduced to the adultery'."

The effect of placing the onus of satisfying the court of the negative in connection with the absolute bars to a decree of divorce is discussed in *Churchman* v. *Churchman* (1) ([1945] 2 All E.R. 190 at p. 195) where reliance is placed on what was said by VISCOUNT DUNEDIN in *Robins* v. *National Trust Co.* (2) ([1927] A.C. 515 at p. 520); and by LORD THANKERTON in *Watt* (*or Thomas*) v. *Thomas* (3) ([1947] 1 All E.R. 582) when, relying on the same case, he said (ibid., at p. 586):

> " . . . as has often been pointed out, no question of burden of proof as a determining factor of the case arises on a concluded proof, except in so far as the court is ultimately unable to come to a definite conclusion on the evidence, or some part of it, and the question will arise as to which party has to suffer thereby."

Since the justices may be said, in one limb of their reasons, to have come to a determinate conclusion that the husband's adultery was conduced to by the wife's misconduct, it might appear that the onus no longer matters, and can be disregarded. We agree, however, with the argument of counsel for the husband that the justices' judgment ceases to be determinate because it is an alternative form*, and therefore the husband is entitled to succeed in defeating the wife's complaint if the facts warrant reliance on the onus as a determining factor of the case. But whether the matter falls to be decided on the positive finding, or on the onus of proof, the essential question still remains: whether the wife's conduct is capable, in law, of amounting to conduct conducing to the husband's adultery.

The evidence was that the parties were married on Sept. 19, 1953. They lived together in Nottingham, where both were employed—the husband in the confectionery trade, in connection with which he was working for an examination. During the first year of married life all went well. In the spring of 1955 the wife began an association with one Morley, a fellow employee whom she had known for some twelve months. She says that she went out with him on some Thursdays and Saturdays, but not every week—only when her husband did not want her to go out with him. She stated that the husband did not seem to bother about her, and she was left to go out on her own. With regard to this aspect of the case, the husband agreed that his time was taken up with riding his motor bicycle and reading for his examination, and that he told the wife that she could go out on her own. He said that he took her out usually on Saturday and Sunday. Once or twice, he said, he asked her if she had been out with anyone and that she replied " no ". He stated, however, that he noticed a change in his wife's attitude towards him; that their relations were not what they had been during the first year of marriage. He said that his wife was not interested in him, and neglected him, so that on occasions he had to get his own meals. As regards sexual intercourse, he said she became cold; that it was not " love "; and that she said that she regarded it as a form of duty on her part. In cross-examination he said that he attributed this recent coldness to intercourse on her part to fear of childbirth; that he therefore took every precaution against her having a child, and that he thought that it would eventually right itself. He said that he did not know of any other man in her life.

Mr. and Mrs. Alsop were friends of theirs. Mr. Alsop worked in the same employment as the husband, who introduced them to the wife. From Aug. 20 to Sept. 3, 1955, Mr. Alsop was away for a fortnight's army training; in the meantime Mrs. Alsop stayed with her mother. On Monday, Aug. 22, Mrs. Alsop came to the Brown's house, and the husband took her to the bus stop. On Thursday, Aug. 25, she again came, and the husband took her home on his motor cycle. During the following week, his wife says, he was out every night. On Monday, Sept. 5, Mr. Alsop came and challenged the husband about his conduct with his (Mr. Alsop's) wife, saying that his wife had confessed to him. The husband thereupon admitted that he had committed adultery with Mrs. Alsop on two occasions: on Wednesday, Aug. 31, on an embankment after they had attended a football match together, and on Friday, Sept. 2, in the country. Following on this confession of adultery by the husband, the wife disclosed to him, for the first time, her association with Mr. Morley, of whose existence the husband had hitherto been unaware. Subsequently Mr. Morley came to the house, and the wife then expressed her love for Mr. Morley (in her evidence qualified as "perhaps infatuation"). The only evidence of the extent of the wife's association with Mr. Morley was that provided by the wife herself, viz., that she had kissed him goodnight; that she thought of telling her husband many times, as it worried her; that she was ashamed of what she had done. She denied in evidence that she had committed adultery with him, and asserted that this association did not affect her behaviour to the husband, and that she was doing her best to keep it from him. The husband nowhere suggested that he suspected adultery by the wife, although he may have sensed that all was not well. With regard to his own adultery with Mrs. Alsop, he said in evidence:

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* See footnote on p. 3, ante.

> "I can only say it was lack of affection on my wife's part . . . There were signs of my marriage coming to an end before I went with Mrs. Alsop."

It was conceded that "it" in this context meant "the cause of my adultery".

The husband's allegation in substance, therefore, is that the complete change for the worse in the sexual relations of the spouses was merely the outward and visible manifestation of a change of heart, amounting to distaste and coldness, on the part of the wife towards himself, arising directly out of her improper association with Mr. Morley. Throughout this judgment we use the justices' phrase "loss of affection and interest" as a short, if incomplete, description of the husband's complaint. They couple with this phrase the epithet "evident", which is plainly intended to convey that the husband was conscious of it and was affected by it. To be more specific, it appears that the justices use the phrase "loss of affection" with particular reference to the manner in which the wife's sexual life with the husband was, as they find, very materially affected, and the phrase "loss of interest", more generally, in connection with other matters such as his examinations and his driving test. The crucial sentence in their reasons is:

> "We have no doubt that this evident loss of his wife's affection and interest conduced to the husband's adultery and we are satisfied that it was due to the association of the wife with another man which whether or not adulterous was improper, and so (notwithstanding the husband's ignorance of it) constituted misconduct."

The word "it" on the first occasion meant, it was conceded, the evident loss of his wife's affection and interest, and on the latter occasion plainly meant the association.

In our opinion, although the association was rightly held to be improper, the justices went rather too far in using the words "whether or not adulterous", inasmuch as earlier in their reasons they said explicitly:

> " . . . there is no evidence that the wife had herself committed adultery with Albert Morley . . ."

albeit they quote passages, already referred to, from her evidence in support of their view of the improper lengths to which the association had gone. We accept unreservedly the finding of the justices about the impropriety of the association, and we reject the argument put forward by counsel for the wife that if loss of affection and interest is held to be conduct conducing to adultery, no spouse would be safe from the stigma of conduct conducing when the ardour of early married life abates in the course of time. Manifestly, no question of guilt would be involved in a natural change of attitude of that character.

Moreover, considerations of that kind would involve an impossible assessment of the extent to which diminution of affection in that respect was or was not a natural reaction to a corresponding diminution in the other spouse, and so forth. In our opinion, the husband is entitled to rely on a finding, from which we are not prepared to differ, that the wife's association with Mr. Morley was improper, and that it constituted misconduct to the husband, notwithstanding his ignorance of it.

This brings us to the question whether this misconduct is such as to be capable in law of amounting to conduct conducing. Both counsel adopted the view that the correct approach to the question whether or not conduct conduces is to ascertain whether the conduct alleged to conduce to the adultery in question is misconduct, and whether it is the cause of the adultery. Nor was it sought to draw any distinction between the various epithets which have from time to time been attached to the word " cause " (e.g., " the main causes " per Sir Francis Jeune, P., in *Symons* v. *Symons* (4) ([1897] P. 167 at p. 174), and the catalogue of epithets given by Lord Sumner in *British Columbia Electric Ry. Co., Ltd.* v. *Loach* (5) ([1916] 1 A.C. 719 at p. 727); see also Lord Wright in *Smith, Hogg & Co., Ltd.* v. *Black Sea & Baltic General Insurance Co., Ltd.* (6) ([1940] 3 All E.R. 405 at p. 409)); or between such phrases as that the conduct must " bring about " the adultery, or be " clearly and directly connected with " it: see *Herod* v. *Herod* (7) ([1938] 3 All E.R. 722 at pp. 729, 730) and *Richards* v. *Richards* (8) ([1952] 1 All E.R. 1384 at p. 1386, per Denning, L.J.). Accepting the above test, counsel for the husband argues with considerable force that there is no break in the chain of causation between the wife's improper affair with Mr. Morley and the commission of adultery by the husband. He admitted, of course, that the husband did not know that the wife was having an affair with Mr. Morley, and that he did not even know that there was such a person until, after his confession of his own adultery to the wife, she told him about the affair. She then made it clear, however, and the justices so find, that she wanted Mr. Morley and meant it, saying amongst other things that he and she were in love. Though the husband did not know about this affair, counsel argues that it is clear that he was not in a state of total ignorance; on the contrary, he plainly suspected that something was going on, though he did not know to what extent or with whom. He argues that the husband's lack of knowledge does not interrupt the chain of causation. Although he admits that the husband's case would be stronger if he had actually known what was going on between the wife and Mr. Morley before he committed adultery, he submits that the lack of knowledge is not fatal to his case, because the justices have found that the association with Mr. Morley caused the loss of affection and interest, and they accept the husband's evidence that she ceased to be interested in him, and that her affection was not there.

There is ample evidence to support this finding. Indeed, it would be strange if it were not so. The wife said that her behaviour towards her husband was " exactly as it was before ", and in this I think there is no doubt that she was speaking of their sexual relations, as well as of other aspects of their married life. As already stated, however, she admitted that she was ashamed of what she had done, that she had thought of telling her husband lots of times, and that it worried her. In plain English, she had a guilty conscience, and was afraid to tell her husband. It is not surprising that the justices did not accept her evidence that this did not affect her attitude towards her husband, not least in their sexual relations. It is perfectly natural, if not inevitable, that the husband sensed that there was something wrong, and the wife admits that on two occasions at least he asked her point blank whether she was going out with someone else. We feel no difficulty in holding that there was no break in the chain of causation between the association and its impact on the husband's mind and feelings.

This still leaves open the question whether his alleged reaction to the affair was justified. In other words, whether the association or its impact on the husband, taken at its highest, is capable in law of amounting to conduct conducing to his adultery. It is not easy to reconcile all the cases on conduct conducing. To take, for example, refusal of sexual intercourse, to which substantially the same considerations as those to which we have just alluded in relation to loss of affection apply, so that cases in which the refusal is deliberate and unjustified, and can be traced directly to an illicit affair, differ in material respect from cases in which refusal or cessation of intercourse is due to reasons of health, advancing years, and the like. There is, however, a considerable conflict of authority on this subject. Sir Francis Jeune, P., held that the wilful refusal of sexual intercourse for a protracted period was not conduct conducing to the husband's adultery (*Synge* v. *Synge* (9) ([1900] P. 180 at p. 207)). On the other hand, in 1928, Lord Merrivale held the contrary in *Plows* v. *Plows* (10) ((1928) 44 T.L.R. 263), a case of wilful refusal to consummate, followed by desertion; and, nearly twenty years later, in *Callister* v. *Callister* (11) ((1947) 63 T.L.R. 503) a Court of Appeal, over which Bucknill, L.J., was presiding, decided that the refusal of intercourse by a wife for eleven years was clearly conduct conducing to the husband's adultery, and held, referring to *Herod* v. *Herod* (7) that it would be difficult to say that the husband's adultery was good cause for the wife's deserting him.

This passage was cited with approval by Denning, L.J., in *Richards* v. *Richards* (8), yet in that case it was held ([1952] 1 All E. R. at p. 1386) that where there is desertion and nothing more, adultery on the part of the wife

> " . . . is due, not to the desertion, but to her own weakness of character, or, as, no doubt, she would prefer to put it, because she fell in love with another man."

This is substantially the same reasoning as that of Sir Francis Jeune, P., in relation to the refusal of sexual intercourse; *Synge* v. *Synge* (9) ([1900] P. at p. 207). Other judges have expressed much the same view. We do not doubt that in using the phrase " desertion and nothing more " Denning, L.J., meant to exclude cases of constructive desertion, for it is easy to imagine expulsive words or other expulsive conduct which might very well be held to conduce to adultery. However that may be, desertion in the nature of things almost invariably involves total deprivation of sexual intercourse, in addition to comprising the wider intention permanently to disrupt the marriage, although it is well settled that the refusal of sexual intercourse does not by itself constitute desertion: *Weatherley* v. *Weatherley* (12) ([1947] 1 All E.R. 563). Thus, desertion is clearly a graver matrimonial offence than refusal of sexual intercourse; and, if the greater includes the less, it is not altogether clear, on principle, how it is that refusal of sexual intercourse can, but desertion cannot, amount to conduct conducing. It was suggested in argument that there is a distinction between desertion and the deprivation of sexual intercourse while the parties are living together, inasmuch as the natural instincts of the deprived spouse are more habitually invoked by the presence of the other. While this may be true in certain cases, it is difficult to distinguish between the deprivation caused by the resolute withdrawal for years to a separate room, and that caused by desertion.

There appears to be singularly little authority on the question whether even actual adultery of the petitioner can per se be conduct conducing to the adultery of the other spouse. It is not easy to understand why it should not be so in certain cases; for example, a confession that adultery has been committed, made without any antecedent warning, or even suspicion, that things were not as they should be, might be such a shock as to lead the other spouse to commit adultery under the reaction to the shock, and it may be that the same would apply whether the confession were true or false if it was intended to convince, and did convince, the other spouse of its truth: see *Glenister* v. *Glenister* (13) ([1945] 1 All E.R. 513), and *Allen* v. *Allen* (14) ([1951] 1 All E.R. 724). In the present case, however, the husband does not assert that he believed that the wife had committed adultery; on the contrary, as has already been said, in spite of his suspicions, he said that he attributed her changed attitude to her own fear of conception. Even assuming that belief in her actual adultery induced by the wife might be conduct conducing, there is a very long step between that and the suggestion that a bare suspicion of an improper association, although the suspicion subsequently proved to be justified, can be conduct conducing.

The lack of authority on this point may be due to the fact that conduct conducing to the adultery charged against the respondent and the adultery committed by the petitioner have since 1857 both been discretionary bars only. Moreover, the older cases show that the test for the exercise of discretion in favour of a petitioner who had committed adultery was more severe than that for conduct conducing: see *Evans* v. *Evans & Elford* (15) ([1906] P. 125). Indeed, Sir Gorell Barnes, P., in that case seems to have gone to the length of ruling that even the fact that the respondent had been guilty of conduct conducing to the petitioner's adultery " afforded no ground for the exercise of the discretion ". The earlier cases are reviewed by Sir Francis Jeune, P., in *Symons* v. *Symons* (4), in which he, after very careful consideration, came to the conclusion that it was safe and proper to hold that the circumstances which might be considered in exercising the discretion should include the case of a husband whose adultery and cruelty, before his desertion, and his prolonged desertion, were the main causes of the wife's adultery, so that he was guilty of misconduct conducing to her adultery. In 1893, in *Cox* v. *Cox* (16) ((1893) 70 L.T. 200), a case to which we will refer later, Sir Francis Jeune, P., addressing his mind to the question whether any marital misconduct of the husband, short of adultery, could conduce to the adultery of the wife, plainly takes it for granted that adultery itself may be conduct conducing.

In the later case of *Constantinidi* v. *Constantinidi & Lance* (17) ([1903] P. 246), in which both the petitioner and the respondent had committed adultery, but it was found that the adultery of the petitioner had not conduced to the adultery of the respondent, Sir Francis Jeune, P., exercised his discretion in favour of the respondent. He called attention to the fact that s. 31 of the Matrimonial Causes Act, 1857, conferred a discretion on the Divorce Court, without imposing specifically any limitation or any directions with regard to its exercise, and, after reviewing the authorities again, laid it down (ibid., at p. 259) that, although the discretion conferred by the section was a judicial and not an arbitrary discretion,

> " . . . the causes, for which the court may, in the exercise of its discretion, allow a divorce notwithstanding misconduct by a petitioner, are to be taken in combination and according to their several degrees of force, and also that the list of such causes is not a closed book, but may be extended as occasion arises . . . "

However, *Wyke* v. *Wyke* (18) ([1904] P. 149), is another case in which the exercise of discretion was refused, although the case was recognised as being a hard one, and one in which the husband's conduct had to some extent conduced to the wife's adultery. The Court of Appeal in *Constantinidi* v. *Constantinidi* (17) ([1905] P. 253), in an appeal arising out of a variation of settlements in the original suit, indicated doubts whether Sir Francis Jeune, P., had gone too far in his pronouncements, both in the earlier case of *Symons* v. *Symons* (4), and in *Constantinidi* v. *Constantinidi* (17) itself. It was in this state of the authorities, fully reviewed in his judgment in *Evans* v. *Evans* (15), that Sir Gorell Barnes, P., refused to exercise his discretion in favour of the petitioner.

Obviously it is not easy to reconcile all these earlier cases. No doubt things have changed, and the discretion of the court in favour of a petitioner who has committed adultery is much more widely exercised than was formerly the case, inasmuch as considerations such as the interest of the children of the adulterous association, the interest of enabling the paramour to regularise his or her situation, have been introduced as relevant considerations, as well as the interest of the community at large in maintaining a true balance between upholding the sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. This has gone to the extent of holding that it may be proper in such cases to grant a decree to both spouses: *Blunt* v. *Blunt* (19) ([1943] 2 All E.R. 76 at pp. 78, 81). Thus, the position may be said to have been reversed, and the comparative rarity in recent times of the pleading of the adultery of the other spouse as conduct conducing may readily be explained by the simplicity of the procedure which enables the petitioner (or the respondent who is making cross-charges) to put himself or herself right with the court by making a disclosure of his or her own adultery. It does not follow, however, from the widening of the grounds for the exercise of discretion in spite of the petitioner's own adultery that the test for conduct conducing is any less strict than before.

Cox v. *Cox* (16), in which the Court of Appeal upheld SIR FRANCIS JEUNE in holding that conduct short of adultery could conduce to adultery, is the case most favourable to the husband's contention of all the cases that have been cited, and it is none the less authoritative on the law because the appeal was decided on an application to strike certain paragraphs alleging conduct conducing out of the plea. See, for example, *Jamieson* v. *Jamieson* (20) ([1952] 1 All E.R. 875) and many of the old cases in the reports in which the common law of England was developed on demurrers to the sufficiency of a declaration or a plea. What was pleaded in *Cox* v. *Cox* (16) was that for about five or six years the husband had paid marked attention to an unmarried lady of their acquaintance, and when the wife had remonstrated with him he told her that he would not, and could not, give up his intimacy with her, but had invited her to the house, and corresponded with her, notwithstanding the wife's repeated objections and remonstrances, and had made her presents, and had absented himself from his wife's society in order to enjoy the society of the lady. Moreover, he told his wife that he had been fascinated by her, and that he would have run away with her if she had consented. Further, that for the last three years the husband had paid marked attention to another lady, and had refused to give up his intimacy with her, notwithstanding the wife's objections and remonstrances, and that he had been guilty of acts of undue familiarity with the said lady, which were particularised as putting his arm round the lady's waist on two occasions, and her sitting on his knee on another. LINDLEY, L.J., pointed out (70 L.T. at p. 201) that

> ". . . we have not to consider ordinary pleadings . . . both at common law and equity, pleading facts which do not admit questions of degree or discretion; but we have to consider a case in which degree is everything, and in which the discretion turns upon the degree . . . "

He pointed out that in proof of the concise statements of the pleading evidence might be given, clothing the skeleton with flesh and blood, and so produce a picture which might justify a judge in declining to grant relief; and he approved the view of SIR FRANCIS JEUNE, P., who said in effect: " Let me see the picture complete; then I will exercise my discretion ". SMITH, L.J., relied particularly on the first and longer association, and asked himself whether, if all the alleged facts were proved, and if the skeleton, as LINDLEY, L.J., called it, were filled up with flesh and blood, it was absolutely impossible that those facts could have conduced to the adultery. He added (ibid., at p. 202):

> " I do not say whether they might or not, but it seems to me it is a case which the respondent is entitled to make against the petitioner."

It is plain, therefore, that the Court of Appeal held that, if justified by the evidence, the facts alleged were capable, in law, of amounting to conduct conducing, and that it was a question of degree and the discretion turning on the degree, for the trial judge to say whether the husband's misconduct did or did not conduce to the wife's adultery. In relying on that case counsel for the husband laid particular stress on the change of onus effected by s. 11 (3) of the Act of 1937, which, as has already been pointed out, obliges the complainant to satisfy the court of the negative. Thus he argued that the considerations which actuated the Court of Appeal in *Cox* v. *Cox* (16) apply a fortiori to a case in which the evidence has already been heard, and the issue determined in the husband's favour. In other words, he suggested, SMITH, L.J., would have asked himself whether it was impossible on the facts found by them for the justices to hold that they were not satisfied that the wife had not conduced to the husband's adultery. Since it is to the question of causation that the change of onus is particularly directed, we acknowledge the force of this argument. In *Cox* v. *Cox* (16), however, there was a course, extending over years, of undue familiarity, persisted in by the husband, and even flaunted by him in the face of the wife, despite her repeated remonstrances. Moreover, the wife was plainly aware of the two associations pleaded.

In the present case, although the association itself was improper, the most that can be said about its impact on the husband is that he may have sensed that there was something wrong. Even this is not very clearly established by his own evidence, since in one part of his evidence he attributed the wife's loss of affection and interest to her fear of conception. Even assuming, however, that it is implicit in the findings of the justices that the husband suspected more than he knew, and that he was affected by what he suspected, it seems to us that the conduct alleged is so different in degree from that pleaded in *Cox* v. *Cox* (16), and the impact on the husband from anything known or even suspected at the time when he committed adultery was so much less than was the case in *Cox* v. *Cox* (16), that we should be going much further than is warranted by that case, or any other decision, if we were to hold that the facts in the present case are capable of amounting to conduct conducing. No doubt the wife's evident loss of affection and interest may have rendered the husband more susceptible to temptation, but in our opinion, even invoking the change of onus, the misconduct here found against the wife cannot in law be held to be conduct conducing to the husband's adultery. For these reasons we think the appeal succeeds. We set aside the dismissal of the wife's complaint, and we substitute therefor a maintenance order of 1d. a week, with a non-cohabitation clause.

Appeal allowed.

Solicitors: *Gardiner & Co.*, agents for *Humphrey Lynde & Vine*, Great Yarmouth (for the wife); *Field, Roscoe & Co.*, agents for *Richards & Flewitt*, Nottingham (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

GOODY *v.* BARING.

[CHANCERY DIVISION (Danckwerts, J.), March 16, 22, 1956.]

Solicitor—Negligence—Sale of dwelling-house—Solicitor acting both for vendor and for purchaser—Duty to ascertain standard rent.

Sale of Land—Requisitions on title—Solicitor's duty to deliver although inquiries made before contract.

The plaintiff instructed the defendant, a solicitor, to act for him on the plaintiff's purchase of a leasehold dwelling-house. At the plaintiff's suggestion the vendor instructed the defendant to act also in the matter on his, the vendor's, behalf. The premises were registered with a good leasehold title and were within the Rent Restrictions Acts. The house contained three floors, and was to be sold with vacant possession of the ground floor. The two upper floors were each let at 25s. per week. The defendant noted answers to questions raised on a printed form of "Inquiries before contract", and in reply to a question relating to subsisting tenancies, with particular reference to the Rent Restrictions Acts and to the amount of the statutory and net rents, the defendant noted, on information supplied by the vendor, that the two upper floors were each let at 25s. weekly inclusive of rates. As regards the top floor the defendant noted that 25s. was the rent receivable when the vendor bought the property in 1948 and no increases in rates had been passed on to the tenant. It was further stated that the vendor could give no information of previous lettings. The contract of sale contained a special condition referring to the fact that the two upper floors were each let at rentals of 25s. per week inclusive. When the plaintiff attended to sign his part of the contract, the defendant went through the inquiries and answers and remarked that as there had been increases in rates since 1950 it was possible that the plaintiff could increase the rents. In January, 1954, the sale was completed. In May, 1954, the plaintiff proposed an increase of rent to the tenants of the upper floors. In reply a reduction was demanded and in September, 1954, the standard rents of the upper floors were fixed by the county court at 15s. each, the recoverable rents with permitted increases being 17s. 6d. per week and 18s. 4d. per week respectively. In consequence the plaintiff had to make repayments of overpaid rents to the tenants. He claimed damages for the defendant's negligence.

Held: the defendant was liable for negligence because he had accepted the information given by the vendor relating to rents without ascertaining, either by questioning the vendor further or by asking the tenants, what were the standard and recoverable rents of the property, and because he had failed to advise the plaintiff that he could not rely on the rents which were being paid being recoverable rents.

Hunt v. *Luck* ([1902] 1 Ch. 428) applied.

Per CURIAM: where inquiries before contract have been made, it is still the duty of a purchaser's solicitor to make the appropriate requisitions and inquiries after the formal contract is signed, even if the preliminary inquiries have been so complete that it is only necessary to ask whether the answers thus received are still complete and accurate (see p. 16, letter I, to p. 17, letter A, post).

[As to the position of a solicitor acting for both vendor and purchaser, see 31 HALSBURY'S LAWS (2nd Edn.) 93, para. 142.]

Cases referred to:

(1) *Moody* v. *Cox & Hatt*, [1917] 2 Ch. 71; 86 L.J.Ch. 424; 116 L.T. 740; 40 Digest 356, *2999*.

(2) *Simmons* v. *Pennington & Son (a firm)*, [1955] 1 All E.R. 240.

(3) *Kitchen's Trustee* v. *Madders*, [1949] 2 All E.R. 1079; [1950] Ch. 134; 2nd Digest Supp.

(4) *Hunt* v. *Luck*, [1902] 1 Ch. 428; 71 L.J.Ch. 239; 86 L.T. 68; 40 Digest 157, *1259*.

Action.

The plaintiff claimed damages for the negligence of the defendant, a solicitor, when acting for the plaintiff in respect of the purchase by the plaintiff of leasehold premises, in that the defendant failed to ascertain the standard and recoverable rents of tenancies subject to which the premises were sold, and to advise the plaintiff that the rents for the time being being paid by the tenants might be in excess of the recoverable rents.

C. P. Harvey, Q.C., and *J. P. Brookes* for the plaintiff.
P. M. O'Connor for the defendant.

Mar. 22. **DANCKWERTS, J.**, read the following judgment: This is an action for negligence by a purchaser of land against the solicitor who acted for him in respect of the purchase. The case turns entirely on matters of conveyancing practice. Only one of the three counsel who appear before me practises habitually in the Chancery Division. The common law counsel appearing in the case are, of course, thoroughly competent in regard to the matters coming within the ambit of their ordinary practice, and are well known to me; but I must observe that their experience in respect of conveyancing matters does not seem to me to be such as to provide me with much assistance in regard to the matters which I have to decide. It is not the counsel concerned who are to blame for this situation.

In 1953 the plaintiff, who was employed as a clerk by a firm of radio manufacturers, saw an advertisement relating to property known as 36, Cecile Park, Hornsey, and he got in touch with the owner, a Mr. Tebbs. On Oct. 12, 1953, he paid Mr. Tebbs a deposit of £100, in respect of the purchase price of £1,000, and a receipt was given to him, which was expressed to be received " subject to signing of contract ". The property was leasehold, held under a lease for the term of ninety-nine years from Dec. 25, 1882 at an annual rent of £9. The plaintiff was told that the two upper floors were let to tenants at 25s. a week each. The plaintiff's intention was himself to occupy the ground floor at some future date, though not immediately, but I think it is clear that he regarded the purchase partly as an investment. He was anxious to complete by the following Jan. 1, but otherwise there was no special urgency. On the same day, Oct. 12, 1953, the plaintiff wrote a letter asking the defendant, whom he had met through his (the plaintiff's) employers, to act for him. The defendant accepted these instructions. Unfortunately, he also agreed to act for Mr. Tebbs, the vendor.

This is not a case in which an inexperienced purchaser has been tempted by a vendor to employ the vendor's solicitor. It was the plaintiff himself who gave the defendant's name to Mr. Tebbs and suggested that instructions should be given to him also by Mr. Tebbs, who was in fact known to the defendant as a tree feller. But this does not make the position any more satisfactory. It seems to me practically impossible for a solicitor to do his duty to each client properly when he tries to act for both a vendor and a purchaser. The position has been pointed out very plainly by Scrutton, L.J., in *Moody* v. *Cox & Hatt* (1) ([1917] 2 Ch. 71 at p. 91):

> " It may be that a solicitor who tries to act for both parties puts himself in such a position that he must be liable to one or the other, whatever he does. The case has been put of a solicitor acting for vendor and purchaser who knows of a flaw in the title by reason of his acting for the vendor, and who, if he discloses that flaw in the title which he knows as acting for the vendor, may be liable to an action by his vendor, and who, if he does not disclose the flaw in the title, may be liable to an action by the purchaser for not doing his duty as solicitor for him. It will be his fault for mixing

> himself up with a transaction in which he has two entirely inconsistent interests, and solicitors who try to act for both vendors and purchasors must appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relation puts upon them."

It is nearly forty years since those words were said by SCRUTTON, L.J., and it appears that they have still not been properly appreciated by some solicitors. Perhaps they have never been read by many of them.

The defendant obtained the documents of title from Mr. Tebbs' bank, and from these it appeared that Mr. Tebbs had acquired the property by an assignment dated June 16, 1950, from a Mr. Edwin Hayes Johnson, who had acquired the property by an assignment dated Sept. 15, 1933.

On Nov. 11, 1953, the defendant saw Mr. Tebbs with the object of obtaining information from him. The defendant had with him a printed form of " Inquiries before contract " sold by a well-known firm of law stationers, and on this form he noted in pencil the answers which he obtained from Mr. Tebbs. Questions 1 (A) and (B) are in the following form:

> " 1. Please supply full particulars of: (A) All subsisting tenancies, stating whch are or have been statutory tenancies, either under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933, or under the Rent and Mortgage Interest Restrictions Act, 1939, all terms of the tenancies, and the names of the tenants, together with copies of any leases or agreements. (B) If the property is now in the vendor's possession, or vacant, or the present tenancy is not a statutory tenancy, please state whether the property is, or has been, subject to the Rent Restrictions Acts, and if so the amounts of the statutory and net rents, and whether the property or any part of it was registered as decontrolled with a local authority."

Against these questions, the defendant wrote down the following information:

> " Top floor let to Mr. Chapman 25s. per week inclusive. This was the rent receivable when the vendor bought in 1948 (?) and no increases have been passed on to tenant. First floor let to Mr. Hommerton 25s. per week ditto. Ground floor let to vendor from 1947 to 1948 at 35s. per week inclusive. No information of previous lettings."

It seems probable that the defendant had not examined the documents of title at this date. Against a certain number of the other questions in the form the defendant also made some pencil notes.

The defendant then proceeded to prepare a contract in duplicate incorporating the National Conditions of Sale (15th Edn.) with some special conditions of sale. But, as the property was registered with good leasehold title, the matter was comparatively simple. One condition states that the property is sold with vacant possession on completion, but it appears that as a result of a telephone conversation with the vendor this was altered by the defendant so as to limit it to the ground floor and garden, and a reference to the first and second floors being let at the inclusive weekly rentals of 25s. each floor was added. Completion on Dec. 18, 1953, was provided for.

In response to a request by the defendant, on Nov. 23, 1953, the plaintiff called on the defendant to sign his part of the contract. According to the plaintiff's account, the defendant had the unsigned contract in front of him, and also the preliminary inquiries (but upside down from the plaintiff's point of view, and in any event the pencil notes are difficult to read). The plaintiff says that the defendant went through the inquiries, but rather for his own satisfaction, it seemed, than for the purpose of informing the plaintiff. The plaintiff says that the defendant remarked that it was possible that the plaintiff could increase the rents, as no increase had been made since 1950 although rates had gone up. The defendant passed the contract over to the plaintiff to sign. The plaintiff says that the defendant did not go through the terms of the contract with him, though he did give him every opportunity to read it. The plaintiff thought he was with the defendant for about three-quarters of an hour.

The defendant, in his evidence, said that he went through all the relevant documents with the plaintiff; that he read the replies which he had noted on the form "Inquiries before contract" out loud; that he remarked to the plaintiff how difficult the situation under the Rent Restrictions Acts was becoming, and that the standard rents were very hard to establish; that he probably did tell the plaintiff that, as increases of rates had not been passed on, it was possible he might get an increase of rents. He also says that he told the plaintiff that the rents might be reduced. He said that the plaintiff seemed to understand and was not much concerned.

As to what took place on this occasion, I think I must accept the plaintiff's story. He appeared to me to be an exceptionally honest and frank witness, and he stood up to a very severe cross-examination without being shaken and without fencing. He was said to be a business man, but he was obviously not a man who dealt often with land, and he seemed to have no more than the average knowledge of "the man in the street" that rents of houses had been "pegged" by the Rent Restrictions Acts. I am far from suggesting that the defendant was not an honest witness, but it seemed to me that his evidence was based not so much on his actual recollection as on what he thought his usual practice was and what he would be likely to have done, and he suffered, as it seems to me, from a certain amount of "happy hindsight". It must also be borne in mind that to a solicitor who does one hundred conveyancing matters in a year a particular transaction is merely one of many, while to the client his case is the only one he has had to bother about.

The contracts were signed and dated Nov. 24, 1953, and the sale was completed on Jan. 1, 1954. The defendant charged a reduced fee. The trouble came in June, 1954. In May the plaintiff proposed to raise the rents of the two tenants by reason of increases in the rates. This drew a letter dated June 3, 1954, from the solicitors for Mr. Chapman (one of the tenants) refusing to pay an increase and instead demanding a reduction. Apparently with very little trouble they had discovered that in 1939 the whole of the first and second floors were let for 30s. a week and increases of rates amounted to no more than 10s. a week for the whole house. Proceedings were started in the county court on July 14, 1954, and eventually on Sept. 9, 1954, the standard rent was fixed by that court as being 15s. per week for each of the two floors, and, with the permitted increases, the recoverable rents were 17s. 6d. per week and 18s. 4d. per week. The consequence was that the plaintiff had to make refunds to the tenants.

The standard on which a solicitor's liability for negligence depends has recently been described by HARMAN, J., and his remarks have been approved by HODSON, L.J., in the Court of Appeal in *Simmons* v. *Pennington & Son (a firm)* (2) ([1955] 1 All E.R. 240). In that case HARMAN, J., said (ibid., at p. 245):

> "I do not think I need deal at any great length with the question of a solicitor's liability for negligence. It is the same as anybody else's liability. Having regard to the degree of skill held out to the public by solicitors, does the conduct of the solicitor fall short of the standard which the public has been led to expect of the solicitor?"

It is plain that the standard of skill and care required of a solicitor who acts for both parties on a sale and purchase is at least as great as that which would be required of a solicitor who acts for a purchaser alone.

Now in the present case the purchaser was buying a property let to two tenants who were in occupation as regards part of the property—the first and second floors. They were paying weekly rents, and the rateable value of the

A whole property (£44 a year) showed that the property was likely to be subject to the provisions of the Rent Restrictions Acts. When that situation is present, the amount of the standard rent is an important fact to be ascertained if possible, because on it depends the amounts of the rents which are lawfully recoverable from the tenants concerned. There have been plenty of cases where the rents have been found to have been unlawfully raised and the owner of the property B has had to refund: see, for example, *Kitchen's Trustee* v. *Madders* (3) ([1949] 2 All E.R. 1079).

It seems to me that the amount of the standard rent must be (i) a subject for inquiry by the solicitor acting for the purchaser, and (ii) a subject on which plain and clear advice may be required from that solicitor to his client. The question is whether these duties were properly performed by the defendant C in the present case.

So far as I can tell, the question what were the standard rents was not put to the vendor in the present case. The form of "Inquiries before contract" seems to be curiously defective in this respect. Question 1 (A), which relates to tenancies, does not mention the standard, or statutory, or recoverable rents at all. The defendant was told by the vendor that the rents of 25s. a week were D receivable when he bought, that no increases had been passed on and that he had no information as to previous lettings. The defendant thereupon was content with this meagre information, and apparently made no further inquiry of the vendor. I cannot help thinking that a solicitor who knew his duty, and was not hampered by acting for both vendor and purchaser, would have pursued the subject more vigorously. The vendor or his solicitors might then E have replied that to the best of the vendor's information and belief the recoverable rent was 25s. a week or they might have replied that the vendor had no further information. But should then the purchaser's solicitor do nothing further in the matter? I do not believe that his duty is then completed. For instance, in *Hunt* v. *Luck* (4) ([1902] 1 Ch. 428), it was held that the occupation of land by a tenant affects a purchaser of the land with constructive notice of F all that tenant's rights, though not of the lessor's title or rights. The deduction from this case surely is that in the course of his investigation of the title the purchaser's solicitor should inquire of the tenants the terms on which they occupy the property; and in a case which is affected by the Rent Restrictions Acts the inquiries should include an inquiry whether the rents they pay are the standard or the recoverable rents of the property.

G In the present case the promptness of the tenants' reaction to the plaintiff's attempt to raise their rents suggests that such inquiries as I have mentioned would have revealed either the information which was vital or sources from which the necessary information could be obtained. I reject the contention of counsel for the defendant that the readiness with which the information was later obtained has no relevance on the question of the defendant's negligence. H The defendant, I may observe, was not aware of *Hunt* v. *Luck* (4).

By accepting the insufficient information given by the vendor, Mr. Tebbs, without further questioning or inquiries in other directions, in my view the defendant failed in his duty to his client. It is, in my view, no excuse for failure that inquiries may be troublesome to make. Neglect to make the inquiries may often result in no adverse claim; but when trouble occurs it does not seem I to me to be sufficient answer to say that a chance is often taken by those whose duty it is to investigate.

However, evidence was called on behalf of the defendant, with the object of showing that the defendant's indifference on the subject of the standard or recoverable rents was in accordance with the usual practice of solicitors, and, therefore, not open to criticism so as to justify an allegation of negligence. Three solicitors were called for this purpose. They were (1) the defendant himself; (2) the solicitor who acted on the occasion of the acquisition of the property by Mr. Tebbs from Mr. Johnson; and (3) a member of the firm of solicitors instructing counsel on behalf of the defendant. I am sure that all three are perfectly respectable solicitors, but I should not describe them as being independent and uninterested in regard to the matters raised by this action. Counsel for the defendant contended that I was bound to accept their evidence on the question of the proper practice in these matters, and (if I understood him correctly) I was not at liberty to draw on my own conveyancing experience or reach conclusions from cases such as *Hunt* v. *Luck* (4), which would suggest that their practices were below standard. This I cannot accept. As to the evidence in question, the defendant no doubt was bound to say that he acted in accordance with his usual practice and that that practice was in accordance with usual conveyancing standards. I am not satisfied that the evidence of the other two solicitors wholly supported him. Mr. Frank Wilders said that, unless the vendor had absolute information, his solicitors would answer inquiries by saying " so far as they were aware ". He said that it really depends on each case what one does. If it is a case of a dealer, one takes more care as it is for an investment. But why should other purchasers suffer from a lower standard of care ? He said he would ask supplementary questions of the vendor's solicitors and if he could get no more he would put the onus on his client, the purchaser. He agreed that if the owner in 1939 was known, there was nothing to prevent inquiries being made of him; but he had not heard of inquiries being made of tenants. When he acted on the occasion of Mr. Tebbs' purchase in 1950, it was very easy for him as there was never any proper contract and there was a quick conveyance. Mr. Tebbs knew the situation and was satisfied.

Mr. William Wadsworth Teggin said that vendors give the information which they have and usually qualify it—by words like " so far as the vendors know", I think he meant. He said it was not unusual to get information from which standard rents or recoverable rents could not be ascertained. He said one tells one's client or inquires again of the vendor. He had heard of tenants or former tenants being asked for information, and he agreed that if the 1939 owner was known it would be right to make inquiries of him.

It seems to me that the inquiries made by the defendant fell below even the standards mentioned by these witnesses. So far as putting the matter up to the client (in the absence of satisfactory information) is concerned, I am not satisfied that the defendant advised the plaintiff in such a way as to make him understand that the amounts of 25s. a week paid by the tenants could not be relied on as recoverable rents, and might involve the plaintiff in possible demands for repayment of amounts of rent overpaid. On the contrary, I think that the defendant spoke to the plaintiff only of possible increases.

In my view, therefore, the defendant was guilty of negligence in that he made inadequate inquiries on the subject of the standard or recoverable rents of the upper floors of the property, and he did not clearly advise the plaintiff that so little was known on this subject that there might have been overpayments. I do not believe that the question of overpayments occurred to the defendant, any more than it did to the plaintiff at the time of the contract.

There is one final remark that I have to make. Counsel for the defendant seemed to contend that when preliminary inquiries before contract have been made there is no obligation on the purchaser's solicitor to make requisitions and any necessary searches or inquiries after the contract has been signed. This is not correct. The practice of making preliminary inquiries has grown up, no doubt, because a sale " subject to contract ", involving a subsequent formal contract, has become a common occurrence, and the provisions in the Law of Property Act, 1925, as to constructive or imputed notice have increased the troubles of an intending purchaser. It is still the duty, however, of a purchaser's solicitor to make the appropriate requisitions and inquiries after the formal contract is signed, even if the preliminary inquiries have been so complete that it is only necessary to ask whether the answers thus received are still complete and accurate.

In the result the action succeeds.

Judgment for the plaintiff.

Solicitors: *Chandler & Creeke* (for the plaintiff); *Hewitt, Woollacott & Chown* (for the defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

MOUNTFORD AND OTHERS *v.* HODKINSON.

[COURT OF APPEAL (Lord Evershed, M.R., Birkett and Romer, L.JJ.), March 22, 23, 1956.]

Agriculture—Agricultural holding—Notice to quit—Counter-notice—What is sufficient counter-notice—Clear intention to invoke Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 63), *s.* 24 (1).

A tenant of an agricultural holding wrote to the landlord, three days after the receipt of a notice to quit, as follows: " In reply to your notice that I received on Saturday I don't intend to go I shall appeal against it and take the matter up with the A.E.C. . . ." Subsequently in an action against the tenant for possession he contended that the letter was a counter-notice requiring that s. 24 (1)* of the Agricultural Holdings Act, 1948, should apply.

Held: although a document alleged to be a counter-notice under the Agricultural Holdings Act, 1948, s. 24 (1), was not to be construed with great strictness, yet it must be so expressed, if effect were to be given to it, as to indicate a clear intention to invoke the right which the Act gave; in the present case the letter did not show an intention to " require that " s. 24 (1) " should apply ", and accordingly the letter did not amount to a counter-notice within s. 24 (1).

Dicta of LORD GREENE, M.R., in *Price* v. *Mann*, [1942] 1 All E.R. at p. 454, and of DANCKWERTS, J., in *Ward* v. *Scott* (1950), 66 (pt. 1) T.L.R. 340, applied.

Appeal dismissed.

[**Editorial Note.** Although the present case is decided on a document alleged to be a counter-notice, the principle that notices under the Agricultural Holdings Act, 1948, ought not to be construed technically or strictly is probably of general application. Thus a notice to quit need not be in any particular form, but it must state, if the right to give a counter-notice is to be excluded, sufficient to enable the provision on which reliance for the exclusion is placed to be identified; see *Budge* v. *Hicks* ([1951] 2 All E.R. 245).

As to the operation of counter-notices under the Agricultural Holdings Act, 1948, see 1 HALSBURY'S LAWS (3rd Edn.) 283, para. 599; and for cases on the subject, see Supplements to 2 DIGEST *30j*.

For s. 24 (1) of the Agricultural Holdings Act, 1948, see 28 HALSBURY'S STATUTES (2nd Edn.) 46.]

Cases referred to:

(1) *Price* v. *Mann*, [1942] 1 All E.R. 453; 31 Digest (Repl.) 602, *7184*.
(2) *Ward* v. *Scott*, (1950), 66 (pt. 1) T.L.R. 340; 2nd Digest Supp.

Appeal.

This was an appeal by the tenant from the judgment of His Honour JUDGE TUCKER given at Leek County Court on Jan. 16, 1956, in an action by the landlords in which the court ordered that the defendant do give possession to the landlords of a farm and premises called Bank Top Farm, Leekfrith, in the County of Stafford, on Apr. 16, 1956. The landlords were the personal representatives of George Martin who died on Jan. 4, 1955, and by whom notice to quit the farm and premises had been given on Mar. 12, 1954, to the tenant. A

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* The text of s. 24 (1) is printed at p. 18, letter D, post.

R. E. Megarry for the tenant.

P. A. Ferns for the landlords.

B

LORD EVERSHED, M.R.: The question raised in this appeal is in truth, as counsel for the tenant said at the beginning of his opening, within a very small compass. The question is whether a letter written by the appellant, and written (I think it may fairly be said) in the heat of the moment, is, within the terms of s. 24 (1) of the Agricultural Holdings Act, 1948, a counter-notice in writing of the character there mentioned. I conclude, in agreement with the learned county C court judge, that, applying the ordinary standards of common sense and of the significance of language, the answer to the question should be in the negative.

The plaintiffs in the action are the executors of the landlord, and the landlord, by what is admittedly an appropriate notice dated Mar. 12, 1954, gave to the tenant notice to determine his tenancy of the agricultural holding known as Bank Top Farm on Mar. 25, 1955. Section 24 (1) of the Agricultural Holdings D Act, 1948, provides as follows:

> "Where notice to quit an agricultural holding . . . is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this sub-section shall apply to the notice to quit, then, subject [as provided] the notice to quit shall not have effect unless the Minister consents to E the operation thereof."

The practical result is that if such counter-notice is given, the landlord must apply to the Minister, whose powers and discretion in the matter have in fact been relegated by appropriate regulation* to the appropriate agricultural executive committee. The appellant's letter, written three days later, reads: F

> "Dear Sir, In reply to your notice that I received on Saturday I don't intend to go I shall appeal against it and take the matter up with the A.E.C. As you have no grounds on which to evict me I don't owe you anything if you did not have your rent direct you had it indirect you had bills amounting to just over £60 that I paid for material for the place last year and now you are prepared to be dirty you can begin sharp and make an application for G a government grant for some stone for the road its your job and I shall have the sanitary inspector to the house and the milk production officer to the building and put you to a bit of expense now you are not satisfied having it done for nothing."

I have said that in my judgment, according to the ordinary standards of language and common sense, that document cannot fairly be treated as a counter-notice H in writing requiring that s. 24 (1) of the Agricultural Holdings Act, 1948, should apply to the notice to quit which the tenant received.

The matter is, I think, not really capable of much elaboration. I observe, however, that the terms of the sub-section do not say (as they might) that if within a month the tenant gives a notice in writing *objecting* to the notice to quit, then consequences follow. The provision of s. 24 (1) is that the tenant must I serve a counter-notice in writing *requiring that this sub-section shall apply*.

Counsel for the tenant's argument rested in the main on the two phrases which appear early in this somewhat unpunctuated epistle: "I shall appeal against it and take the matter up with the A.E.C." Counsel says that that is a sufficient indication to a well-informed and cautious landlord that what the tenant is intending is to invoke the right which he has under this section; the practical effect of which would be that, by the regulations, the agricultural executive committee would have to give, so to speak, its imprimatur to the notice to quit. I observe, however, that when the tenant says that he will appeal against the matter and will take the matter up with the agricultural executive committee he is not in fact referring at all to the procedure which s. 24 (1), if invoked, would bring into being. As I have indicated, if that provision is invoked, then it is for the landlord to invite the Minister (acting through the agricultural executive committee) to give his confirmation to the notice to quit which has been given.

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* See the Agriculture (Delegation to County Agricultural Executive Committees) Regulations, 1948 (S.I. 1948 No. 187); 1 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 255; and for the procedure consequent on a counter-notice, see the Agriculture (Control of Notices to Quit) Regulations, 1948 (S.I. 1948 No. 190); 1 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 97.

During the argument many examples were suggested to counsel of letters in most informal or even vituperative terms, and the question was put: Would this, that or the other example be a counter-notice within this section? I do not refer to those examples because, as counsel fairly said, we are here concerned, not with hypothetical cases, but with the effect of this particular letter. I agree with counsel, and it is well established, that notice or counter-notices of the kind here in question are not to be construed with great strictness. It will suffice if, whatever the language or form of the letter, it indicates a clear intention to invoke the right which the Act gives. I have used deliberately the two words "clear intention" which I borrow from the judgment of LORD GREENE, M.R., in *Price* v. *Mann* (1) ([1942] 1 All E.R. 453 at p. 454), to which counsel referred. Counsel's argument, however, really amounts to this, that any reference to legal rights or possible remedies, however ill-informed the writer is (and even if he did not know that he had such rights) would constitute a counter-notice requiring that s. 24 (1) should operate. I cannot think that the rules of these courts or of justice require or justify so very loose and indulgent a construction of the terms of the statute in favour of an agricultural tenant. I agree with the careful judgment of the learned county court judge from which I cite one or two passages. He said:

> "It is said here that this particular section is a restriction on the rights of the landlord and, therefore, that the provision must be construed against the tenant. I do not in this case intend to construe it against the tenant any more than against the landlord. I am looking at the sub-section itself. I turn again to this letter which is the vital matter and there is certainly no question of the defendant saying that he required this s. 24 to apply."

With all of that I entirely agree. The county court judge continues subsequently:

> "I do not think it is clear that he is requiring that this sub-section should apply to the notice to quit. I certainly should not have suspected from the letter that he was requiring that the notice to quit should be dealt with under the provisions of this sub-section, or that the letter actually referred to it. There must be some reasonable intimation by the tenant that he requires the sub-section to apply."

I agree with the learned county court judge and with the reasons which he gives. I think that this appeal should be dismissed.

BIRKETT, L.J.: I agree with the judgment of my Lord and also with the judgment of the learned county court judge, and merely desire to add just a sentence or two. I am bound to say for my own part that I feel much sympathy with the argument of counsel for the tenant to this extent, that when one is dealing with people like tenant farmers one must make some allowance for the kind of language which they may happen to employ. As no particular form of words is required by the counter-notice under s. 24 (1), I think that the court should regard with a benevolent eye any document which could reasonably be said to be a proper counter-notice within the section. After listening to the argument, however, I am driven to the conclusion that there was no other course which the learned county court judge could take other than the course which he did take in this case. I feel that the notice to quit sent by the deceased landlord on Mar. 12, 1954, is a very careful notice in perfectly legal form, and I think that it may be a reasonable inference that he knew the provisions of the Agricultural Holdings Act, 1948, which in the year 1954 had been in operation for a long time. One can conceive a kindly landlord saying, when a letter of this kind is received: " The man is very angry and he obviously wants the committee to intervene. This is no counter-notice, but I think I will just put him right about the legal form." There is, of course, no obligation on the landlord to do anything of that kind. Here we have to decide the simple question whether this notice in the terms of this letter can possibly be said to be a compliance with the section in this sense, that it can be interpreted as saying: " I require s. 24 (1) of the Act of 1948 to apply to this notice ". I think that it is quite impossible to do so.

One other matter is also, I think, rather important. There is no provision in the Act for an extension of the period within which a counter-notice has to be given. It has to be given within a month, and, if it goes beyond the month, the remedy has gone. I should have thought that it was of the first importance to tenants that they should make themselves acquainted with a section which was intended to give them some measure of security of tenure. That, however, is really beside the point. The question here is whether the learned county court judge was right in saying: " I cannot construe this rather angry letter—even though it contains reference to an appeal to the agricultural executive committee —as being a compliance with the section, or interpret it as a counter-notice within the meaning of the sub-section ". I think that it was quite impossible for the learned judge to say that it was.

ROMER, L.J.: I also agree. It is quite clear that although according to the actual language of s. 24 (1) a tenant who wants to serve a counter-notice at all must serve a counter-notice in writing requiring that the sub-section shall apply to the notice to quit, the tenant can plainly indicate his intention that he desires to take advantage of the sub-section without exactly following that language. The question is how far he can depart from it. For my part I think that the position was put accurately by Mr. Miles who was acting for the tenant in *Ward* v. *Scott* (2) ((1950) 66 (pt. 1) T.L.R. 340) to which counsel for the tenant referred us. That was a case in which the tenant of an agricultural holding was given notice to quit, and he served a counter-notice which was perfectly right in form except that it referred to the Agriculture Act, 1947, instead of the Agricultural Holdings Act, 1948; and s. 31 of the Act of 1947, by the time when he served his notice, had been replaced by s. 24 of the Act of 1948. It was objected on behalf of the landlord in that case that the notice was not a valid counter-notice. According to the judgment which DANCKWERTS, J., delivered in that case, Mr. Miles for the tenant had put the matter in this way. He said (ibid., at p. 341):

> ". . . the court is indulgent in respect of a notice of this kind and does not, in effect, care for merely technical points, and if the meaning is so plain that the landlords cannot mistake what is meant, then effect should be given to the notice."

That proposition, I think, commended itself to DANCKWERTS, J., though he actually decided the case on another point. For my part I think that that is right, though perhaps subject to this, as counsel for the tenant pointed out, that one should add the word " reasonably " so as to make it read: " and if the meaning is so plain that the landlord cannot reasonably mistake what is meant, then effect should be given to the notice ". It seems to me that is the proper test to apply to notices of this sort. The reason why the tenant has to make his intention reasonably clear is that the landlord has to take action on the counter-notice. Under the Agriculture (Control of Notices to Quit) Regulations, 1948 (S.I. 1948 No. 190), he has, within one month of being served with a counter-notice, to make application to the Minister for his consent. It is, therefore, quite obvious that he has to have served on him some notice which he understands, that is to say, a notice which reasonably indicates that the tenant is intending to invoke, and which is in fact invoking, the operation of s. 24 (1) of the Agricultural Holdings Act, 1948. Unless the notice sufficiently enables the landlord to understand that, then I think it is a bad notice.

For the reasons which the learned county court judge stated in his judgment it seems to me quite impossible to say that the counter-notice now in question satisfied that criterion, and I accordingly agree that this appeal fails.

Appeal dismissed.

Solicitors: *Gibson & Weldon.* agents for *Bowcock & Pursaill*, Leek (for the tenant); *Collyer-Bristow & Co.*, agents for *Wilkins & Thompson*, Uttoxeter (for the landlords).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re HEYWORTH'S SETTLEMENTS.

[CHANCERY DIVISION (Upjohn, J.), February 22, 23, 28, March 22, 1956.]

Settlement—Variation of trusts—Sale of infant's reversionary interest—Whether court could sanction sale.

Trust and Trustee—Variation of trusts by the court—Infant interested in capital contingently on surviving tenant for life—Proposed sale of reversionary interest to tenant for life—Whether court could sanction sale—Inherent jurisdiction—Trustee Act, 1925 (15 *& 16 Geo.* 5 *c.* 19), *s.* 53.

Under two settlements trust funds were held, subject to the life interest of F. who was seventy-four years of age, on trusts by which members of a class of whom the infant applicant was one were entitled to the capital contingently on surviving F. and, in the case of the applicant, on attaining twenty-one. By an agreement of sale dated Jan. 9, 1956, it was agreed that, conditionally on the court's sanctioning the carrying out of the transaction on behalf of the applicant, F. should purchase immediately for cash from the reversioners entitled to the trust funds expectant on her death their respective contingent reversionary interests therein. The applicant, who would be twenty-one on May 19, 1956, had been maintained for the past two years as a student nurse out of other funds and there was no serious suggestion that the agreement of sale was necessary to enable her to be maintained down to the date of her twenty-first birthday. On an application for the sanction of the court in respect of the proposed purchase of the applicant's reversionary interest either under s. 53 of the Trustee Act, 1925*, or under the court's inherent jurisdiction,

Held: (i) the conditional agreement had not been entered into " with a view to the application of " any capital or income of the applicant for her benefit within s. 53 of the Trustee Act, 1925, but merely in order to put an end to the trusts of the settlements, and the court had, therefore, no jurisdiction under the section to sanction the proposed purchase.

(ii) save where necessary for the maintenance of an infant or in the salvage cases, the court had no power under its inherent jurisdiction to deal with infants' interests and alter trusts of settlements merely because it would be for the infants' benefit so to do (*Chapman* v. *Chapman*, [1954] 1 All E.R. 798, followed); and accordingly the court had no inherent jurisdiction in the present case to sanction the proposed purchase.

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* The terms of the section are printed at p. 23, letter E, post.

[**Editorial Note.** On the point that expediency alone is not enough to enable the court to vary trusts for the benefit of infants the present case may be compared with *Re Powell-Cotton's Re-Settlement* ([1956] 1 All E.R. 60), where the variation proposed was a new investment clause.

As to the inherent jurisdiction of the court to authorise departure from the terms of a trust, see 33 HALSBURY'S LAWS (2nd Edn.) 297, para. 520; and for cases on the subject, see 43 DIGEST 839-841, *2857-2867*.

For the Trustee Act, 1925, s. 53, see 26 HALSBURY'S STATUTES (2nd Edn.) 134.]

Cases referred to:

(1) *Re Vestey's* (*Baron*) *Settlement*, [1950] 2 All E.R. 891; [1951] Ch. 209; 2nd Digest Supp.

(2) *Nunn* v. *Hancock*, (1871), 6 Ch. App. 850; 40 L.J.Ch. 700; 25 L.T. 469; 28 Digest 186, *442*.

(3) *Taylor* v. *Philips*, (1750), 2 Ves. Sen. 23; 28 E.R. 16; 28 Digest 181, *409*.

(4) *Chapman* v. *Chapman*, [1954] 1 All E.R. 798; [1954] A.C. 429; 3rd Digest Supp.

Adjourned Summons.

The infant, Susan Mary Heyworth, by her next friend applied by originating summons under s. 53 of the Trustee Act, 1925, for the following relief, namely, that a conditional agreement for the sale to Florence Parkinson Heyworth at the prices of £2,400 and £1,350 respectively of the contingent reversionary interests to which the infant applicant was beneficially entitled in the property comprised in settlements dated Mar. 3, 1931, and July 10, 1935, might be approved and the respondent trustees appointed to convey the said interests and receive the said purchase moneys on trust for the infant applicant and to give discharges therefor with a view to the application of the capital or income thereof for her maintenance, education and benefit.

The facts appear in the judgment.

Raymond Jennings, Q.C., and *J. A. Armstrong* for the infant applicant.

J. A. Brightman for the trustee respondents.

Cur. adv. vult.

Mar. 22. **UPJOHN, J.**, read the following judgment: The infant applicant, Susan Mary Heyworth, who will be twenty-one on May 19 next, is one of a class contingently interested in capital of two settlements dated respectively Mar. 3, 1931, and July 10, 1935, subject to the life interest in each case of her grandmother Florence Heyworth, a lady of some seventy-four years of age. Under the terms of each settlement the class who are entitled to capital are those children of Mrs. Heyworth living at her death who attain twenty-one, with a proviso substituting the children of any child dying in her lifetime who attain twenty-one or being daughters marry and who survive Mrs. Heyworth. Mrs. Heyworth had two children, a daughter, Mrs. Scott, who herself has two children, and a son, Brian, who died in 1940 leaving two children, a son, Michael, who has attained twenty-one and the infant Susan. Accordingly, the class of those contingently interested consists of Mrs. Scott and her children who will step into her shoes if Mrs. Scott does not survive her mother, Michael and Susan. There are some ultimate trusts in favour of other contingent classes of persons in the event of none of the foregoing class attaining vested interests, but I need not consider them in detail; they differ in the two settlements.

The parties beneficially interested under the settlements have now come to an extremely sensible and very beneficial arrangement embodied in a deed of Jan. 9, 1956, which I am asked to sanction on behalf of Susan. Briefly, the arrangement is that Mrs. Heyworth, who is the fortunate owner of very large free assets, has agreed to purchase for cash from the reversioners expectant on her death their respective contingent reversionary interests. This familiar operation has, as the law at present stands, very substantial fiscal advantages.

The sums which Mrs. Heyworth pays to the reversioners will not, it is said, be liable to estate duty however soon Mrs. Heyworth should die after the transaction is completed. She can therefore make immediate provision for her family and at the same time will greatly reduce the rate and amount of duty payable on her death. Mrs. Heyworth, as the evidence shows conclusively, is offering immediate payment to the reversioners, and in particular to Susan, of sums which are substantially in excess of the present actuarial value of the respective reversions and, what is perhaps more realistic, substantially in excess of the sums which will be receivable on her death unless there is in the meantime some wholly unexpected and sharp fall in the rate of estate duty. Furthermore, during the hearing, an offer was made to secure by a policy of life insurance that Susan should not suffer should the class be decreased during her grandmother's lifetime by the death of her brother or aunt and cousins. The arrangement is one which is most advantageous from the point of view of the infant in almost every conceivable circumstance, and, if I have jurisdiction to do so, I shall most certainly sanction it. I thought at first that as the infant's twenty-first birthday is so near, I ought to leave her to decide whether or not to execute the deed, but I have been persuaded not to reject this application on that ground for it is obvious that she will execute it on attaining that age. There is no real decision to be made by her, for she will almost certainly get immediately more than she would get on her grandmother's death, while on the other hand there is always a risk that her grandmother may die before the infant's next birthday, although there is no suggestion that her health is other than normal for a lady of her age.

The application was made originally under s. 53 of the Trustee Act, 1925, but at a later stage in the argument reliance was also placed on the inherent jurisdiction of the court. Section 53 is in these terms:

> " Where an infant is beneficially entitled to any property the court may, with a view to the application of the capital or income thereof for the maintenance, education, or benefit of the infant, make an order—(a) appointing a person to convey such property; or (b) in the case of stock, or a thing in action, vesting in any person the right to transfer or call for a transfer of such stock, or to receive the dividends or income thereof, or to sue for and recover such thing in action, upon such terms as the court may think fit."

It is to be observed that the section does not authorise the court to convey an infant's property merely because it is for his or her benefit but only

> " with a view to the application of the capital or income thereof for the maintenance, education, or benefit of the infant."

It was faintly suggested in evidence that this transaction was necessary in order to provide an income to enable Susan to continue her training in London as a student nurse and if that had been established I do not doubt that the court has ample jurisdiction to sanction the arrangement, but the facts did not bear serious examination. Susan has in fact been maintained as a student nurse out of other funds for nearly two years, although admittedly by way of advances rather than out of income, and it cannot be seriously suggested that this deed is necessary to enable her to be maintained down to her twenty-first birthday. Susan will then obviously execute the deed on attaining her majority, so no post-infancy period can be called in aid and counsel did not seriously press this point. I accept also the argument that the phrase " maintenance, education, or benefit " are words of the widest import. It covers not merely expenditure but capital investment such as the purchase of a house to live in or a share in a partnership or even in some cases placing of money on deposit for an infant (*Re Baron Vestey's Settlement* (**1**), [1950] 2 All E.R. 891). However, to bring the jurisdiction into play there must be " a view to the application " of the capital or income for the maintenance, education or benefit of the infant. Counsel concedes that phrase is equivalent to " for the purpose of applying ". Shorn of the niceties of legal argument, this deed is intended to put an end to the trusts created by the settlement or to enlarge the interest of the life tenant to include some or all of the reversioners' interests by means of a sale of those reversionary interests for cash. The infant (inter alia) receives an immediate absolute interest in a sum of cash in exchange for a future contingent interest. The deed is not in the least degree entered into with a view to the application of, or for the purpose of applying, any capital or income of the infant for her benefit.

If I sanction this scheme on behalf of the infant I should be reading the section as though it empowered the court to convey the property of an infant whenever it was for her benefit. Unfortunately, the section only confers a more limited jurisdiction. In my judgment, I have no jurisdiction to sanction this arrangement under the section.

I turn to the question of the inherent jurisdiction. The authorities clearly establish the proposition that there is no jurisdiction to sell real estate and formerly copyhold estate of an infant merely because it is for his or her benefit, save in what are usually called the salvage cases or to provide the infant with necessaries. The authorities on the position with regard to the personal estate of an infant are not quite so clear. The court on occasion appears to have ordered a sale of an infant's contingent reversionary interest in personalty, as in *Nunn* v. *Hancock* (2) ((1871) 6 Ch. App. 850), a case strongly relied on by the applicant, but the circumstances in which it did so do not emerge from the report. In some of the early cases it may be that the court was prepared to take greater liberties with the personal estate of an infant than with real or copyhold estates: see *Taylor* v. *Philips* (3) ((1750) 2 Ves. Sen. 23). However, none of the authorities cited to me establish clearly any general proposition that a court will sell an infant's property in the sense of altering the nature of his beneficial interest (and not merely transposing his interest, for example, by selling personalty and investing it in realty) merely because it is for his or her benefit. It does so when it is necessary for the maintenance of the infant or in the salvage cases. In relation to personal estate s. 53 of the Trustee Act, 1925, may be taken as declaratory of the existing law.

Further reference to the earlier authorities is, however, unnecessary because all the speeches in the House of Lords in *Chapman* v. *Chapman* (4) ([1954] 1 All E.R. 798), make it perfectly clear that there is no inherent jurisdiction to deal with an infant's interest and to alter trusts merely because it is for the benefit of the infant. There is no question here of maintenance of the infant, compromise of rights or salvage of the property, nor can this transaction with any semblance of truth be described as being a mere change in the nature of the investment. It is said this is not a case of altering trusts but of selling the infant's interest, but that, with all respect, is a mere play on words. Whenever the trusts of an instrument are sought to be varied or terminated, that involves a sale or disposition of the original interest for cash or in exchange for some other interest. The net result is that if the transaction goes through then the trusts are varied or terminated.

I have no jurisdiction to sanction or approve the deed under the inherent jurisdiction of the court. I therefore dismiss this application.

Application dismissed.

Solicitors: *Sandilands, Williamson, Hill & Co.*, agents for *Marsden & Marsden*, Blackburn (for the applicant and the respondents).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

PETER LONG & PARTNERS *v.* BURNS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), March 20, 21, 1956.]

Estate Agent—Commission—Agreement to pay commission on purchaser entering into a " binding contract "—Contract signed but rescinded before completion owing to innocent misrepresentation—Whether estate agent entitled to commission.

The vendor appointed the plaintiffs, a firm of house and business transfer agents, her sole agents to sell her garage business. She signed a commission note under which she undertook not to consent to her business being sold except to a person introduced by the plaintiffs and to pay to the plaintiffs commission " upon [their] introducing a person ready, willing and able to enter into a binding contract to purchase " her business. A purchaser, who had not been introduced by the plaintiffs, signed a contract to purchase the business having been induced to sign by an innocent misrepresentation made to the purchaser by a representative of the plaintiffs in the presence of and on information supplied by the vendor as to the effect of a town and country planning scheme. The purchaser, having subsequently discovered that the scheme might result almost in the abolition of the garage, sought to rescind the contract on the grounds of misrepresentation and by agreement was released from the bargain. The plaintiffs claimed from the vendor commission on the ground that they had introduced a person who had entered into a binding contract to purchase.

Held: the words " binding contract " in the commission note meant a contract which could be enforced by the vendor against the purchaser, and accordingly the plaintiffs were not entitled to recover the commission because the contract was induced by innocent misrepresentation and was one from which the purchaser could and did resile.

Midgley Estates, Ltd. v. *Hand* ([1952] 1 All E.R. 1394) distinguished.

[As to estate agents' commission, see 1 HALSBURY'S LAWS (3rd Edn.) 198, para. 457; and for cases on the subject, see 1 DIGEST 488-528, *1664-1861*.]

Cases referred to:

(1) *Midgley Estates, Ltd.* v. *Hand*, [1952] 1 All E.R. 1394; [1952] 2 Q.B. 432; 3rd Digest Supp.

(2) *Dennis Reed, Ltd.* v. *Goody*, [1950] 1 All E.R. 919; [1950] 2 K.B. 277; 2nd Digest Supp.

Action.

The plaintiffs, Peter Long & Partners, a firm of house agents and business transfer agents, were appointed on Aug. 8, 1954, by the defendant, Mrs. Beatrice Ada Burns, sole agents for the sale of her property and business comprising a house and garage premises at the village of Three Mile Cross near Reading. The agreement between the parties which was signed by the defendant contained the following clause:

> " To Messrs. Peter Long & Partners. I hereby appoint you my sole agent for the sale of my business and property the details of which are truly stated above and overleaf, at the price of £9,750 and trade stocks at valuation. In consideration of your services I undertake not to revoke this agreement and agree to pay your commission in accordance with the terms stated herein on the total purchase price (including stock) upon your introducing a person ready, willing and able to enter into a binding contract to purchase my business referred to above. In further consideration of your services I agree to leave the disposal of my business and property with you as my sole agent for a further period of three months from the date hereof, nor will I consent to my business being sold except to a person introduced by you. Date Aug. 8, 1954."

On Sept. 12, 1954, a Mr. and Mrs. Pritchard saw the defendant concerning the sale of the property, Mrs. Pritchard being the prospective purchaser. She had not been introduced by the plaintiffs, but a representative of the plaintiffs, a Mr. Wade, was present at the meeting. A question was asked by Mr. Pritchard whether the property was affected by any town planning scheme and he was told by Mr. Wade, on information which he had been given by the vendor, that two or three feet would be taken from the forecourt of the garage. At the time Mr. Pritchard did not regard this with any concern and the purchaser (Mrs. Pritchard) on Sept. 30, 1954, signed a contract to purchase the property. The information given by Mr. Wade, although given in the belief that it was accurate, was not in fact correct as it transpired that the effect of the various planning schemes affecting this property would be that a large part of the property would be acquired by the county council for a road widening scheme. On learning of this the purchaser repudiated the contract. The vendor denied that the purchaser was entitled to repudiate but after negotiation agreed to release her from the contract on payment of a small sum. The plaintiffs claimed commission from the vendor, on the ground that they were entitled to be paid the commission provided for by the commission note of Aug. 8, 1954, because they had negotiated on the vendor's behalf the sale of the property to the purchaser who had signed a binding contract to purchase. The plaintiffs further pleaded by their reply that if the purchaser were entitled to rescind the contract the vendor was estopped as against the plaintiffs from setting up the misrepresentation on which the purchaser's claim to rescind was based since the misrepresentation was her own and was made by her to the plaintiffs and relied on by the plaintiffs.

H. P. B. Dow for the plaintiffs.
J. Stirling, Q.C., for the defendant, the vendor.

LORD GODDARD, C.J., having reviewed the facts, and having found that it was immaterial since the vendor was bound in contract not to sell except to a purchaser introduced by the plaintiffs, that the plaintiffs had not originally introduced the purchaser, continued: I am going to assume that the contract between the parties in this case is as stated by the commission note and that the commission was payable if the plaintiffs produced a person ready, willing and able to enter into a binding contract. The first thing which I have to consider is: What is the meaning of the words " binding contract "? I have to give a meaning to the word " binding ". I think that it means a contract that is enforceable. Every contract that is entered into freely between two persons, provided that it is not one of those contracts which is void, as, for instance, a contract entered into by an infant or a contract entered into for some immoral or illegal purpose, is a binding contract. Counsel for the plaintiffs, who argued this very well and carefully, argued that whether the contract is induced by fraud or whether it is induced by innocent misrepresentation, unless and until it is set aside it is a binding contract. It may not be binding in one sense, however, because it may not have any legal effect until it is acted on. If in this case the sale had been completed by conveyance of the property and the purchaser had then discovered the wide effect of this town and country planning scheme, she could not have avoided the transaction and demanded her money back as the representation concerning the town and country planning scheme is not alleged to have been fraudulent. Rescission on the ground of innocent misrepresentation is only possible while the contract is executory. It was, however, executory at the time when the purchaser resiled.

Counsel argued that this commission note gave the plaintiffs a cause of action at the moment when the contract was signed and that they could have issued a writ there and then. I do not think that that is so. I think that the words " binding contract " mean, in a case of this sort, a contract which can be enforced by the vendor against the purchaser. They must mean that. There are many contracts entered into with regard to the sale of land which, because of difficulties of title or for whatever may be the reason among a variety of reasons, cannot be enforced and completion cannot be insisted on. Sometimes the vendor can resile because some requisition is made with which the vendor is unable or unwilling to comply. Sometimes the purchaser finds out some fact which he had not known but which he had a right to know, or a misrepresentation may have been made to him, albeit innocently, which gives him a right to rescind the contract. The true construction of this contract is that the commission is payable when the contract has been shown to be a binding contract; and it may be that it cannot be shown to be a binding contract until completion has taken place. Then the purchase money has been received. In so holding I am not in any way departing from what was laid down in *Midgley Estates, Ltd.* v. *Hand* (1) ([1952] 1 All E.R. 1394). That was a case in which the term " legally binding contract " was used. I do not think that the term " legally " makes any difference at all. " Binding ", I think, means binding in law. In that case the agents had stipulated that they would be entitled to commission if a binding contract were executed and, a purchaser having been introduced, the agents claimed that they were entitled to commission. It was held that they were so entitled, because the purchaser had signed a contract and that contract, no one disputed, was binding on him. It was not suggested that the contract could be rescinded. The purchaser failed to complete because he had not got the money; but the contract was a binding contract. The difference between *Midgley Estates, Ltd.* v. *Hand* (1) and the other cases* which have been decided on these points with regard to agents' commission was that the law now is that, if no special condition is imported, the agent is only entitled to his commission if the transaction really goes through and money is received.

In this case the words are substantially the same, for the absence of the word " legally " makes no difference; but this is not a case in which the purchaser is admitting that he is bound by the contract even though he cannot fulfil it. The purchaser is saying that it is not a binding contract. I have to consider whether it was a binding contract. As the parties have agreed that the purchaser was induced to sign the contract by the statement made by Mr. Wade, I am bound to hold that it was a contract induced by an innocent misrepresentation, and I cannot say that it was not with reference to a substantial matter. The purchaser had been told that the town and country planning scheme which was in existence (which might, of course, have been seen by either party if they had wanted to) would only affect this garage to the extent of two or three feet; but in fact it would almost have wiped it out of existence, if it had not entirely done so. I cannot say that a representation of that sort is not a representation on a substantial matter; and, although it was an innocent misrepresentation, it was a representation of which the purchaser was entitled to take advantage while the contract was still executory and to say that she would not carry out the bargain because it had been induced by the representation. A person is not bound to show that the innocent misrepresentation was the only representation made. If the representation was one of the representations made and was of a substantial nature and affected the purchaser's mind, she was entitled to resile from this contract. It is true that the vendor took up the attitude that the purchaser was not entitled to resile and that the parties came to a settlement among themselves. I cannot say, however, that this was a binding contract, if it was a contract from which the purchaser was entitled to resile; and, on the agreed facts, I think she was entitled so to resile. Therefore, in my opinion, the true meaning of this commission note is that the money did not become payable at the moment the contract of sale was signed, because, until completion, it was not possible to say whether it was a binding contract of sale or not. If

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* See *Dennis Reed, Ltd.* v. *Goody* (2) ([1950] 1 All E.R. 919) and cases there cited.

completion had taken place, well and good. It has been shown, however, that A
this was not a binding contract of sale, because the purchaser had a right to rescind the contract and to say that it was not a contract binding on her.

For these reasons I have come to the conclusion that the plaintiffs cannot recover in this action, and the claim is, therefore, dismissed with costs.

Judgment for the defendant, the vendor. B

Solicitors: *J. J. Dunnett* (for the plaintiffs); *Torr & Co.*, agents for *Francis & Parkes*, Reading (for the defendant, the vendor).

[*Reported by* A. P. Pringle, Esq., *Barrister-at-Law.*]

C

OWEN *v.* GADD AND OTHERS.

[Court of Appeal (Lord Evershed, M.R., Birkett and Romer, L.JJ.), March 23, 26, 1956.]

Landlord and Tenant—Covenant—Breach—Covenant for quiet enjoyment—Lock-up shop—Erection of scaffolding outside shop window. D

By a lease dated Oct. 13, 1955, lessors let to the lessee a lock-up shop for a term of ten years at a rent of £700 per annum. The lessee covenanted to use the premises only for the purposes of retailing baby carriages, radio sets and accessories and toys. The lease contained a covenant by the lessors that the lessee " shall and may peaceably and quietly hold and enjoy the E
said premises . . . without any lawful interruption or disturbance from or by the lessors . . ." Soon after the lease was granted scaffold poles were erected immediately in front of the windows and door of the shop in order that necessary repairs should be carried out by the lessors to the upper part of the premises which they occupied. The poles remained there for eleven days. They interfered with the access of the public to the shop windows F
of the lessee and with his trade. In an action by the lessee for damages for breach of the covenant for quiet enjoyment the county court judge found that the existence of the scaffolding constituted a breach of the covenant and was not so trifling or transitory in character as to disentitle the lessee from maintaining a claim and awarded the lessee forty shillings damages. On appeal,

Held: the purpose of the demise being that the premises should be used G
as a shop for retail sale of particular articles, the erection of the scaffolding constituted an interference sufficiently physical and direct to be a breach of the covenant for quiet enjoyment, and the decision of the county court judge should stand.

Dictum of Parker, J., in *Browne* v. *Flower*, [1911] 1 Ch. at p. 228, applied; H
dictum of Fry, L.J., in *Sanderson* v. *Berwick-upon-Tweed Corpn.* (1884), 13 Q.B.D. at p. 551, considered.

Appeal dismissed.

[As to acts constituting breaches of covenants for quiet enjoyment although done off the premises, see 20 Halsbury's Laws (2nd Edn.) 244, para. 272; and for cases on the subject, see 31 Digest (Repl.) 141, 142, *2801-2811.*] I

Cases referred to:

(1) *Sanderson* v. *Berwick-upon-Tweed Corpn.*, (1884), 13 Q.B.D. 547; 53 L.J.Q.B. 559; 51 L.T. 495; 49 J.P. 6; 31 Digest (Repl.) 141, *2801.*

(2) *Robinson* v. *Kilvert*, (1889), 41 Ch.D. 88; 58 L.J.Ch. 392; 61 L.T. 60; 31 Digest (Repl.) 130, *2676.*

(3) *Browne* v. *Flower*, [1911] 1 Ch. 219; 80 L.J.Ch. 181; 103 L.T. 557; 31 Digest (Repl.) 142, *2807.*

Appeal.

Appeal of the lessors from a judgment of His Honour JUDGE REID at Kingston-upon-Thames County Court on Jan. 20, 1956, giving judgment for the lessee for 40s. damages for breach of covenant by the lessors in a lease dated Oct. 13, 1955, and made between the lessors and the lessee that the lessee should peaceably and quietly hold and enjoy the premises known as 16, Eden Street, Kingston-upon-Thames during the term granted by the said lease without any lawful interruption or disturbance from or by the lessors or any person or persons claiming under them.

Stephen Chapman, Q.C., and *J. D. May* for the lessors.
T. L. Dewhurst for the lessee.

LORD EVERSHED, M.R.: This was an action for damages for breach of covenant for quiet enjoyment. The appellants in this court, the lessors, by a lease dated Oct. 13, 1955, demised to the plaintiff, the respondent, the ground floor lock-up shop, situate at and known as No. 16, Eden Street, Kingston-upon-Thames, for a term of ten years at a rent of £700 per annum. The lessee entered into numerous covenants of the kind that one would expect in a lease of this character. The covenants included, however, the following:

> ". . . and also will use and occupy the said shop for the retailing of baby carriages radio sets and radio accessories and toys and for no other purpose except with the consent in writing of the lessors . . ."

Among the lessors' covenants was a covenant for quiet enjoyment in, no doubt, very usual form. Having regard to the argument, it is desirable that I should read it:

> ". . . and that the lessee paying the rent hereby reserved and performing and observing the several covenants conditions and agreements herein contained and on his part to be performed and observed shall and may peaceably and quietly hold and enjoy the said premises hereby demised during the term hereby granted without any lawful interruption or disturbance from or by the lessors or any person or persons claiming under them or either of them."

Three days after the grant of this lease the lessors, through certain contractors employed for the purpose, proceeded to erect immediately in front of the shop window and door scaffold poles in order to carry out repairs, which were urgently needed, on the upper part of the same premises in Eden Street. These upper premises belonged to the lessors and were in their occupation. Most unfortunately, the lessors omitted to warn the lessee of this impending operation or to inform him about it; and the dismay of the lessee in finding scaffold poles in front of this shop window would, I think, be natural enough. What, unfortunately, also aggravated the dismay of the lessee was that, for reasons which are referred to in the evidence and the judgment, the week next following happened to be a week in which a very much more active retail trade was likely in the class of articles which the lessee was selling and had, indeed, covenanted to sell. In fairness to the lessors, however, it must be said that, when the view of the lessee was brought to their minds, they took all proper steps as good landlords to minimise the disarrangement (I am deliberately using a neutral word) of the lessee's affairs by arranging that the scaffold poles should be placed as conveniently as possible from the lessee's point of view and also by arranging that the work should be done at once and with great expedition. It was in fact completed in eleven days instead of taking, as had originally been expected, six weeks. Still, the lessee claimed that he had suffered through this vital week a serious and a substantial loss of his business as a shopkeeper, and that for a reason not far to seek, namely, that the presence of these scaffold poles, and perhaps the men working on the planks immediately above them, seriously interfered with the ordinary access of the public to the shop window. It need not be emphasised that a lock-up A shop, according to the ordinary significance of that term, means a place which will have a shop window, and in that shop window the goods to be sold will be exhibited so as to attract custom.

In the circumstances, as I have stated them, the judge came to the conclusion that the erection of these scaffold poles in close proximity to the shop window constituted a breach of the covenant for quiet enjoyment, not being of so trifling B or purely transitory a character as to disentitle the lessee from making any claim; but, though the judge heard evidence of lost trade, he was not satisfied that the lessee had proved in fact specific losses, and he therefore ended his judgment with these words:

> " I am entitled, although no special damages have been proved, to award C more than merely contemptuous damages, and I propose therefore to award the plaintiff the sum of 40s. by way of damages."

That being the result of the case, it seemed at first sight surprising that the lessors should desire this court to re-hear the matter on a claim for 40s.; but counsel for the lessors stated that the ground of the decision, or the legal premise on which it rested, was a matter of great importance to the lessors, whose business D is that of surveyors and estate and house agents; and he intimated that according to his submission the decision would create something of a new departure in the law relating to covenants of this nature. Let me say at once that, in my judgment, the duty and the sole duty of this court is to say whether the award of 40s. which His Honour gave to the plaintiff in this action was justified having regard to the circumstances of this case and the facts as found by the judge and by the E terms of the lease in question. The case being so confined, I am for my part satisfied that there is no ground shown for disturbing the judge's conclusion. I think there are in truth, as counsel for the lessors submitted, two distinct questions in a case of this kind. The first is one of law, viz., what is the meaning and effect, so far as relevant, of the covenant breach of which is alleged? The second is on the facts, and is whether the plaintiff has proved that he has brought F himself within the scope of the covenant as properly construed? I begin by referring again briefly to the lease. I have stated that it is a lease of a shop and I have referred to the necessary implications of that word. It is also to be noted that the demise was for a purpose expressly defined, namely, the retail sale of particular articles. That being so, it would appear prima facie that the language of the covenant would suffice to cover any act on the lessors' part which G prevented the lessee from the enjoyment of the premises demised to him for the purposes for which they were so demised. There is no doubt that covenants of this character have been the subject of many decisions, and the general conclusion to be drawn from them may from time to time give rise to difficulty. In the well-known text-book FOA'S GENERAL LAW OF LANDLORD AND TENANT (7th Edn.), at p. 292, there is stated the following proposition under a heading " Substantial H interference with enjoyment ":

> " The question whether the quiet enjoyment of the premises demised has been interrupted or not is in every case one of fact; and the covenant is broken although neither the title to the land nor the possession of the land may be otherwise affected, where the ordinary and lawful enjoyment is substantially interfered with by the acts of the lessor or of those lawfully I claiming under him."

The second sentence is in fact a citation of the language of FRY, L.J., in this court in the well-known case of *Sanderson* v. *Berwick-upon-Tweed Corpn.* (1) ((1884) 13 Q.B.D. 547 at p. 551), the judgment of the lord justice being the judgment of the court. As to the first part of the passage which I have read (and I should have said that it is taken from earlier editions of the same work which were written by the learned author himself) the first sentence, " The question whether the quiet enjoyment . . . has been interrupted or not is in every case one of fact ", seems to me, on the present appeal, to reduce the scope of the debate considerably; for, having looked at the evidence and looked particularly at the photographs, it seems to me impossible to say that the learned judge was not well justified in concluding as he did, that the interference here, the interruption of the quiet enjoyment, was as a fact substantial even though it did not last a very long time. That was, in all the circumstances of this particular case, the conclusion of fact at which the judge arrived; and counsel for the lessors has not indeed pressed us much on that aspect of the matter.

There remains, however, the question whether the nature of the obstruction or interruption is of a kind incapable of constituting a breach of the covenant. If the passage which I have read from Fry, L.J.'s judgment is correct, then it undoubtedly on the face of it suffices to justify the legal premise on which the judge proceeded; and it is, I think, right to mention that Fry, L.J.'s, language was expressly referred to with approval in the later case of *Robinson* v. *Kilvert* (2) ((1889) 41 Ch.D. 88) by Lindley, L.J. It may well be true, however, also to say that some qualification should be placed on the broad significance of the language which I have read from Fry, L.J., if for no other reason, for this reason, that the language which Fry, L.J., used was used in reference to the facts of the particular case then before the court. I am prepared to assume that the disturbance, the interruption, must at least be of what is called a direct and physical character. It was very early decided that an injunction granted at the suit of a superior landlord to prevent the carrying on of some business or the doing of some act by the sub-lessee cannot be treated as constituting a breach of covenant for quiet enjoyment; and there have been other cases where the matter complained of has been the emanation of fumes or the making of noises and other matters of a kind commonly forming the subject of actions for nuisance. We are here concerned, however, with something that is not only physical—the placing of scaffold poles, like hoardings, is certainly physical—but also is direct; it was done at the direct requirement of the lessors. I take as correct the language of Parker, J., from *Browne* v. *Flower* (3) ([1911] 1 Ch. 219 at p. 228):

> " It appears to me that to constitute a breach of such a covenant there must be some physical interference with the enjoyment of the demised premises, and that a mere interference with the comfort of persons using the demised premises by the creation of a personal annoyance such as might arise from noise, invasion of privacy, or otherwise is not enough."

If that passage be taken, as I am content to assume that it is, as correct, then it certainly does not, as I think, disable in any sense the basis on which the learned judge in the present case decided in the plaintiff's favour. It was said by counsel for the lessors that we must further qualify the language of Fry, L.J., and that there could be no breach of the covenant for quiet enjoyment unless there was what he called an actual physical irruption into or on the premises demised on the part of the landlords or some persons authorised by them by their actually entering on or invading the premises or say by the irruption thereon of water emitted from the landlords' premises elsewhere. In my judgment, that submission is not justified by the authorities. I do not think that there is any sufficient warrant for such a limitation on the language of Fry, L.J. Concluding, therefore, as I do, that in this case the judge was entitled to find as a fact that the interference was substantial and that there was no principle of law which disqualified him from concluding as he did, I think that this appeal must fail and should be dismissed.

BIRKETT, L.J.: I think the learned judge in this case was entirely right, and, as my Lord has expressed all that I would wish to have said, I will content myself by saying that I agree with the judgment which has just been delivered, and have nothing further to add.

ROMER, L.J.: I also agree, and have very little to add. I think it has become quite well established by the authorities that no act of a lessor will constitute an actionable breach of a covenant for quiet enjoyment unless it involves some physical or direct interference with the enjoyment of demised premises. In regard to that, I think that counsel for the lessee was right when he said that, in considering whether the enjoyment of premises has been disturbed, one looks to see what the purposes were for which the premises were granted. In a case such as the present, where the premises were demised for the use of a retail shop, the question is whether there has been an interruption or disturbance by the lessee of the enjoyment of the premises in relation to that purpose.

The question whether or not there has been such a physical or direct interference with the enjoyment of the premises has been decided here by the learned judge on the facts in favour of the plaintiff. I am bound to say that I entirely agree with him. One has a very good picture of what is being done from the photographs, which show the scaffolding which was put up and which show that there was an interference with the access to the shop premises by anybody who desired to enter them. Then comes the question whether the degree of interruption be such as to constitute a ground for legal complaint or whether it should be merely dismissed on the ground of its being of a temporary character or on the ground of de minimis. That appears to me to be essentially a question of fact to be determined by the judge who tries the action. The learned judge in this case, having reviewed all the circumstances which he considered relevant, including the fact that the period of time, these eleven days, during which the scaffolding was up preceded the autumn budget, came to the conclusion that it did involve an interference of access to the premises of a kind and degree which entitled the plaintiff to sustain his action. That is not a conclusion with which we should, even if we could, interfere; and there is ample evidence and material to support the learned judge's conclusion at which he arrived. Therefore I do not think that we ought to disturb it. For my part, I cannot see that the learned judge's finding should be displaced by the considerations on which counsel for the lessors relied, which may be summarised in this way, that the work of external repair which the lessors put in hand was reasonably necessary, that it was efficiently done and was done with all reasonable speed. I do not think that those considerations are really relevant to the question whether there has been a breach of the lessee's contractual rights under the covenant for quiet enjoyment, although they have obviously assumed importance in the minds of the lessors themselves. Accordingly, it appears to me that the learned judge has in no way misdirected himself on any point of law in the case, and has made findings of fact with which this court should not interfere even if it took a different view, which for my part I do not; and accordingly the appeal must fail.

Appeal dismissed.

Solicitors: *George C. Carter & Co.* (for the lessors); *George E. Baker*, Guildford (for the lessee).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

A

TRESEDER-GRIFFIN AND ANOTHER *v.* CO-OPERATIVE INSURANCE SOCIETY, LTD.

[COURT OF APPEAL (Denning and Morris, L.JJ., and Harman, J.), February 20, 21, March 20, 1956.]

B *Landlord and Tenant—Rent—Reddendum for payment in gold or equivalent in Bank of England notes.*

Money—Covenant to pay on gold basis—Rent—Payment to be either in gold sterling or Bank of England notes to the equivalent value in gold sterling of a specified sum.

Lessors demised two shops to tenants on a lease for thirty-four years from C June 24, 1930, at a rent rising from £1,600 to £1,900 per annum. Having subsequently bought the freehold, on Dec. 30, 1938, they demised the shops to the same tenants from June 24, 1930, for ninety-nine years " paying therefor yearly during the said term either in gold sterling or Bank of England notes to the equivalent value in gold sterling the rent of £1,900 to be paid without any deduction except for landlord's property tax land D tax and tithe redemption annuity by equal quarterly payments . . ." repeating a similar clause in the earlier lease apart from the figure of rent. There was a covenant " to pay the reserved rent at the time and in manner aforesaid ". The lease having been assigned, the lessors claimed from the lessees (i.e., the assignees) payment of rent on the basis of the value of 475 gold sovereigns a quarter at the date when the payment became due, either E the value of their gold content as bullion (e.g., £5,610 6s. 1d., on Sept. 29, 1955) or the value of the sovereigns as vendible coins (e.g., £6,412 10s. at that date) the value in either case fluctuating with the market.

Held (HARMAN, J., dissenting): on a true construction of the lease the yearly rent payable was a fixed rent of £1,900 and the reddendum was intended to determine the manner in which the rent was paid but not to fix F its amount, because (i) (per DENNING, L.J.) the phrase " gold sterling " in the reddendum denoted gold coins regarded as currency, worth as such their nominal value, and did not refer to gold coins regarded as a commodity or as bullion (see p. 38, letters B and I, post), and (ii) (per MORRIS, L.J.) the word " value " in the reddendum denoted nominal value, with the consequence that for the purpose of the reddendum gold sterling might G be satisfied at 20s. or a £1 bank note for the gold pound (see p. 45, letter H, post).

Feist v. Société Intercommunale Belge d'Electricité ([1934] A.C. 161) and *R.* v. *International Trustee for Protection of Bondholders Aktiengesellschaft* ([1937] 2 All E.R. 164) distinguished.

Decision of LORD GODDARD, C.J. ([1955] 3 All E.R. 793) reversed.

H

[As to payment on a gold basis, see 23 HALSBURY'S LAWS (2nd Edn.) 173, para. 251; and for cases on the subject, see DIGEST Supp., " Money ", 17*a*-17*c*, 17*n*.

As to legal money, see 7 HALSBURY'S LAWS (3rd Edn.) 303-305, paras. 646, 647; I and as to the note issue, see 2 HALSBURY'S LAWS (3rd Edn.) 153-155, paras. 282, 283.

For the Coinage Act, 1870, s. 3, s. 4, and s. 6, see 4 HALSBURY'S STATUTES (2nd Edn.) 575, 576.

For the Gold Standard Act, 1925, and the Gold Standard (Amendment) Act, 1931, see 2 HALSBURY'S STATUTES (2nd Edn.) 260, 266.

For the Currency and Bank Notes Act, 1928, see 2 HALSBURY'S STATUTES (2nd Edn.) 261.

For the Exchange Control Act, 1947, s. 1 and s. 2, see 16 HALSBURY'S STATUTES (2nd Edn.) 560, 562.]

Cases referred to:

(1) *Case of Mixed Money*, (1605), Davies 48; 2 St. Tr. 113; 11 Digest (Repl.) 640, *637*.

(2) *R.* v. *International Trustee for Protection of Bondholders Aktiengesellschaft*, [1937] 2 All E.R. 164; [1937] A.C. 500; 106 L.J.K.B. 236; 156 L.T. 352; Digest Supp.

(3) *New Brunswick Ry. Co.* v. *British & French Trust Corpn., Ltd.*, [1938] 4 All E.R. 747; [1939] A.C. 1; 108 L.J.K.B. 115; 160 L.T. 137; Digest Supp.

(4) *R.* v. *de Yonge*, (1811), 14 East 402; 104 E.R. 657.

(5) *Feist* v. *Société Intercommunale Belge d'Electricité*, [1934] A.C. 161; 103 L.J.Ch. 41; sub nom. *Re Société Intercommunale Belge d'Electricité*, 150 L.T. 41; Digest Supp.

(6) *Montagu* v. *Browning*, [1954] 2 All E.R. 601; 3rd Digest Supp.

(7) *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.*, [1934] A.C. 122; 103 L.J.Ch. 85; 150 L.T. 281; Digest Supp.

(8) *Syndic in Bankruptcy of Salim Nasrullah Khoury* v. *Khayat*, [1943] 2 All E.R. 406; [1943] A.C. 507; 2nd Digest Supp.

Appeal.

The respondent lessors brought an action against the appellant lessees claiming £7,416 17s. 6d., rent alleged to be due in respect of two shops, Nos. 4 and 6, Queen Street, Cardiff, held by the lessees under a lease dated Dec. 30, 1938, for ninety-nine years from June 24, 1930; and for a declaration as to the true construction of the reddendum clause contained in the lease, and for interest. The lessors contended that on a true construction of the covenant to pay rent contained in the lease, they were entitled to receive 475 gold sovereigns on each quarter day during the term of the lease or alternatively such sum in Bank of England notes as represented the value of 475 gold sovereigns in sterling in London calculated at the date on which payment was due. The lessees contended that their obligation under the lease was limited to payment of £475 per quarter. On Dec. 6, 1955, LORD GODDARD, C.J. ([1955] 3 All E.R. 793), gave judgment for the lessors for £7,505 holding that the lessors were entitled to receive each quarter the number of banknotes which would be required to buy from an authorised dealer gold coins to the value of £475. The lessees appealed to the Court of Appeal.

Eustace Roskill, Q.C., and *W. H. Griffiths* for the lessors.

Neville Gray, Q.C., and *R. J. S. Thompson* for the lessees.

Cur. adv. vult.

Mar. 20. The following judgments were read.

DENNING, L.J.: By a lease dated July 28, 1932, Mr. Treseder-Griffin and others (the trustees of the estate of Mr. H. A. Griffin, deceased) let to Montague Burton, Ltd., two shops, Nos. 4 and 6, Queen Street, Cardiff, for thirty-four years from June 24, 1930. The lease contained a special clause about the rental. The lessors demised the premises to the lessees to hold for the term of thirty-four years

> " paying either in gold sterling or Bank of England notes to the equivalent value in gold sterling the yearly rental of £1,600 for the first seven years, £1,800 for the next seven years, and £1,900 for the remainder of the term to be payable by equal quarterly payments on the usual quarter days."

The lessees covenanted " to pay the reserved rent at the time and in manner aforesaid ". The lessors covenanted that " the lessees paying the rent hereby reserved " should quietly enjoy the premises. The lessors (who only held a lease themselves) further covenanted to use their best endeavours to get an extension or renewal of their own lease; and in the event of their obtaining it, covenanted that they would, if required, grant to the lessees a lease for an equal term to their own

> "up to a total of ninety-nine years from the date of the commencement of the term hereby granted subject to the payment of the yearly rent of £1,900 per annum and to the same covenants and conditions"

as were contained in the lease.

It appears that the lessors did not obtain an extension or renewal of their own lease. They bought the freehold, and then granted to the lessees a new lease. By this new lease made Dec. 30, 1938, the lessors let to the lessees the same two shops for ninety-nine years from June 24, 1930. The lease contained a similar special clause about the rental. The lessors demised the premises to the lessees to hold for the term of ninety-nine years

> "paying therefor yearly during the said term either in gold sterling or Bank of England notes to the equivalent value in gold sterling the rent of £1,900 to be paid without any deduction except for landlord's property tax land tax and tithe redemption annuity by equal quarterly payments on Mar. 25, June 24, Sept. 29 and Dec. 25 in every year, the proportionate part of the first payment calculated as from Nov. 5, 1937, to be considered as having become due on Dec. 25, 1937."

The lessees covenanted "to pay the reserved rent at the times and in manner aforesaid". The lessors covenanted with the lessees that "the lessees paying the rent hereby reserved" should quietly enjoy the premises. There was a proviso for re-entry

> "if the rent hereby reserved or any part thereof shall be in arrear for twenty-one days after the same shall become due (whether demanded or not)."

Despite the special clause about gold, the lessors for many years right up to June, 1953, demanded of Montague Burton, Ltd., only £475 a quarter, i.e., £1,900 a year; but they always guarded the demand by these words:

> "The executors of the late Mr. H. A. Griffin would accept a cheque for £475 in full settlement of one quarter's rent . . . without prejudice to claim for future quarter's rent under the clauses of the lease with you . . . relating to payment in gold or the equivalent in Bank of England notes."

They gave a receipt in the same words. The result was that they accepted £1,900 a year until 1953 and cannot re-open those payments, but they kept open the position for the future.

On June 23, 1953, Montague Burton, Ltd., assigned the lease to the Co-operative Insurance Society, Ltd. Thenceforward the lessors have demanded of the new lessees a rental of £5,000 or £6,000 a year, saying that that was the amount due under the special clause. The lessees say that the amount due is only £1,900 a year.

The lessors say that, under the special clause, the rent here consists of 1,900 gold sovereigns or their equivalent in notes. They point out that 1,900 gold sovereigns are nowadays worth far more than £1,900. Their value changes from day to day and from hour to hour according to the state of the bullion market. If 1,900 gold sovereigns were melted down and the gold content sold in the bullion market, they would be worth, e.g., as at Sept. 29, 1955, £5,610 6s. 1d. If they were not melted down but sold just as they are, simply as coins, they would be worth even more; because there are some parts of the world today where sovereigns are much sought after, sometimes by people who wish to hoard them, and at other times by rulers who wish to have them as a backing for their own currency. This hoarding value, too, changes from day to day. The value of 1,900 sovereigns, as coins, for example, as at Sept. 29, 1955, was £6,412 10s. That is the value which the lessors claim and to which the order of Lord Goddard, C.J., entitles them.

This is the first case, so far as I know, to come before our courts where the parties have inserted a "gold clause" in a domestic contract where all the parties are within our own country. In external transactions it is, of course, quite common for parties to protect themselves against a depreciation in the rate of exchange by means of a gold clause. But in England we have always looked on a pound as a pound whatever its international value. We have dealt in pounds for more than a thousand years—long before there were gold coins or paper notes—in all our dealings we have disregarded alike the debasement of the currency by kings and rulers or the depreciation of it by the march of time or events. This is well shown by the *Case of Mixed Money* (1) ((1605) Davies 48). Creditors and debtors have arranged for payment in our sterling currency in the sure knowledge that the sum they fix will be upheld by the law. A man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at that time. Sterling is the constant unit of value by which in the eye of the law everything else is measured. Prices of commodities may go up or down, other currencies may go up and down, but sterling remains the same.

This principle is strikingly illustrated by what happened in 1811, when there was severe depreciation of the pound. A landlord named Lord King then sought to get his tenants to pay their rents at figures which went up according to the price of gold, but he failed. The occasion is thus described by Sir Albert Feavearyear in his book on The Pound Sterling, at p. 190:

> "King announced that he would no longer receive from his tenants in payment of their rents bank notes at face value. He proposed to calculate for each tenant, the quantity of gold which would have been purchased at the date of that tenant's agreement with the rent stipulated therein, and to require from him the same quantity of gold now, or the amount of paper money which would be required to purchase it at the present price."

Note the similarity to what the landlords here seek to do. But Lord King did not succeed in his plan. His opponents, says Sir Albert Feavearyear, were not

> "prepared to accept the view that a pound was a definite quantity of gold bullion. They held to the time-honoured principle that a man who contracted to receive a pound, whether his contract were a long or a short one, must take whatever was by general consent called a pound when payment was made. This was the principle which had been followed for a thousand years in spite of all the many changes of form and value, some of them very rapid, which the pound had undergone."

Parliament immediately passed an Act which affirmed this principle. They put a stop to Lord King's plan. Bank notes were made legal tender for rent equal to gold currency of their face value (see (1811) 51 Geo. 3 c. 127, s. 3).

The principle which I have stated is so well established that it is disturbing to find a creditor inserting a gold clause in a domestic transaction. I am not altogether sure that it is lawful. In the United States, gold clauses are declared by the Joint Resolution of Congress to be contrary to public policy (see *R.* v. *International Trustee for Protection of Bondholders Aktiengesellschaft* (2) ([1937] 2 All E.R. 164). In Canada they are rendered inoperative by the Gold Clauses Act, 1937 (see *New Brunswick Ry. Co.* v. *British & French Trust Corpn., Ltd.* (3) ([1938] 4 All E.R. 747). Many other countries have like legislation. In France, ever since the Franco-Prussian war, the Cour de Cassation has ruled that gold clauses are invalid in the case of internal contracts for payments in France by the French people; but they are valid in the case of international payments, i.e., those which involve a traffic across international frontiers. Those countries do it, I suppose, to protect their own currencies. If we are now to hold gold clauses valid in England for internal payments, we may be opening a door through which lessors and mortgagees, debenture-holders and preference shareholders, and many others, may all pass. We might find every creditor stipulating for payment according to the price of gold: and every debtor scanning the bullion market to find out how much he has to pay. What then is to become of sterling? It would become a discredited currency unable to look its enemy inflation in the face. That should not be allowed to happen.

In considering the validity of these clauses, there is another fundamental principle which runs like a thread through the history of our currency. It is this: that no one shall sell or buy, pay or receive, any gold coin lawfully current in this land for more or less than the true lawful value which it does by its denomination import. Thus a gold sovereign, in the days when it was current, was by law worth £1 sterling, no more and no less. This principle was stated in many statutes, which were declaratory of the common law but provided special penalties for the breach of it. These statutes were all passed in times when there was a depreciation of the currency. They stretch from 1350 (25 Edw. 3 c. 12), after the Black Death, to 1816 (56 Geo. 3 c. 68), after the Napoleonic Wars.

A good illustration comes from the year 1810. A man called de Yonge sold fifty gold guineas (of the face value of £52 10s.) for banknotes of £56 face value, plus a silver dollar of 5s., thus making £3 15s. profit. He was convicted of an offence against the Statute of Edward 6 (1552) (5 & 6 Edw. 6 c. 19): but the judges sitting in the Exchequer Chamber arrested the judgment, apparently for the somewhat technical reason that there were no banknotes in the time of Edward 6 (see *R.* v. *de Yonge* (4) ((1811) 14 East 402)). Within three weeks, however, Parliament affirmed the principle which I have stated. They passed an Act providing that no one should pay more for guineas than their face value (see 51 Geo. 3 c. 127). During the next twenty years banknotes became freely convertible into gold coin of like value and there was then no reason for anyone to make any difference between banknotes and gold coin. In 1832, therefore, the old statutes providing for special penalties were repealed (see 2 Will. 4 c. 34, s. 1): but the common law principle remained, and it remains intact to this day. It is not often applicable, because gold coin has ceased to be in circulation. Gold coin is now treated as a commodity and can be bought or sold through an authorised dealer for more than its face value, provided that the Treasury give permission (see s. 1 and s. 2 of the Exchange Control Act, 1947). Nevertheless, if occasion should arise for a gold sovereign to be regarded as currency, and not as a commodity, the common law principle still holds good, namely, that as currency it is worth £1 sterling, no more and no less. Thus, if a party to an agreement, old or new, should stipulate for payment in gold coins, *regarded as currency*, then they must be taken at their face value in sterling, no more and no less. No person can today, any more than in times past, treat the gold coin of this realm (when *regarded as currency* and not as a commodity) as worth more or less than the true lawful value which it does by its denomination import.

This leads me to the construction of the clause in our present case which requires the lessees to pay the yearly rent of £1,900 by equal quarterly payments

> " either in gold sterling or Bank of England notes to the equivalent value in gold sterling . . . "

The phrase " gold sterling " is somewhat odd. " Sterling " is, of course, simply the name of our currency, English pounds, shillings and pence. The origin of the word is uncertain. In the *Case of Mixed Money* (1) (Davies at pp. 60-65), the word " sterling " is said to be derived from the fact that the early kings employed people from the East to make pure English money. These people were called " Esterlings ", and the coins they made were called sterling money. This view is not, I believe, acceptable to antiquarians today. They think the word had its origin in the fact that some of the early coins had a small star on them. Howsoever that may be, the phrase " gold sterling " must mean, I think, gold coins of sterling currency, that is, in modern times sovereigns or half-sovereigns.

The lessors start by accepting that meaning, and thence seek to say that the rent here consists of 1,900 gold sovereigns or their equivalent in notes. In arguing thus, they are regarding the 1,900 sovereigns as a commodity and they say they are entitled to the value of them as such. I think the argument is fallacious, because the phrase " gold sterling " in the clause does not mean gold coins regarded as a commodity. It means gold coins regarded as sterling currency: and as such 1,900 sovereigns are worth £1,900, no more and no less. A sovereign is, for the purposes of legal tender, worth no more than £1. No sensible man would, of course, use it as currency to pay his debts, but, nevertheless, if he did so use it, it would be only worth £1.

It follows that I do not think the lessors can possibly recover the hoarding value of 1,900 sovereigns, e.g., £6,412 10s.: for that is only their value regarded as objects of art or collectors' pieces. Nor do I think that they can recover the value of the gold content, e.g., £5,610 6s. 1d., for that is only their value regarded as bullion. The lessees did not promise to pay a rent of 1,900 gold sovereigns regarded as a commodity, or the realisable value of that commodity in notes. They promised to pay 1,900 pounds: and 1,900 pounds means £1,900, no more and no less, no matter whether it is paid in gold coins or in paper notes.

The point can be made clear by asking here the question which counsel for the appellant propounded in *Feist* v. *Société Intercommunale Belge d'Electricité* (5) ([1934] A.C. 161 at p. 163):

> " Is the intention of those words to fix *the amount* to be paid, or to determine *the manner* in which an amount already fixed is to be discharged? "

My answer is that the amount to be paid is here fixed by the clause at " £1,900." The remaining words,

> " either in gold sterling or in Bank of England notes to the equivalent value in gold sterling ",

merely determine the *manner* in which the £1,900 already fixed is to be discharged. If those words mean that the £1,900 rent is to be discharged either by 1,900 gold sovereigns regarded as currency or by 1,900 £1 Bank of England notes regarded as currency (as I think they do), there is nothing unlawful in it, but it adds nothing to the obligation to pay £1,900.

By contrast, in *Feist* v. *Société Intercommunale Belge d'Electricité* (5) the House of Lords held that the words of the clause there fixed *the amount* to be paid. The company agreed to pay

> " the sum of £100 in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on Sept. 1, 1928."

The House of Lords held that the reference to gold coin of the United Kingdom was not a reference to the *mode* of payment but to the *measure* of the company's obligation. The sum to be paid was to be ascertained by taking the amount of gold contained in one hundred sovereigns and seeing what that amount of gold would be worth in sterling. In other words, the clause treated gold coin as a commodity and not as currency. I cannot construe our present clause in that way. The sum to be paid is fixed at £1,900, no more and no less. The reference to " gold sterling " is merely a reference to the mode of payment, not to the measure of the lessees' obligation.

Furthermore, in considering this clause in the lease, it is important to bear in mind s. 6 of the Coinage Act, 1870. That section in my opinion makes it unlawful for a creditor to stipulate for payment of a money debt in any other way than in lawful currency. Its application can be well seen by reference to the law of landlord and tenant. The section does not prevent a landlord from stipulating for a rent to be rendered in kind, as, e.g., in so much corn or services, as has been done for centuries (see 2 BLACKSTONE 41, *Montagu* v. *Browning* (6), [1954] 2 All E.R. 601): but if he stipulates for a money rent, it must be expressed in terms of a sum of money in lawful currency and not otherwise. Much of our law about rent proceeds on this footing and would not be workable if it were not so. Thus a rent must be a sum certain, or capable of being calculated with certainty. It becomes due in the morning of the day appointed for payment, but it is not in arrear until after midnight. (I pause to ask how anyone can say how much is the rent, if it is to be calculated by reference to the state of the bullion market, which fluctuates from hour to hour.) It is the duty of the tenant on the appointed day to know what amount he owes (without being told what it is), and to have it ready to be paid in cash on the demised premises to the landlord. Although a formal demand is often dispensed with, nevertheless a money rent, in order to be valid, should be capable of being lawfully demanded; and for that purpose it must be demanded on the premises just before sunset in sufficient time to count the money, and the demand must be for the exact amount to a penny.

If the lessor's construction of this gold clause is right, there will not be a sum certain due as rent, and there will never be any " equal quarterly payments ". Each quarter's payment will be different from the one before. The price of gold is always on the move. It would also mean that in 1938, when the lease was granted, the rent payable was, not £1,900 as stated in the lease, but the hoarding value of 1,900 sovereigns, which was at that time £3,348 15s. That cannot have been intended. Whereas if the lessees' construction is right, there is no difficulty at all.

In my opinion, therefore, the rent payable under the lease is £1,900 per annum, no more and no less. I confess that I am glad to be able to come to this conclusion, because of the detrimental effect which any other view would have on our sterling currency. I would allow the appeal accordingly.

MORRIS, L.J.: The difficult question which arises in this case concerns the construction of the words used in the reddendum of the lease. In short the question may be posed thus: what is the reserved rent? It may seem surprising that as to so fundamental a matter the words of a lease should permit of a controversy which according to how it is resolved permits of widely divergent results. The lessees contend that the lease provides in terms for a fixed rent of £1,900. The lessors contend that there are qualifying words which have the result that the rent is a varying amount which now is over three times the amount of £1,900 and may well in the future be higher.

The lease is dated and was made on Dec. 30, 1938. The term was ninety-nine years from June 24, 1930. The rent was payable by equal quarterly payments. It was provided that

> " the proportionate part of the first payment calculated as from Nov. 5, 1937, to be considered as having become due on Dec. 25, 1937."

The parties chose the words by which in the lease they expressed their intention. It now becomes the task of the court to resolve the dispute as to what the words mean and as to the amount of rent the lessors can claim. Some phrases are perplexing and may give rise to speculation or intelligent guess as to what one party may have hoped to stipulate: but where sharp dispute arises it must be for the lessors who claim particular sums to show that the recorded and defined agreement is one under which payment of the sums now claimed must be made.

The words of the reddendum give an option to the lessees (which expression includes their assigns) to pay in one of two ways. They may be expressed as follows. One way is by

> " paying . . . yearly during the said term . . . in gold sterling . . . the rent of £1,900."

The other way is by

> " paying . . . yearly during the said term . . . in . . . Bank of England notes to the equivalent value in gold sterling the rent of £1,900."

Whichever way is chosen, what has to be paid is stated to be " the rent of £1,900 ". The " equivalent " value must presumably denote a value equivalent to the value *of* gold sterling. I think that this is so although the language actually used is somewhat clumsy in that it reads " to the equivalent value *in* gold sterling ". The phrase used must I think denote Bank of England notes to the equivalent value of gold sterling.

If the first of the above recited alternatives is adopted, I cannot think that it matters whether the words " in gold sterling " come before or after the words " the rent of £1,900 ". The first alternative is, I think, to pay £1,900 in gold sterling. The second alternative is to pay £1,900 in Bank of England notes to the equivalent value of £1,900 gold sterling.

If only the first method of payment had been prescribed, then the position today would be that £1,900 could not in practice be paid in gold sterling. I take the word " sterling " as referring to English currency. I consider that " gold sterling " denotes gold coins. At the time that the lease was entered into (Dec. 30, 1938) gold coins were no longer in ordinary circulation.

By the Currency and Bank Notes Act, 1914, the Treasury were authorised to issue currency notes for £1 and for 10s., and it was provided by s. 1 (1) that:

> " those notes shall be current in the United Kingdom in the same manner and to the same extent and as fully as sovereigns and half-sovereigns are current and shall be legal tender in the United Kingdom for the payment of any amount."

By s. 1 (3) it was provided that:

> " The holder of a currency note shall be entitled to obtain on demand, during office hours at the Bank of England, payment for the note at its face value in gold coin which is for the time being legal tender in the United Kingdom."

By the Gold Standard Act, 1925, the Bank of England was relieved of any obligation to pay Bank of England notes in gold coin, though it was provided that such notes should not thereby cease to be legal tender. It was provided that s. 1 (3) of the Act of 1914, which I have cited supra, should cease to have effect. It was further provided that the bank was obliged to sell gold bullion,

> " but only in the form of bars containing approximately four hundred ounces troy of fine gold ":

the purchase price, which could be paid " in any legal tender ", was £3 17s. 10½d. per ounce troy

> " of gold of the standard of fineness prescribed for gold coin by the Coinage Act, 1870 . . . "

The Currency and Bank Notes Act, 1928, s. 1 (1) (2), authorised the Bank of England to issue banknotes " for £1 and for 10s.", which were to be " legal tender for the payment of any amount ". Existing currency notes were converted into banknotes. The bank was required to issue banknotes (s. 2)

> ". . . up to the amount representing the gold coin and gold bullion for the time being in the issue department ";

and an amount in excess which was referred to as the " fiduciary note issue ". The expression " coin " meant coin which was current and legal tender in the United Kingdom. By the same Act, the bank was empowered to require a person in the United Kingdom owning gold coin or bullion to an amount exceeding £10,000 " in value " to sell it to the bank on payment (in the case of gold coin) of the nominal value thereof. The provisions as to the fiduciary note issue contained in the Act of 1928 were replaced by those contained in the Currency and Bank Notes Act, 1954. By that Act it is provided that the Bank of England may issue banknotes of such denominations as the Treasury may approve and shall not issue any other banknotes. By the Gold Standard (Amendment) Act, 1931, the gold standard was suspended and the Bank of England ceased to be under obligation to sell gold bullion.

Though gold coins were not at the time of the lease in ordinary circulation, they were legal tender and could have been used. A sovereign was legal tender for £1. The metallic value of the gold content in the coin was, however, rising. Later it was provided by s. 1 (1) of the Exchange Control Act, 1947, that:

> " Except with the permission of the Treasury, no person, other than an authorised dealer, shall, in the United Kingdom, and no person resident in the United Kingdom, other than an authorised dealer, shall, outside the United Kingdom, buy or borrow any gold or foreign currency from, or sell or lend any gold or foreign currency to, any person other than an authorised dealer."

Section 2 contains provisions as to the surrender of gold and foreign currency. The position therefore was that, at the date of the lease, banknotes constituted for all practical purposes the only currency in the country apart from silver and bronze.

The lease is for a term which ends on June 24, 2029. It is clearly impossible to forecast whether within that period gold coins will be minted and re-introduced for ordinary and general use. The Coinage Act, 1870, prescribed the standard of both gold and silver coins. No one can foresee whether, if before the year 2029 gold coins come back into use, they will be coins of the weight and fineness specified by the Act of 1870. It is I think of significance that the lease refers merely to " gold sterling ". There is no provision that the gold sterling is to be of specified weight and fineness. There is no wording comparable with that in *Feist* v. *Société Intercommunale Belge d'Electricité* (5); the obligation imposed by bonds there in question was to pay

> " the sum of £100 in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on Sept. 1, 1928."

In *New Brunswick Ry. Co.* v. *British & French Trust Corpn., Ltd.* (3), the railway company issued a series of mortgage bonds by which the company promised to pay

> " the sum of £100 sterling gold coin of Great Britain of the present standard of weight and fineness . . . "

In the present case there is no provision that the gold sterling is to be gold sterling which conforms to the weight and standard existing at the date of the lease. It is to be noted that in *Feist* v. *Société Intercommunale Belge d'Electricité* (5) the word " value " is not used. Nor is there an alternative method of payment given, as there is in the present case. In his speech in *Feist* v. *Société Intercommunale Belge d'Electricité* (5) LORD RUSSELL OF KILLOWEN said ([1934] A.C. at p. 171) that it could in that case be surmised that neither party to the bond could have contemplated payment under the bond being actually made in gold coins. In the present case there is no reason to suppose that the parties did not contemplate actual payment, if not in gold, at least in Bank of England notes. Whatever may be thought of the reference to gold sterling, there was no need expressly to mention Bank of England notes unless payment in notes was contemplated. The provision for alternative forms of payment points to the view that there is definition of the mode in which a debt is to be discharged rather than definition of the means by which a debt is to be measured and ascertained. There was no alternative in the language of *R.* v. *International Trustee for Protection of Bondholders Aktiengesellschaft* (2) nor in *New Brunswick Ry. Co.* v. *British & French Trust Corpn., Ltd.* (3). The language used in the present case has not been

> " adopted in business and financial affairs with a clear understanding of what was meant . . .",

to quote the words of Lord Wright in the latter case ([1938] 4 All E.R. at p. 762).

It is to be noted that in *New Brunswick Ry. Co.* v. *British & French Trust Corpn., Ltd.* (3), though the *Feist* construction (5) was held to apply to the mortgage bonds, it did not apply to the interest coupons annexed to the bonds. Lord Maugham, L.C., said (ibid., at p. 754):

> " On the other hand, I do not think that a construction on the lines of the *Feist* decision (5) ought to be adopted unless the so-called gold clause obligation is expressed in clear language, and, for myself, I do not think that this can be asserted in reference to the interest payments."

If during the term of the lease gold coins denominated in pounds or half pounds come into use, then, even if some future legislation altered the weight and fineness laid down by the Coinage Act, 1870 (whether this be thought unlikely or not), the lessees could discharge their indebtedness by paying £1,900 in such gold coins.

But at the present time the lessees could not pay £1,900 in gold sterling even if they wished to do so, and accordingly, in order to pay their rent for the period in issue in this action they must pay £1,900 yearly in Bank of England notes to the equivalent value of £1,900 gold sterling. The question arises as to the meaning in this connection of the word " value ". One view is that the word " value " means nominal value. Another view is that the obligation denotes and involves paying in Bank of England notes the sum which would be realised if gold coin of a nominal value of £1,900 were sold. Another view is that the obligation denotes and involves paying in Bank of England notes the cost of purchasing gold coin of a nominal value of £1,900. The conclusion expressed by the Lord Chief Justice ([1955] 3 All E.R. at p. 796) was:

> ". . . that the plaintiffs' contentions are correct and that they are entitled to receive each quarter the number of banknotes which would be required to buy from an authorised dealer gold coins to the value of £475."

But during the period covered by the claim it was not lawful, save with Treasury permission, to buy gold coins from an authorised dealer. It is not known how many banknotes would be required to buy from an authorised dealer gold coins to the value of £475. There are no figures before the court showing the purchase price of sovereigns, and it may be—though there is no evidence as to this—that authorised dealers would charge more to a purchaser of sovereigns than they would give to a seller of sovereigns. The authorised dealer might have certain expenses to cover. The provisions of the Exchange Control Act, 1947, s. 1 (1), prohibit the purchase of sovereigns save with permission. In the period covered, the lessees could not pay rent to the lessors in gold coin (s. 2 and s. 3 of the Exchange Control Act, 1947). The actual order of the court as drawn differs from the words I have quoted. It declares that

> " the plaintiffs are entitled as lessors to receive from the defendants 475 gold sovereigns on each quarter day during the term of ninety-nine years computed from June 24, 1930, or alternatively to receive such sum in Bank of England notes as represents the value of 475 gold sovereigns in sterling in London calculated on the day upon which payment is due."

By the phrase " value of 475 gold sovereigns ", I assume that what is denoted is the selling price of gold sovereigns. It is lawful to sell gold sovereigns to an authorised dealer, and it was accepted that gold sovereigns have a selling price which is not related to the price of the gold content (which is 11/12ths of the whole), but which also takes into account a scarcity value and the fact that, for reasons which perhaps cannot be precisely defined, there is a particular demand for sovereigns in certain foreign places.

It is common knowledge that gold sovereigns have for many years not been minted. They were not in circulation, and it may be that they were not being minted, at the date of the lease. The future cannot be divined, but it is possible that, by the year 2029, the position will be that no gold sovereigns will have been brought into existence for about a hundred years. Gold sovereigns might be virtually unobtainable, and, if so, their selling price might be at a startlingly high level. The figures as to the selling prices at various dates of sovereigns as well as the figures as to the selling price of the gold content which forms 11/12ths of sovereigns were agreed. It would I think have been valuable to have had evidence as to the extent at the present time of the sales of sovereigns and as to the factors which bring it about that as coins they realise more than the selling price of the gold which they contain.

The lease does not mention, however, payment in " sovereigns ", and I see no reason why, if payment of rent had been or might in the future be made in gold sterling, it need necessarily be in sovereigns. It could, I think, alternatively have been made in £5 or £2 pieces or in half sovereigns—assuming that these pieces had before 1947 been available for circulation. If payment could have been made by handing over 950 half sovereigns, there is no evidence whether their value or selling price would have been the same as the selling price of 475 sovereigns.

The issue raised in the case turns, therefore, on the meaning in its context of the word " value ", and it becomes necessary to examine the contract and to consider which interpretation of the word best permits or assists the performance of the contract.

The very fact that the reddendum is phrased as it is lends strong support for the view that someone had an intention (perhaps imperfectly thought out) to give protection to the lessors against a depreciation in the pound. But just as the presence of the words under consideration suggests that someone had in view a clause of the nature of what is commonly known as a " gold clause ", so the fact that a word is used whose meaning in the context permits of doubt suggests that it is not certain that everyone connected had a "gold clause " in mind. Anyone reading the lease without critical consideration of all its words might confidently conclude that the obligation of the lessees was to pay £1,900 rent and that such obligation could be discharged either by paying £1,900 in gold or by paying £1,900 in notes. Anyone reading the words in question in 1932 might have been even more confident. But, even if it were thought that very probably those concerned did have an intention of inserting some sort of " gold clause ", the present problem is not what they may have had in mind (as to which in these proceedings evidence would not have been admissible and is not available), but what they have in fact agreed.

The view that " value " denotes the selling price of English gold coin is supported by the fact that the early part of the reddendum is in the form in which it appears. It is further supported by the consideration that the contrary view gives no real force and effect to the words " to the equivalent value in gold sterling ".

By the words which are used, it is perhaps made clear that the rent is not to be paid by cheque and that the lessors insist on gold sterling or banknotes. But even so, on the view put forward by the lessees, no meaning is given to the words " to the equivalent value in gold sterling ", unless it be that the lessors were insisting that the Bank of England notes which they would receive were to be of no higher denomination than that of any current gold coins. This would exclude payment in notes of any high denomination.

If on a construction of the words in question in their context in the lease the *Feist* principle (5) is not applicable, then it is a possible view that payment of rent of £1,900 in gold sterling by equal quarterly payments would be achieved if on each quarter day there were handed over either such number of sovereigns as would on a sale of them as sovereigns realise £475, or such number of sovereigns as contained a gold content the selling price of which was £475. But this view gives no real meaning to the words " to the equivalent value in gold sterling ", and might involve a violation of s. 6 of the Coinage Act, 1870, and also would be open to some of the objections to which I later refer.

There are, however, certain considerations which suggest on the other hand that in its context the word " value " must be interpreted as meaning nominal value.

(1) The first of the covenants of the lessees is " to pay the reserved rent at the times and in the manner aforesaid ". In the context I think that the reference to " the reserved rent " is to " the rent of £1,900 ". The " times " referred to are Mar. 25, June 24, Sept. 29 and Dec. 25. The " manner " of payment refers to payment (a) either in gold sterling or in Bank of England notes to the equivalent value in gold sterling, (b) without any deduction except for landlord's property tax, land tax and tithe redemption annuity, (c) by equal quarterly payments. An alternative view would be that the " reserved rent " is the rent of £1,900 payable either in gold sterling or Bank of England notes to the equivalent value in gold sterling. The " manner " of payment would, on this view, be (b) and (c) above. If, as I think, the first of these two views is to be preferred, then the words being considered in this case are not words which fix the amount to be paid (as in *Feist* v. *Société Intercommunale Belge d'Electricité* (5)), but are words which determine the manner in which a stipulated or fixed amount is to be paid. If the second alternative view is adopted, the obligation to pay by equal quarterly payments remains.

In *Feist* v. *Société Intercommunale Belge d'Electricité* (5), LORD RUSSELL OF KILLOWEN recognised ([1934] A.C. at p. 173) that the construction which was then being adopted involved that half-yearly payments of interest in accordance with coupons might in fact not be equal, though the expressed obligation was to pay " by equal half-yearly payments ": but he said (ibid.):

> " . . . I prefer this to the only other alternatives—namely, attributing no meaning at all to the gold clause, or attributing to it a meaning which from other parts of the document and the surrounding circumstances the parties cannot have intended it to bear."

In the present case, the lessees, by saying that the obligation of the lessees is to pay £1,900 either in gold or in notes, interpret the contract in a way which, while it possibly does not give significance to some of the words now in question, at least does not involve varying them.

(2) In the context it seems to me that the contract provides that £1,900 is to be divided into four equal parts, and that, with one proviso as to deduction, one part is to be paid each quarter day. If the plan was that there was to be a rent which was to fluctuate, then it seems to me that different language should have been adopted from the present language with its phrases " the rent of £1,900 " and " equal quarterly payments ". It seems quite incongruous that with such phrases the five quarters' rent in the present case should be claimed as in para. 6 of the statement of claim to be:—

Rent due for the quarter ended	Sept. 29, 1953	£1,377	10s.	
,, ,, ,, ,, ,, ,,	Dec. 25, 1953	£1,377	10s.	
,, ,, ,, ,, ,, ,,	Mar. 25, 1954	£1,508	2s.	6d.
,, ,, ,, ,, ,, ,,	June 24, 1954	£1,615	0s.	
,, ,, ,, ,, ,, ,,	Sept. 29, 1954	£1,626	17s.	6d.

(3) The provision in the lease as to the first payment which was to be considered as having become due on Dec. 25, 1937, appears to denote that " the proportionate part " was to be calculated by reference to one quarter of £1,900.

(4) On Dec. 24, 1938, the selling price of 1,900 gold sovereigns was £3,344 15s. 10d. If the parties had intended to safeguard the lessors from future depreciation of the pound, it would be reasonable to expect that there would be a defined starting figure. If they contemplated that the amount immediately payable was to be nearly £3,350, it seems strange that the stated rent should be £1,900 and not £3,350. If the selling price of gold sovereigns had remained constant for the first year, the result for which the lessors contend is that the lessees' obligation was to pay £1,900 either in gold or by paying £3,344 15s. 10d. in Bank of England notes.

(5) As an illustration of the strange result which flows from the lessors' contention, reference may be made to the demand for rent made for the quarter ending Sept. 29, 1954:

> "To rent of premises at 4/6 Queen Street, Cardiff. For quarter ending Sept. 29, 1954 . . . £1,626 17s. 6d."

It would not seem to be possible to pay the sum of 7s. 6d. in Bank of England notes.

(6) In the respects to which I have earlier referred there would be much uncertainty if "value" were other than nominal or (to use another word) currency value. There would be uncertainty in regard to the denomination of the gold coins to be taken. There would be uncertainty whether, in regard to whichever coins were taken, their "value" was to be computed by reference to their purchase price or to their selling price.

(7) The lease provides for deduction by the lessees of "landlord's property tax land tax and tithe redemption annuity". If the quarterly payments are all to be of £475, subject only to any such deduction, then no difficulty arises. But on the basis of the declaration which has been made, can a deduction first be made from £475, leaving the resultant amount to be paid either in gold sovereigns or notes representing the value of gold sovereigns of such resultant number ? Or, unless there is payment in gold sovereigns, must there first be an ascertainment of the sum in Bank of England notes which represents the value of 475 gold sovereigns and must there then be a deduction ? A different liability would attach according to which alternative was appropriate.

(8) If the parties to the lease were relating the quantum of the reserved rent to the selling price of sovereigns, it seems strange that they did not mention sovereigns. Furthermore, they must have known that sovereigns were not in circulation, and they may not have known whether or not they were being produced. It seems unlikely that parties would agree to pay rent on a basis calculated by reference to the purely artificial scarcity selling price which gold sovereigns might command as the years progress towards the year 2029. If they had in mind the selling price (viewed as bullion) of that amount of gold as is contained in gold coins, then they could have said so and would perhaps have specified a particular standard of weight and fineness.

In my judgment there can be compliance with the terms of the lease if the word "value" denotes nominal value, whereas difficulties and anomalies arise if the words of the reddendum are construed as denoting the selling price of sovereigns. Accordingly, I think that the reddendum should be regarded as fixing a rent of £1,900 and as defining or seeking to define the mode by which payment of £1,900 is to be made.

Reliance was placed by the lessees on s. 6 of the Coinage Act, 1870. This provides:

> "Every contract, sale, payment, bill, note, instrument, and security for money, and every transaction, dealing, matter, and thing whatever relating to money, or involving the payment of or the liability to pay any money, which is made, executed, or entered into, done or had, shall be made, executed, entered into, done and had according to the coins which are current and legal tender in pursuance of this Act, and not otherwise,

> unless the same be made, executed, entered into, done or had according to the currency of some British possession or some foreign state."

It was submitted that the provision that payment must be made " according to the coins which are current and legal tender " and not otherwise shows that for payment purposes coins must have their value as currency and according to their denominations, and must not be given a higher or a lower value. It was submitted therefore that, in a transaction involving the payment of money, a £1 Bank of England note is equivalent in value to a gold sovereign. The meaning of s. 6 is not clear, and though I consider that there is much force in the argument which was founded on the section, I prefer to base my approach to the case on an analysis of the terms of the lease and on their construction. It is with much diffidence that I arrive at a conclusion which differs from that of the Lord Chief Justice, but, for the reasons which I have given, I consider that the obligation of the lessees is limited to payment of the sum of £475 per quarter. I would allow the appeal.

HARMAN, J.: I have the misfortune to differ in opinion from my Lords. Moreover, though I agree with the reasoning of the Lord Chief Justice, I dissent from his conclusion, if it be rightly expressed in the declaration contained in his order. On looking at his judgment, I suspect that he intended a result consonant with *Feist* v. *Société Intercommunale Belge d'Electricité* (5). If so, I should agree; but the declaration as framed fails to reach that result. It behoves me in the circumstances to state my own conclusion and to indicate the road by which I have travelled.

This is a case of construction, and it is a truism to say that the parties must be supposed to have intended that which is the true meaning of the written words in which the contract is expressed. The only contract *is* the written words, and the question is, not what did the parties want to effect, but to what have they subscribed. If the language used be unambiguous, it must be adhered to, notwithstanding that the result be one which seems unlikely or even capricious. On the other hand, if there be a doubt, it is legitimate to choose that interpretation which seems most consonant with what the parties may be thought to have had in mind having regard to the surrounding circumstances. Here there is manifestly a doubt. If no meaning at all can be attached to the words in question, no effect can be given to them, and that portion of the document will be void for uncertainty. If, therefore, no sense can be extracted from these words, or if on analysis they prove to be so obscure that their meaning remains in doubt, they may be rejected, leaving the lessees' obligation merely to pay £1,900; but that result is for a court of construction a counsel of despair, and it is only in the last resort that the court will throw in its hand and declare itself defeated by the obscurity of the language. The contracting parties, after all, must be taken to have intended the words to mean something, and it ought not to be beyond the wit of man to discover what it was.

A court of construction, however, is entitled—nay, bound—before embarking on its inquiry, to inform itself of the situation of the contracting parties and the circumstances existing when the contract was made. The relevant facts are that the lessees were at the time already in possession of the shops under a lease of July 28, 1932, which created a term of thirty-four years from Midsummer, 1930. This term must be treated as having become merged in the longer term created by the 1938 lease, but for the latter document it would be still current today. The reddendum in the 1932 lease contains the same words as are in question in the present lease, and reserves a rent rising to £1,900 after the first fourteen years. The 1932 lease also contained an option to the lessees, exercisable in an event which has not happened, to obtain a further lease on like conditions but extending the term up to ninety-nine years, as has in effect been done by the 1938 lease. It appears that the terms of both leases ran from 1930 because the lessees in fact were in possession from that year; the rent under the 1932 lease ran from Nov. 3, 1930, and that under the 1938 lease from Nov. 5, 1937.

It appears also to be the fact that, during the time when the original lessees retained possession, no demand was ever made for rent beyond the nominal amounts reserved by the leases, but that the lessors always framed their demands for rent and their receipts in such a way as not to prejudice their rights for the future. It seems probable that some understanding existed between the lessors and the original lessees not to make any further demand, for, so soon as the term was assigned to the present lessees, demand was made for rent in a sum representing the market price of gold sovereigns at the due date. That demand has been acceded to in the order of the court below. The annual rent on this formula would amount to a fluctuating sum in recent times amounting to as much as £6,500. The present lessees say that £1,900 is their total liability. The lessors uphold the order made, but prefer in the alternative an interpretation which would entitle them to a rent calculated by reference to the intrinsic value of the gold content of the appropriate number of sovereigns at the relevant time. This would produce a sum at present about £1,000 a year less than the basis adopted below. As I have said, the judgment leads me to suspect that the higher figure was not the intention of the Lord Chief Justice.

These surprising differences have their origin in the circumstances of the times. At Christmas, 1930, when the first payment mentioned in the 1932 lease was made, this country was on a gold standard under the Gold Standard Act, 1925, and there was no discrepancy. The country went off the gold standard in 1931 under the Gold Standard (Amendment) Act, 1931, and by Christmas, 1938, the rent on either of the formulae supported by the lessors would have exceeded £3,300. There was no significant difference between the results of these two formulae till 1954, six months after the term vested in the present lessees. This curious modern development arose from events in the Middle East rather of a political than of an economic character.

My Lords were influenced by the point raised by counsel for the lessees that in 1938 the rent on either formula would have exceeded £3,300. He argued that, if this were intended, £1,900 could not have appeared on the face of the document. There seems to me to be no force in this point, when it is remembered that the parties were merely copying a formula adopted in 1932, and that £1,900 was in fact in 1938 being accepted as a discharge. Moreover, if £1,900 was intended in all circumstances to be the measure of liability, this could have been effected simply by leaving out all the words about gold sterling; but these words cannot be supposed to have been put in without any object at all. What then can they mean? I agree with the Lord Chief Justice that they were clearly intended in some way or other to produce the effect of a gold clause, though, of course, the draftsman may have failed in his object.

One more thing seems fairly clear, viz., that the lessees are at liberty to pay £1,900 in gold coin of the realm, for this must be the meaning of the words "in gold sterling". In 1932 and in 1938 this was a legal course, though at all times impracticable, but it has since become illegal under the Exchange Control Act, 1947, s. 2 and s. 3. The lessees must, therefore, have recourse to the alternative of payment in banknotes, which would seem to have been provided for the very purpose of avoiding such an impossibility. They may pay in banknotes; but these must have "an equivalent value in gold sterling" to the gold sterling payable under the first alternative. My Lords have accepted the view put forward by the lessees that, as the sovereign as a current coin has never had a greater value than 20s., this from a currency point of view must be regarded as its value, so that gold sterling may be satisfied at 20s. or one £1 banknote to the pound. I do not feel able to accept this argument, for, as far as I can see, it must in all circumstances deprive all the words about gold sterling of any effect.

What are the alternatives ? The order appealed from rests on the argument that, in order to buy 1,900 gold sovereigns, if one could do such a thing nowadays, one would have to pay the price of sovereigns from an authorised dealer under the Exchange Control Act, 1947, and is based on the view that value means price so ascertained. For this there is indeed much to be said, but it does produce a result that could not have been within the contemplation of the parties, who cannot be supposed to have foreseen the circumstances which have lately forced the value of the sovereign far above the intrinsic value of its gold content. It would indeed be a bizarre result that the liability of an English lessee under a lease of English land should be measured by the cupidity of the unknown ruler of an oasis near the Persian Gulf.

Is there another possible alternative? If these words can properly refer to the intrinsic value of the gold content of the sovereign, then the clause is in its true sense a gold clause. Such clauses have been in use as far back as 1870 or so—(see the speech of Lord Wright in *New Brunswick Ry. Co.* v. *British & French Trust Corpn., Ltd.* (3) ([1938] 4 All E.R. at p. 762))—and their meaning was authoritatively pronounced in the House of Lords in *Feist* v. *Société Intercommunale Belge d'Electricité* (5). The decision in that case was reached after a great deal of judicial difference, and it has since been followed in a number of cases where the words used were not identical. Parts of it have already been cited by Morris, L.J., and I need not read any more of them. It is true that these are cases with an international flavour, but I see no reason why parties to a domestic document should not adopt the same method of evaluating their obligations.

I find nothing in public policy which should forbid a landlord parting with his land for a long term of years from attempting to protect himself against fluctuations in the value of money. Corn rents are familiar in English law, and rent may be tied to the value of minerals.

Section 45 of the Settled Land Act, 1925, provides:

> " (1) In a mining lease—(i) the rent may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf; and (ii) the rent may also be made to vary according to the price of the minerals or substances gotten, or any of them, and such price may be the saleable value, or the price or value appearing in any trade or market or other price list or return from time to time, or may be the marketable value as ascertained in any manner prescribed by the lease . . ."

Nor do I find the attempt obnoxious in law to the provisions of s. 6 of the Coinage Act, 1870. Payment here is to be made in lawful money, either gold coins of the realm or banknotes. The reference to gold is merely a measure of the extent of the obligation, as the gold clause cases show. I respectfully concur in Lord Tomlin's view of the obscurity of the section—(*Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.* (7), [1934] A.C. 122 at p. 144)—but I cannot think it pertinent to this case.

In *Syndic in Bankruptcy of Salim Nasrullah Khoury* v. *Khayat* (8) in the Privy Council ([1943] 2 All E.R. 406), Lord Wright, pronouncing the Board's judgment, says this (ibid., at p. 408):

> " Nor were the notes any the less negotiable instruments because of the word ' gold '. That word does not here import an obligation to deliver gold or pay in gold. What it does is to import a special standard or measure of value. This special measure of value may be described sufficiently, though not with precise accuracy, as being the value which the specified unit of account would have if the currency was on a gold basis. It is equivalent

> to a gold clause. ' Such clauses ' were said by LORD MAUGHAM in *R.* v. *International Trustee for Protection of Bondholders Aktiengesellschaft* (2) to have been ' intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed. ' Gold clauses were discussed and explained by the House of Lords in the opinion delivered by LORD RUSSELL OF KILLOWEN in *Feist* v. *Société Intercommunale Belge d'Electricité* (5). Such clauses often specify a standard of value based on a particular weight and fineness of gold. In this case it is taken without objection that the Turkish gold pound has an established value."

In that case there was not present the element usually found, namely, a reference to a particular weight and fineness of gold; so that it is clear that this element is not essential. A reference, therefore, in the contract to gold or gold coins imports, not an obligation to pay in gold coins, but a standard of value. Considering again the surrounding circumstances, it seems to me a legitimate conclusion that this is exactly what the parties here were aiming at, and that, if the words are capable of this meaning, it is one that is most likely to have been within their contemplation. For myself, I find it possible to interpret the word " value " as meaning intrinsic value and in construing the clause to give an alternative of payment either in gold coins or in banknotes equivalent in value to the gold content of those coins. In other words, this seems to me to be a gold clause and I would construe it accordingly.

I would, therefore, for myself, vary the order of the Lord Chief Justice by substituting for the declaration which he made some such words as " such sum in Bank of England notes as represents the value of the gold content of 475 sovereigns calculated at the London rate current at the date when payment is due."

Judgment for the lessees. Leave to appeal to the House of Lords granted.

Solicitors: *Wrentmore & Sons*, agents for *Ewan G. Davies*, Cardiff (for the lessors); *N. C. Wright* (for the lessees).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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ROLPH *v.* MARSTON VALLEY BRICK CO., LTD.

[QUEEN'S BENCH DIVISION (Devlin, J.), March 27, 1956.]

Legal Aid—Costs—Disallowance—View before trial.

An infant plaintiff who had been knocked down and injured by a lorry when she was running across a street subsequently obtained a civil aid certificate to take proceedings " for damages for personal injuries and to enforce any order for costs ". The plaintiff's contribution was assessed at £22 10s. The action was settled on terms under which £1,475 was paid into court by the defendants and became subject to the charge enacted by s. 3 (4) of the Legal Aid and Advice Act, 1949, for the benefit of the legal aid fund. This charge extended, among other things, to the amount by which the legal aid fund's liability for costs in relation to the proceedings exceeded the plaintiff's contribution. An order was made for the taxation of the plaintiff's costs against the defendants as between party and party and also for taxation of those costs under Sch. 3 to the Legal Aid and Advice Act, 1949, on the basis of solicitor and client costs payable out of a common fund in which the plaintiff and others were interested. Certain items, amounting to £40 5s. and including £37 10s. for counsel's fees, in respect of a view advised by counsel before trial were disallowed in both taxations in accordance with the general rule, stated in the Masters' Practice Notes on Costs, 1902, Note (136). On objection to the disallowance the taxing master allowed in lieu a sum which he considered appropriate to a double consultation between counsel, the clients and an expert (£11 10s.). The legal aid committee having given authority under reg. 14 (3) (c) of the Legal Aid (General) Regulations, 1950, to lodge an interlocutory appeal from this decision, a summons was taken out in the plaintiff's name for a review of taxation.

Held: the taxing master had made no error in principle and the summons would be dismissed.

Legal Aid—Costs—Taxation—Review of taxation—Summons for review dismissed—Costs of the review of taxation—Whether taxable under the Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6 *c.* 51)*—Legal Aid (General) Regulations,* 1950 (*S.I.* 1950 *No.* 1359), *reg.* 8 (1) (*b*), *reg.* 14 (3) (*c*), *reg.* 18 (3), *as substituted by Legal Aid (General) (Amendment No. 1) Regulations,* 1954 (*S.I.* 1954 *No.* 166).

The summons for review of taxation, referred to above, having been dismissed, an application was made for an order pursuant to reg. 18 (3) (b) of the Legal Aid (General) Regulations, 1950, that the costs of the summons should be taxed under the Legal Aid and Advice Act, 1949.

Held: (i) the court had no jurisdiction to make the order because reg. 18 (3) (b) required the court to direct taxation only when giving judgment or making a final order and the order dismissing the summons to review taxation was an interlocutory order (*Re Jerome*, [1907] 2 Ch. 145, followed) and was not a judgment or a final order (see p. 57, letter I, to p. 58, letter A, post).

(ii) the taxation of the costs of the summons to review taxation could not be treated as an interlocutory matter covered by the original order for taxation in the action since the summons to review taxation was not a proceeding to which the plaintiff had been authorised by the civil aid certificate to become a party and the court of trial would not have had jurisdiction under reg. 18 (3) (b) to order taxation of such costs (see p. 58, letters D to F, post).

(iii) the civil aid certificate could not be amended so as to include the proceedings for review of taxation because the review of taxation was a matter wholly distinct from the action out of which the bill of costs arose (see p. 59, letter A, post).

Theocharides v. *Joannou*, [1955] 1 All E.R. 615, not followed.

Per CURIAM: probably the summons ought to have been dismissed by the court at the outset on the ground that though brought in the name of an assisted person it could not have been brought with her authority (see p. 56, letter D, post).

[For the Legal Aid and Advice Act, 1949, s. 3 (4), see 18 HALSBURY'S STATUTES (2nd Edn.) 537.

For the Legal Aid (General) Regulations, 1950, reg. 8 (1) (b), reg. 14 (3) (c), and reg. 18 (3), as substituted by the Legal Aid (General) (Amendment No. 1) Regulations, 1954, see 5 HALSBURY'S STATUTORY INSTRUMENTS 209, 214, 218 and Supplement.

For the Masters' Practice Notes on Costs, Note (136), see ANNUAL PRACTICE, 1956, p. 2848.]

Cases referred to:

(1) *Self* v. *Self*, [1954] 2 All E.R. 550; [1954] P. 480; 3rd Digest Supp.

(2) *Theocharides* v. *Joannou*, [1955] 1 All E.R. 615.

(3) *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co.* (*Great Britain*), *Ltd.*, [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 9 Digest (Repl.) 573, *3780*.

(4) *Adams* v. *Naylor*, [1946] 2 All E.R. 241; [1946] A.C. 543; 115 L.J.K.B. 356; 175 L.T. 97; 2nd Digest Supp.

(5) *Brown* v. *Brown*, [1952] 1 All E.R. 1018; 3rd Digest Supp.

(6) *Page* v. *Page*, *Metcalf* v. *Wells*, [1953] 1 All E.R. 626; [1953] Ch. 320; 3rd Digest Supp.

(7) *Re Jerome*, [1907] 2 Ch. 145; 76 L.J.Ch. 432; 96 L.T. 866; 42 Digest 216, *2436*.

Summons to review taxation.

On Apr. 10, 1954, the infant plaintiff, Carol Ann Rolph, suing by her father and next friend, George William Rolph, obtained a civil aid certificate under the Legal Aid and Advice Act, 1949, to enable her to prosecute an action against the defendants, the Marston Valley Brick Co., Ltd., " for damages for personal injuries and to enable her to enforce any order for costs ". The action, which was a running-down action, was compromised and the settlement was approved by an order of JONES, J., dated Oct. 18, 1955. The order provided that the plaintiff's costs should be taxed against the defendants as between party and party and also should be taxed in accordance with Sch. 3 to the Legal Aid and Advice Act, 1949. On taxation certain items concerned with a view of the scene of the accident by counsel and solicitors for the plaintiff were disallowed in both the party and party and the legal aid taxation. These items included the fees of leading and junior counsel, and solicitors' charges for attendances and journeys, for the purpose of a view with counsel of the scene of the accident. The plaintiff's solicitors carried in objections to the disallowance of these items in the legal aid taxation. The grounds of objection were that the view had been advised by junior counsel and that leading counsel had also considered that a view was desirable; that the case was difficult and that the difficulties were largely due to questions of time, distances and the nature of the place where the accident happened; and that the infant plaintiff could give no coherent account of the accident so that her case partly rested on the conjectures of an expert witness. It was further urged that the view proved to be of great assistance and also enabled a pre-trial conference with the infant and next friend to be dispensed with. The objections were heard by the master on Jan. 30, 1956. In his answer to the objections the senior taxing master, Master ADAMS, stated that the practice, as set out in the Masters' Practice Notes in the ANNUAL PRACTICE, 1956, p. 2848, Note (136), was that a view by counsel would be disallowed as a rule; that applied on a taxation of costs between party and party, and the test was whether the incurring of the expense of a view by counsel was necessary and proper for attaining justice; on taxation as between solicitor and client out of a common fund (i.e., the legal aid taxation) a rather more generous view of the matter should A be taken than as between party and party. The case was that of a street accident where the infant plaintiff had run across cross-roads on a London road at her mother's call and had been knocked down by a motor van; there were available for the hearing a large-scale plan of the road, a series of photographs, and the evidence of a consulting engineer who had been called to inspect the scene of the accident and to give a detailed report as to its circumstances. Moreover, the B mother of the infant plaintiff, who was an eye-witness of the accident, was available to give evidence. The evidence on which it was proposed to rely at the trial was that of the parents of the infant plaintiff, a police officer who was not an eye-witness but would prove skid marks, and a consulting engineer who had visited the scene of the accident and would well be able to explain points on timing and visibility which might require to be brought to the notice of the court C by reference to the plan and photographs. The taxing master found it impossible to accept that counsel needed to see the road itself in order to understand the circumstances of the accident and present them to the court in view, in particular, of the assistance which the engineer could give and of the other aids available. Accordingly the taxing master disallowed the objections but he accepted that a consultation between counsel, the clients and the expert might well have been D helpful and proper and accordingly he allowed counsel's fees and costs appropriate to such a double consultation in lieu of the fees and costs of the view. These were allowed at £11 10s. The plaintiff's solicitors took out a summons under R.S.C., Ord. 65, r. 27 (41), for an order to review the taxation, which came before DEVLIN, J., in chambers and subsequently was adjourned, judgment being delivered in open court. E

J. Ritchie for the plaintiff on the summons to review.

Cur. adv. vult.

Mar. 27. **DEVLIN, J.**, read the following judgment: On Mar. 9, 1953, the infant plaintiff, a girl then aged seven, was knocked down by the defendants' lorry when she was running across a road junction, apparently in answer to her F mother's call. On Apr. 10, 1954, the infant acting through her father as next friend obtained a civil aid certificate under the Legal Aid and Advice Act, 1949, entitling her to legal aid as plaintiff in connection with proceedings that were described as follows:

> " by her father and next friend, Mr. George William Rolph, prosecuting an action in the High Court of Justice, Queen's Bench Division against G Messrs. Marston Valley Brick Company Limited for damages for personal injuries, and to enforce any order for costs."

The assisted person's contribution was assessed at £22 10s. On Apr. 27, 1954, the writ was issued, and on Oct. 18, 1955, the action was compromised by an offer from the defendants to consent to judgment for the sum of £1,500 with costs. H The settlement was approved by an order of the court made by JONES, J., whereby it was also ordered that, except for £25 paid direct to her father, £1,475 was to be paid into court, bearing a first charge under s. 3 (4) of the Legal Aid and Advice Act, 1949; under this sub-section the legal aid fund has a charge which can be enforced so that they may recoup themselves for the full amount they have expended on costs for the benefit of the plaintiff; one likely cause of a I deficiency, as in this case, is that the sum recovered from the defendant as party and party costs may be less than the amount expended as solicitor and client costs. The order also contains the usual direction that the plaintiff's costs, as well as being taxed against the defendant, are to be taxed as between solicitor and client in accordance with Sch. 3 to the Act.

The taxation duly took place and the items in the bill that have given rise to the matter now before me are items that are concerned with the expense of a view of the scene of the accident that was asked for by counsel in preparation for the trial. These items amount to £40 5s. of which the greater part is composed of the fees of leading and junior counsel amounting together to £37 10s. The senior taxing master, Master ADAMS, disallowed these items both as against the defendants and in the legal aid taxation. The Masters' Practice Notes on Costs (see the 1956 ANNUAL PRACTICE, p. 2848) state that a view by counsel will be disallowed as a rule. As between party and party the taxing master's decision has been accepted, but the plaintiff's solicitor objected to the disallowance as between solicitor and client. One of the points made in the written objection was that the view had enabled a pre-trial conference with the infant and next friend to be dispensed with. The taxing master in his answer to the objection, while he adhered to his opinion that counsel's fees for the view must be disallowed, allowed instead the costs appropriate to a double consultation, that is, he reduced counsel's fees from £37 10s. for a view to £11 10s. for a consultation, so that to that extent the objection was met. The plaintiff's solicitor, being still dissatisfied, took out a summons under R.S.C., Ord. 65, r. 27 (41) for an order to review. This is the summons that is now before me. Before taking it out, the solicitor applied for and obtained authority from the legal aid committee to " lodge an interlocutory appeal " under reg. 14 (3) (c) of the Legal Aid (General) Regulations, 1950.*

It is well established that a review will be ordered only if the taxing master is shown to have erred in principle. Counsel for the plaintiff has put his case on this point in two ways. In the first place he submits that the practice note, to which I have referred, ought now to be reconsidered; it was made, he says, in 1902 and is now out of date; he also submits that the fact that not only junior counsel but also leading counsel thought a view to be necessary shows that it is a very exceptional case. These considerations do not satisfy me that the taxing master has exercised his discretion wrongly. It is not disputed that he applied the right principle to a legal aid taxation which is, as he puts it, that " a rather more generous view of the matter should be taken than as between party and party ". There cannot be many running-down cases in which photographs and a plan are not sufficient for the judge and counsel to learn all that need be known about the scene of the accident. No doubt great weight should be given to the fact that the view was advised by both counsel, but the taxing master said that he had given that point very careful consideration. I do not think that he has made any error of principle.

The other way that counsel put the point was to say that the taxing master had no power to allow fees for a double consultation that was only a notional one; and the fact that he had purported to do so showed that he had exercised his discretion wrongly about the view. I should like to hear the question of the taxing master's power, which counsel says depends on the construction of R.S.C., Ord. 65, r. 27 (29), argued on the other side before making up my mind about it. But even if counsel is right, I do not think the point helps him. If counsel's case was that while the taxing master had power to do it, he ought not as a matter of discretion to have done it, I could see the force of the point; it might then be said that his discretion in relation to the whole of this matter was unreliable. But that is not said. If the taxing master had power to do it, it seems to me to be a very sensible way of trying to do justice. If the taxing master was trying to do justice in a sensible way, the fact that he misconstrued his power to allow a double consultation is not to my mind any indication that his discretion about the view was wrongly exercised.

When counsel had concluded his submission, I told him that for reasons of this nature I would dismiss the summons. He then asked for an order directing that the costs of the summons should be taxed under the Legal Aid and Advice Act, 1949. It appears that there has been a number of these cases in which solicitors have appealed from disallowances by the taxing master under a legal aid taxation and that the order for which counsel asks has generally been made without question. It seemed to me, however, to be an odd order to make in the circumstances and I therefore adjourned the matter so that counsel could direct me to the detailed provisions of the Act which entitled him to have it. At the adjourned hearing he argued the matter before me very fully and I have obtained the greatest possible help from his submissions; as no other party was represented, he had the difficult task of trying to put the matter on both sides. He said that the position under the scheme had puzzled those who have to administer these provisions of it and that they would welcome a ruling. I therefore reserved my judgment and it is for that reason that I am delivering it in open court.

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* S.I. 1950 No. 1359; 5 HALSBURY'S STATUTORY INSTRUMENTS 214.

I shall begin by making a general observation. The framers of the legal aid scheme do not seem to me to have considered sufficiently the results that follow from imposing its provisions on the ordinary relationship of solicitor and client. In ordinary litigation a solicitor's position about his bill is not fundamentally different from that of any other professional agent. He does the work which his client instructs him to do and is entitled to be paid for it accordingly; the only unusual feature of it is that if his bill is not acceptable to his client the dispute is settled by the taxing master instead of by a judge or a referee. In legally aided litigation this position is altered in at least three major respects. First, the scope for agreement between solicitor and client is strictly limited. Secondly, the possibility of a dispute between the solicitor and his client about the amount of his remuneration hardly seems to have been contemplated and there is no proper machinery for resolving it. Thirdly, he is not himself in any way responsible for the fees of counsel whom he instructs; they are not entitled to be paid more than what is allowed on taxation less fifteen per cent. This last distinction is simply stated; the other two need to be elaborated a little further.

First, who for this purpose is the client ? The person who actually pays the solicitor for his services is the legal aid fund; the fund is not of course a legal entity; it is administered or protected by various bodies under the scheme, but, for the purpose of this judgment, I can treat them collectively as the fund. The fund alone is in law responsible for the solicitor's bill and the lay client's contribution, if any, goes into the fund and not direct to the solicitor. But the fund's capacity for agreeing to special expenditure of the kind for which a solicitor usually asks for special instructions from his client is limited to the matters set out in reg. 14 (3). These include, as I have stated, the lodging of interlocutory appeals, but not giving instructions for a view. When the solicitor's bill is finally presented, the fund cannot, like the ordinary client, accept it without demur. There must be a taxation; and the Act provides in Sch. 3, para. 4, that it shall be conducted

> " . . . according to the ordinary rules applicable on a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested: Provided that no question shall be raised as to the propriety of any act for which prior approval was obtained as required by regulations."

I have said that the fund is alone responsible in law for the bill; but the fund is not always the only person interested because it is not always the only person on whom the whole bill will ultimately fall. If the legally aided litigant is successful, the party and party costs will normally be recovered from the losing party; but to the extent that they are not so recovered or to the extent that the solicitor and client costs exceed the party and party costs, and always in the case of an unsuccessful litigant, the bill or a part of it may ultimately fall either on the fund or on the lay client. Generally speaking (unless, for example, the client's contribution is exceptionally high), in the case of an unsuccessful litigant the bill will fall on the fund. Also, generally speaking (unless, for example, the amount recovered in the action is exceptionally low), in the case of a successful litigant that part of the bill that is not recouped from the other party to the action

A will fall on the lay client and will be discharged out of the damages or other property recovered in the action. The facts of this case bring it into the latter category. If the summons had succeeded, £40 would therefore have been deducted to meet the additional fees and charges from the £1,500 damages awarded to the infant plaintiff. There is no option on this point; under reg. 16 (6) (b) of the Legal Aid (General) Regulations, 1950, the deduction is B mandatory. Thus in this case, which in this respect is not exceptional, the client is on one side and the solicitor on the other; if he wins, she loses.

Now the scheme makes no provision for any party being heard on the legal aid taxation except the solicitor himself. It treats the taxation as if it were a piece of machinery into which the bill is inserted and from which it emerges quite correct. It does not seem to treat it as an adjudication on which two opposing C contentions may have to be advanced, argued and determined. Consequently, the regulations, except in one respect which I note below, say nothing about the costs of a taxation or of any appeal arising from it or of how they are to be borne.

So far as the fund is concerned, I suppose the intention is that it should be made to submit to whatever order the taxing master or judge thinks fit to make. This seems to me to place a heavy burden on the taxing master or judge (particu- D larly the latter since he is treading on unfamiliar ground) and also on counsel who has to try to put both sides fairly to the court. Comment has already been made on this by SACHS, J., in *Self* v. *Self* (1) ([1954] 2 All E.R. 550 at p. 552), and by HARMAN, J., in *Theocharides* v. *Joannou* (2) ([1955] 1 All E.R. 615 at p. 617); but apart from the burden put on the court no other difficulty necessarily arises. The fund may be the solicitor's paymaster but it is not his client; the solicitor E is entitled to press his case for payment from the fund and if the fund cannot be represented, that is the fund's misfortune. Where, however, the lay client is going to pay, the position seems to me to be entirely different. The solicitor is at once subjected to a conflict between his own interest and his duty to the client in whose name he is still acting. In ordinary life he would at once go to his client and tell him he must place his affairs in other hands. It shows the F artificiality of the arrangements made under the scheme that it has obviously never occurred to the experienced firm of solicitors instructing counsel that that would be the proper thing to do. If a solicitor does not do it, he may find himself sued by his client for breach of duty. If on the other hand he does do it, the curious result might follow that the client applied for a fresh grant of legal aid to fight his former solicitor. I draw attention to that because it throws a light G on the problem I have to consider. If the client got a new certificate, could his old certificate conceivably be regarded as still covering his former solicitor ? Yet if the lay client is not heard, injustice may easily result. The present case affords an example. The taxing master, as I have said, allowed £11 10s. for a consultation instead of a view. If counsel is right, he had no power to do so. But there is no one on the client's behalf to take that point or to ask for a review, H and so it may be that a sum will be deducted from her damages which ought not to be deducted.

As to the costs of the taxation and of appeals arising out of it, the scheme, as I have said, makes little or no express provision. In reg. 18 (3)* three cases are specified in which an order or direction for a legal aid taxation is to be made. In the last of them, which is not this case, it is expressly provided that the cost I of the

> " . . . taxation shall be deemed to be costs in the proceedings to which the certificate relates . . . "

I do not know what is the right inference to be drawn from the silence of the regulation on this point in the other two cases. In practice, the solicitor is allowed his costs of the taxation, and I dare say that this follows from the direction in A Sch. 3 that the taxation is to be " according to the ordinary rules ". Those rules provide how the costs of the proceedings before the taxing master are to be borne, but they do not provide for any costs which are in the discretion of the judge; about these the scheme says nothing.

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* Regulation 18 (3) of the Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), as substituted by the Legal Aid (General) (Amendment No. 1) Regulations, 1954 (S.I. 1954 No. 166).

I have set out these general considerations because they show that the problem which I have to answer has to be presented to me quite artificially and that it B arises from the omission to make proper provision for the sort of situation I am now considering and in particular for the situation in which the lay client may be financially interested. HARMAN, J., in *Theocharides* v. *Joannou* (2) ([1955] 1 All E.R. at p. 618) foresaw the situation and said it would create " a very extraordinary state of things ", as indeed it does. Let me look at the reality of it, which can only be seen if the proceedings before me are stripped of several C layers. In form they arise because a solicitor is aggrieved by a deduction of £40 from his bill; but in fact, since the solicitor is not responsible for counsel's fees, he has suffered by the deduction a loss of only about £2 and no solicitor would bother about that. The proceedings are therefore brought mainly for the benefit of counsel; and so when the outer layer is removed, the summons is seen as a proceeding in which the professional advisers of the infant plaintiff are asking D in her name, but without the knowledge or approval of herself or her next friend, that a part of their fees be paid out of her estate. That, however, is not quite the true position either. I am told that, as one might expect, counsel and solicitors do not concern themselves personally about these points. What happens is that decisions of this sort given on taxations, when they are thought to involve points of principle, are reported to the Bar Council and the Law Society. These E bodies very properly make it their business to see that decisions establishing principles which may be adverse to the general interests of the profession do not go unchallenged. In this case, since the decision affects the Bar more than the Law Society, it was the Bar Council which decided that it should be challenged; they have sought to establish that the present practice relating to the costs of a view is too rigorous. Thus in the end it is the Bar Council that turns out to be F the real litigant. From time to time the operation of this beneficent scheme has accidentally produced some odd recipients of legal aid but none quite so odd, I think, as the Bar Council or the distinguished counsel who were engaged in this case. What is needed is some regulation dealing specifically with the aftermath of legally aided proceedings. Until one is made the court is forced to deal with the situation quite unrealistically. G

There are three possible grounds for dismissing this application. The first is that it ought not to have been entertained at all on the ground that the solicitor is acting without the authority of the client in whose name he purports to act. The second is that I have no power to give the direction asked for because I am not making a final order in any proceedings. The third is that the proceedings now before me are not proceedings to which an assisted person is a party. H

I do not propose to refuse the application on the first ground because the point was not investigated in the argument before me and I have not therefore got any specific information about the nature of the solicitor's retainer. As I intend to refuse the application on the other grounds I have not felt it necessary that the expense should be incurred of inviting a further argument from counsel on the first point. But I think that probably I ought to have dismissed the summons I at the outset without going into the merits of it at all. It is brought by the solicitor in the name of the assisted person; but the solicitor cannot possibly have authority from the assisted person to bring this summons. He could not be heard to say that she was his client, for, if she was, he would be acting in breach of duty towards her by seeking to obtain money from her estate partly for his own benefit. When the court becomes aware that a solicitor is acting without authority, I think the court should act of its own motion and refuse to grant relief; see *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co.* (*Great Britain*), *Ltd.* (3) ([1916] 2 A.C. 307 at p. 337, per LORD PARKER OF WADDINGTON). That was a different type of case to this, but I think that the principle is of general application and certainly should be applied in a case where the relief would affect an infant plaintiff who is unrepresented. The fact is that the notion that the solicitor is still acting for his nominal client is a fiction that is maintained so that the legal aid scheme may still be made applicable. The court, however, has always set its face against fictions of this sort; see *Adams* v. *Naylor* (4) ([1946] 2 All E.R. 241).

Before I deal with the next two grounds I must mention *Brown* v. *Brown* (5) ([1952] 1 All E.R. 1018) and *Page* v. *Page* (6) ([1953] 1 All E.R. 626), so as to show that I have not overlooked these decisions of the Court of Appeal. I understand that the order that I am now asked to make has on some occasions been made without question because it has been supposed that in the light of those decisions the judge had no power to do otherwise. Such a supposition would, I respectfully think, be based on a misconception of those cases. They make it plain that the judge is in no sense a court of appeal from the decision of the committee granting legal aid. If a civil aid certificate embodying such a decision is produced, the judge has no discretion which will enable him to inquire into the merits of the matter and to consider whether legal aid ought or ought not to have been granted. But unless such a certificate is produced the judge cannot act; and if what is produced is an invalid certificate, for example, because it is ultra vires the body purporting to grant it, the position is no better than if no certificate is produced at all. The judge is not required to make an order merely because he is told it is a legal aid case or because a bit of paper is put in front of him; he must satisfy himself that he is dealing with proceedings to which an assisted person is a party; and I do not think that *Brown* v. *Brown* (5) or *Page* v. *Page* (6) decides anything to the contrary of that. There is no doubt that the relevant words in the Legal Aid and Advice Act, 1949, are mandatory and that the judge is given no discretion; but that does not absolve him from the duty of satisfying himself that the order he is asked to make is one that falls within the mandate.

I therefore turn first to the regulations under which, counsel says, I am required to give the direction. This is reg. 18 (3) (b)* and, omitting immaterial parts, it provides as follows:

> " Where in any proceedings to which an assisted person is a party . . . (b) the court gives judgment or makes a final order in the proceedings, the judgment or order shall include a direction . . . that the costs of any assisted person shall be so taxed . . . "

Before I can give the direction I must therefore be satisfied of two things. First, that the proceedings before me are " proceedings to which an assisted person is a party "; and secondly that I am giving judgment or making a final order in those proceedings.

It is convenient to take the second point first as it is the shorter one. In one sense a court gives judgment whenever it arrives at any adjudication, whether the proceeding is interlocutory or final. It is plain, however, that the word " judgment " is not used in that sense for it is not intended that whenever at any stage of an action a judge has made a pronouncement on some aspect of it he should order an immediate taxation. The distinction is between final judgments and orders and interlocutory judgments and orders. Into which of these two categories does the order that I have made dismissing this summons for review fall ? This question placed counsel in something of a dilemma. As I have already said, those instructing him had obtained authority from the legal aid committee to bring the summons for review on the basis that it was an interlocutory appeal. A Counsel cited on this point *Re Jerome* (7) ([1907] 2 Ch. 145), in which the Court of Appeal decided that an order dismissing a summons to review a taxation of a solicitor's bill of costs under the Solicitors Act, 1843, was not final but interlocutory. I think that I am bound by this authority to reach the same conclusion and accordingly on this short ground I find myself without power to make the order for which counsel asks. B

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* Regulation 18 (3) of the Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), as substituted by the Legal Aid (General) (Amendment No. 1) Regulations, 1954 (S.I. 1954 No. 166).

A decision on this short ground would leave it open to counsel's clients (whoever they may be) to take two alternative steps. The first and most logical one would be to treat this matter as interlocutory and therefore as one which does not require an order for taxation; they should go back to the taxing master and invite him to treat it as an interlocutory matter which is proleptically covered by the final order made by JONES, J. The other is to invite the committee to amend the C certificate so as to include within its scope the summons for review. If I had thought that either of these courses would assist counsel, I should have allowed an adjournment for the necessary steps to be taken, as I should not wish a matter of this importance to be decided merely on the footing that the wrong regulation had been invoked. I have, however, reached the conclusion that neither of these courses would improve counsel's position, and I shall state my reasons for it. D

The taxing master has no jurisdiction to tax unless it is given to him by an order or direction made under reg. 18 (3). If the order of JONES, J., is relied on for this purpose, the taxing master must satisfy himself that the proceedings he is asked to tax are within the order. Even if the order of JONES, J., can be construed as covering proceedings which had not then taken place, it could not cover this summons for review. The jurisdiction of JONES, J., under the E regulation I have already quoted was limited to " proceedings to which an assisted person is a party ". The proper way of finding out whether any set of proceedings falls within that description is to call for the legal aid certificate and look at the description set out on it. The certificate in this case describes the proceedings as an action by the infant plaintiff " for damages for personal injuries, and to enforce any order for costs ". A summons for a review of a F solicitor and client taxation cannot come within that description; and of course the assisted person is not a party to them at all, or at least not a party in the sense that the certificate contemplates. The position is not improved by the letter from the legal aid committee under reg. 14 (3) (c) authorising as an interlocutory appeal the bringing of the summons for review; for that regulation is plainly dealing only with proceedings that are within the certificate. Accordingly, an G application to the taxing master to tax the costs of this summons under the order of JONES, J., would in my opinion be fruitless.

The alternative step is to amend the certificate to include in the proceedings therein described the summons for review. The power to amend is contained in reg. 8 (1) (b) of the Legal Aid (General) Regulations, 1950, and, if the power could be validly exercised in relation to this summons, then the only point in this H case would be purely procedural, namely, that the committee had issued a letter under reg. 14 (3) (c) instead of making an amendment under reg. 8 (1) (b). In my opinion, however, such an amendment would not be valid. I have been told that in the past a certificate amended in this way has been acted on; and in particular I was reminded that in *Theocharides* v. *Joannou* (2) ([1955] 1 All E.R. 615) HARMAN, J., although apparently he was doubtful about the position, I gave effect to an amended certificate. He said (ibid., at p. 620):

> " I propose to make the usual order for taxation of the defendant's costs of this application under the Legal Aid and Advice Act, 1949, he having a certificate covering the application."

But the point was not argued before him, he did not inquire into it and I do not believe he would regard himself as having given a final and considered decision on it. I think therefore that I ought to reach my own conclusion. Regulation 5 (2) provides that "a certificate shall not relate to more than one action, cause or matter . . ."; and reg. 8 (1) (b) provides that a certificate may be amended "to extend to other proceedings, being part of the same action, cause or matter to which the certificate relates". In my judgment a matter in which a solicitor is seeking to have a review of the taxation of his bill against a client is one that is wholly distinct from the action out of which the bill arises; and so an amendment which included the summons for review would be ultra vires.

On these grounds I refuse the application for an order that the applicant's costs be taxed under the Legal Aid and Advice Act, 1949. I shall, if it is asked for, give leave to appeal from my refusal. I shall also, if it is asked for, enlarge the time for entering notice of appeal so that there may be an opportunity for deeper reflection than usually has to be given to the matter of an interlocutory appeal. The infant plaintiff will not be hurt by any delay; she will not be kept out of her money since it has to remain as a fund in court even after the charge under the Act has been removed.

The need for reflection is because the Bar Council may have allowed itself to get into a position that it does not really wish to occupy. When one is concerned with the daily administration of a scheme such as this and is searching the statutes and regulations for solutions to puzzling problems, there is a danger that, as one moves from sub-section to sub-section, one may keep one's eyes too closely on the track and lose a wider view. If those who are concerned in these matters will now pause and look around from the place they have got to, they may find that it is not one in which they wish to remain. Whether my judgment on the law is right or wrong, it cannot, I feel, be consistent with the dignity of a great profession that, having attempted very properly to obtain in favour of its members a decision on a point of principle and failed, it should wish to be reimbursed the costs of the unsuccessful attempt either out of a public fund provided for necessitous litigants or out of a sum awarded to an infant in compensation for her injuries.

Application refused.

Solicitors: *Cliftons* (for the plaintiff).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

LEE (VALUATION OFFICER) *v.* MID-NORTHAMPTONSHIRE WATER BOARD.

[COURT OF APPEAL (Denning, Morris and Parker, L.JJ.), March 9, 12, 13, 14, 27, 1956.]

Rates—Assessment—Profits basis—Water undertaking—Gross receipts—Revenue from precepts on board's constituent authorities—Precepts to meet cost of uncompleted works.

A water board expected that it would spend £328,550 on new works in the year ending on Mar. 31, 1952, and would have to pay £9,515 loan charges thereon in that year. It issued precepts to its constituent authorities for £66,170 including this sum to be raised as part of their general rates. In fact, it spent only £112,167 on new works in that year, and the loan charges were only £3,365. In arriving at the cumulo net annual value of the undertaking for rating purposes on the basis of the accounts for that year, the valuation officer treated the receipts under precept including the £9,515 as part of the profits of the undertaking.

Held: the £9,515 was not deductible from the gross receipts of the undertaking but was properly treated as part of its profits in ascertaining its net annual value for rating purposes, since it was revenue which could be obtained by the hypothetical tenant from his occupation of the existing works and its application by the hypothetical landlord as rent received to capital works, even uncompleted (since he would expect to receive enough rent to keep pace with growing expenditure), was irrelevant.

Dewsbury Waterworks Board v. *Penistone Union Assessment Committee* ((1886) 17 Q.B.D. 384), and *Merthyr Tydfil Local Board of Health* v. *Merthyr Tydfil Assessment Committee* ([1891] 1 Q.B. 186) followed, and *Aberdeen Magistrates* v. *Aberdeen Assessor* (1927 S.C. 458) approved and followed.

St. James' & Pall Mall Electric Light Co., Ltd. v. *Westminster Assessment Committee* ([1934] A.C. 33) applied.

Metropolitan Water Board v. *St. Marylebone Assessment Committee* ([1923] 1 K.B. 86), and *Manchester Corpn.* v. *Bolton Area Assessment Committee & Little Hulton Urban District Council* ((1931) 144 L.T. 571) overruled.

Appeal allowed.

[As to receipts to be taken into account in the valuation of a water undertaking for rating purposes, see 27 HALSBURY'S LAWS (2nd Edn.) 418-420, paras. 849, 850; and for cases on the subject, see 38 DIGEST 547-551, *899-918*.]

Cases referred to:

(1) *Kingston Union* v. *Metropolitan Water Board*, [1926] A.C. 331; 95 L.J.K.B. 605; 134 L.T. 483; 90 J.P. 69; 38 Digest 547, *901*.

(2) *Manchester Corpn.* v. *Bolton Area Assessment Committee & Little Hulton Urban District Council*, (1931), 144 L.T. 571; Digest Supp.

(3) *Dewsbury Waterworks Board* v. *Penistone Union Assessment Committee*, (1886), 17 Q.B.D. 384; 55 L.J.M.C. 121; 54 L.T. 592; 50 J.P. 644; 38 Digest 547, *902*.

(4) *Merthyr Tydfil Local Board of Health* v. *Merthyr Tydfil Assessment Committee*, [1891] 1 Q.B. 186; 60 L.J.M.C. 42; 63 L.T. 647; 55 J.P. 294; 38 Digest 547, *904*.

(5) *Metropolitan Water Board* v. *St. Marylebone Assessment Committee*, [1923] 1 K.B. 86; 92 L.J.K.B. 161; 128 L.T. 358; 86 J.P. 225; 38 Digest 547, *903*.

(6) *St. James' & Pall Mall Electric Light Co., Ltd.* v. *Westminster Assessment Committee*, [1934] A.C. 33; 103 L.J.K.B. 9; 150 L.T. 123; 98 J.P. 20; Digest Supp.

(7) *Aberdeen Magistrates* v. *Aberdeen Assessor*, 1927 S.C. 458; 38 Digest 575, m.

Case Stated.

The respondent water board was the owner and occupier of hereditaments comprising (i) a pumping station, booster station, water tower, offices, water mains and appurtenances and (ii) reservoirs in Wellingborough Urban District. On Sept. 29, 1952, the appellant valuation officer made a proposal to assess the former hereditament at £2,117 net annual value and rateable value. On Mar. 26, 1953, the valuation officer made a further proposal to assess the former hereditament at £500 net annual value and rateable value and the latter hereditament at £100 net annual value, £64 rateable value. A local valuation court of the Northamptonshire and County Borough of Northampton Local Valuation Panel determining the appeals arising out of the two proposals directed that the former hereditament should be assessed at £1,386 net annual value and rateable value under the first proposal and £1,178 net annual value and rateable value under the second proposal and that the latter hereditament should be assessed at £100 net annual value £64 rateable value. The valuation officer appealed to the Lands Tribunal.

In arriving at the cumulo net annual value of the water undertaking for each of the two periods for which the assessments were made on the basis of the accounts of the undertaking for the year ending on Mar. 31, 1952, the valuation officer included as part of the gross receipts a sum of £9,515 which the board had anticipated it would require for financing capital works not yet in beneficial occupation in that year and for which it had issued precepts to its constituent authorities. In fact only £3,365 was spent on that purpose in that year. The valuation officer contended that the £9,515 sum constituted receipts of the hypothetical tenant. The board contended that no part of the £9,515 should be included in the gross receipts on the ground that it was not revenue potentially available to the hypothetical tenant, having been raised for the purpose of landlord's loan charges in respect of expenditure on works not yet occupied. The Lands Tribunal held that the £9,515 should be deducted from the gross receipts in calculating the cumulo value of the undertaking as a whole, the case being governed by *Manchester Corpn.* v. *Bolton Area Assessment Committee & Little Hulton Urban District Council* (2) which had not been overruled by *St. James' & Pall Mall Electric Light Co., Ltd.* v. *Westminster Assessment Committee* (6). The valuation officer appealed to the Court of Appeal.

C. P. Harvey, Q.C., and *P. R. E. Browne* for the valuation officer.
Harold Williams, Q.C., and *W. L. Roots* for the water board.

Cur. adv. vult.

Mar. 27. **DENNING, L.J.**, read the following judgment of the court: This case raises a question about the rating of the Mid-Northamptonshire Water Board. The board is constituted by the Mid-Northamptonshire Water Board Order Confirmation (Special Procedure) Act, 1949. In 1949 it took over the undertakings of several other previous water concerns. It serves the districts of sixteen local authorities, who nominate the members of the board. During the first five years of its existence, namely, from 1949 to 1954, the board obtained its revenue partly from rates levied on consumers and partly by issuing precepts to the local councils. After 1954 the board will obtain all its revenue, or nearly all of it, by means of precepts to local councils. Each council will add the amount of the precept to the general rate and collect it from the general ratepayers as part of the general rate. The consumers will therefore not pay their water rates separately from the general rate, but will pay the whole of their rates direct to the local council, who will then pay to the water board the amount of the precept.

This case arises out of a project for a new reservoir and other works. In the beginning of 1951, the board anticipated that it would spend £328,550 on new works in the year ending Mar. 31, 1952, and would have to borrow capital money for the purpose. It estimated that it would have to pay £9,515 interest on this money and budgeted in its accounts accordingly. It prepared precepts so as to enable it to meet all its anticipated current expenditure, including this £9,515. It turns out that it did not spend £328,550 or anything like it on the new works, but only £112,167. The amount in fact required for loan charges was therefore not £9,515, but only £3,365.

The question is how this £9,515 is to be treated in the accounts for rating purposes. The water board is rated on the profits basis, which was explained by VISCOUNT CAVE, L.C., in *Kingston Union* v. *Metropolitan Water Board* (1) ([1926] A.C. 331 at pp. 338, 339), and I will read two sentences from his speech:

> " In these circumstances it was desirable, in order that a fair assessment might be arrived at, to devise some formula which, while allowing a fair value to the hereditaments in each parish, would not compel the undertakers to pay rates on an aggregate sum exceeding the whole yearly value of their undertaking; and accordingly rating surveyors, soon after the passing of the [Parochial Assessments Act, 1836], began to assess waterworks and other like concerns, such as railways, canals, gasworks, etc., upon the basis of the profits earned by the whole undertaking. From the gross receipts of the undertakers for the preceding year they deducted working expenses, an allowance for tenant's profit, and the cost of repairs and other statutable deductions, and treated the balance remaining (which would presumably

represent the rent which a tenant would be willing to pay for the undertaking) as the rateable value of the entire concern."

Applying this basis, the figures found by the tribunal are as follows:

For the rate period ending Sept. 30, 1952.

	£
Gross receipts	
Revenue from water charges, etc.	195,148
Revenue from precepts	56,555
	£251,703
Working expenses, including repairs and renewals	187,521
	£64,182
Tenant's share	18,292
Net annual value plus rates	£45,890
Deduct rates at 20s. 5d. in the £	23,182
Cumulo net annual value	£22,708

The figure that is questioned is the " revenue from precepts, £56,555 ". The true revenue from precepts as shown in the accounts was £66,170, but the tribunal thought that, in arriving at the figure of revenue for the " profits basis ", it ought to exclude the £9,515 (which was estimated for loan charges). It deducted it, therefore, from the £66,170 and arrived at the sum of £56,555 [another £100 was involved which is immaterial for the present purpose]. The tribunal came to that decision because it thought it was bound so to do by reason of *Manchester Corpn.* v. *Bolton Area Assessment Committee & Little Hulton Urban District Council* (2) ((1931) 144 L.T. 571).

It was shown to us that the current revenue of the board in 1952 was not enough to meet the current expenditure. It started off on Apr. 1, 1951, with a credit balance of £30,193 3s. 4d. brought forward from the previous year. It finished up on Mar. 31, 1952, with a credit balance only of £13,650 16s. 5d. It described this as the " excess of precept income ": but it had had to draw on the last year's balance to get any excess.

It seems to us to be quite wrong to bring into the " profits basis " any of the estimates which are prepared for the purpose of calculating the amount of the precepts. The estimates are not binding on the board. Once it issues the precepts and gets the money, it can use it as it likes, provided of course that it uses it for the board's purposes. No part of it is earmarked for any particular purpose. The £9,515 may not have gone to pay any interest charges at all. It may have been used up in paying salaries or wages: or it may not have been used at all. It may all have gone into the balance carried forward of £13,650 16s. 5d.

Even if the £9,515 could be earmarked for interest charges, we do not think it ought to be deducted. The revenue from precepts was £66,170. That was the revenue of the board of which it had the right to dispose as it wished. It ought to be taken without any deduction for interest charges. That is, we think, the result of the cases which we now proceed to consider.

In the past, the revenue of the water boards has often been derived in part from water rents levied on the consumers for water supplied, and in part from a " public water rate " levied on householders in order to aid the receipts of the board and ensure that it suffers no loss. In such cases it has been decided for over seventy years that, in applying the " profits basis ", the revenue is to be taken as the total revenue from water rents and water rates without any deduction for interest charges on borrowed money: see *Dewsbury Waterworks Board* v. *Penistone Union Assessment Committee* (3) ((1886) 17 Q.B.D. 384); and *Merthyr*

A *Tydfil Local Board of Health* v. *Merthyr Tydfil Assessment Committee* (4) ([1891] 1 Q.B. 186). In *Metropolitan Water Board* v. *St. Marylebone Assessment Committee* (5) ([1923] 1 K.B. 86), where we will simplify the facts, the Metropolitan Water Board received in one year £3 million from the consumers of water. The board spent £2½ million on working expenses. It also had to pay £1½ million for interest charges on capital sums it had borrowed. It would therefore be B £1 million down on the year. In order to meet the £1 million deficiency, it issued precepts on local authorities who added the amount on to the general rate, collected it from the general body of the ratepayers and handed it over to the water board. The question was whether the sum received by means of precepts was to be included as part of the revenue of the hypothetical tenant. The Divisional Court held the sums received from precepts were not to be included C because the interest charges were payments of a kind which would fall on a landlord and not on a tenant. The Divisional Court distinguished the *Dewsbury* case (3) on grounds that are not apparent to us. The only difference that we can see is that the revenue in the *St. Marylebone* case (5) was derived, not from water rents or from water rates levied on householders, but from precepts directed to the local authorities—which seems to us only a difference in the mode of collecting D the revenue—not in the nature of it.

Three years later, LORD BLANESBURGH pointed out the remarkable consequences of the *St. Marylebone* decision (5) and hinted that it was not correct: see *Kingston Union* v. *Metropolitan Water Board* (1) ([1926] A.C. at pp. 353-354). We think it plain that it cannot stand with the reasoning of the House of Lords in *St. James' & Pall Mall Electric Light Co., Ltd.* v. *Westminster Assessment Com-* E *mittee* (6) ([1934] A.C. 33). The hypothetical landlord who builds a waterworks would reasonably expect to receive enough rent to enable him to pay interest on money he has borrowed and also to put something aside for a sinking fund. It is true that the question is what the hypothetical tenant can afford to pay, but in these cases the tenant has the power to raise the additional revenue required to enable him to pay the rent which the landlord would reasonably expect to receive. F The " interest charge " and the " sinking fund charge " are, no doubt, landlord's charges: but that is irrelevant to the calculation of rent on the " profits basis ". The hypothetical tenant would not take them into his calculations. The whole question is what are his receipts? The particular application of the receipts when once ascertained is immaterial: see per LORD ATKIN in the *St. James'* case (6) (ibid., at p. 44).

G In the *St. Marylebone* case (5), the Divisional Court was impressed by the argument: If the board levies a rate to meet interest charges, surely both items must appear in the annual accounts. The rate must come on the revenue side and the interest charge on the expenditure side. You cannot take one without the other. That is a fallacy which has often been exposed. It fails to have regard to the hypothesis underlying the " profits basis ". Once you assume a hypothe- H tical landlord and a hypothetical tenant, it is apparent that the tenant is not concerned with interest charges paid by his landlord. He is not concerned with whether his landlord is living on borrowed money or not.

Manchester Corpn. v. *Bolton Area Assessment Committee & Little Hulton Urban District Council* (2) followed the *St. Marylebone* case (5) and we will simplify the facts there, too. It appeared that the Manchester Corporation had a I revenue of £750,000 from the ratepayers, of which £670,000 was received from the " domestic water rate " levied on consumers, and £80,000 from a " public water rate " levied on owners of property. The corporation spent £635,000 in paying working expenses and also paying interest on capital sums they had borrowed in the past for works that had long been completed and were in use. They had, however, recently borrowed further sums so as to make a new pipe-line and service reservoir. They had not completed these new works, but they had had to pay interest on the sums borrowed. This interest came to

£115,000. In order to meet that interest charge, the corporation applied the whole of the £80,000 which they had received from the public water rate and also £35,000 out of the receipts from the domestic water rate. The question was whether the £80,000 received from the public water rate was to be included as part of the revenue of the hypothetical tenant. The Divisional Court held that it was not to be included. Avory, J., held that the question was governed by the *St. Marylebone* case (5). He held that the interest charges were landlord's charges, and that the £80,000, being raised to meet a landlord's charge, ought not to be brought into account. The decision was, we think, also wrong. Being based on the *St. Marylebone* case (5) it falls with it, unless a distinction can be drawn on the ground that in the *Manchester* case (2) the works were not completed. No such point was taken in the *Manchester* case (2), but it is the very point here and we must consider it.

It is said that a hypothetical tenant would not pay any rent for works which were not completed, so nothing should be included on that account. The answer is, however, that we are not inquiring what rent he would pay for the yet uncompleted works, but the rent for the already completed works. The hypothetical landlord of a growing undertaking would reasonably expect to receive enough rent from the existing works to enable him to keep pace with his growing expenditure. The hypothetical tenant is not concerned with what the hypothetical landlord does with his money once he gets it. The hypothetical landlord can lay it out on maintaining the old works or making new ones. The whole question is what is the landlord's rent? What he does with it is his concern, not the tenant's.

The point is also put in a slightly different way. It is said that what is being rated is the existing water system, not the uncompleted works which are incapable of beneficial occupation. This, however, carries the matter no further, since the question is always what revenue can be obtained by the hypothetical tenant from his occupation of the hereditaments to be rated and all the receipts from the precepts form part of such revenue. The Court of Session had this very point before it in *Aberdeen Magistrates* v. *Aberdeen Assessor* (7) (1927 S.C. 458). The Aberdeen Corporation had spent £7,390 on interest and sinking fund on incomplete and unproductive works. It argued that this should be deducted from its total revenue: but the court held that the deduction was inadmissible. We agree with that decision and think we should follow it.

In coming to our conclusion, we have not failed to observe that the House of Lords in the *St. James*' case (6) and except for Lord Blanesburgh in the *Kingston Union* case (1) have not thrown any doubt on the *St. Marylebone* case (5) and that Slesser, L.J., in the *St. James*' case (6) appears to refer to both the *St. Marylebone* case (5) and *Manchester* case (2) with approval: but in those cases they did not come directly up for consideration, whereas they do here. We think that the *St. Marylebone* case (5) and the *Manchester* case (2) were wrongly decided and should be overruled. The tribunal was wrong in deducting the £9,515 from the gross revenue of the board. The appeal should be allowed accordingly.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue* (for the valuation officer); *Sherwood & Co.*, agents for *Vivian Rowe*, Northampton (for the water board).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

LAW SOCIETY *v.* ELDER.

[COURT OF APPEAL (Lord Evershed, M.R., Denning and Birkett, L.JJ.), March 21, 1956.]

Legal Aid—Certificate—Certificate limited to obtaining opinion of counsel in regard to contemplated proceedings—No proceedings taken—Validity of certificate—Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6 *c.* 51), *s.* 1 (5), (6).

A civil aid certificate was granted to E. " as plaintiff in connection with the following proceedings . . . to take proceedings for a declaration [of citizenship] under . . . the British Nationality Act, 1948. Limited to obtaining opinion of leading counsel versed in constitutional law ". It was further stated on the certificate that E.'s contribution was assessed at £38, of which £2 5s. became payable (and was paid) on acceptance, and the balance of £35 15s. was payable by monthly instalments of £3 5s. The opinion of leading counsel was to the effect that E.'s claim could not be successful, and no proceedings were taken. E. having failed to pay any monthly instalments of the contribution due from him, the certificate was discharged, and the Law Society, who were responsible for the administration of the legal aid scheme and the legal aid fund, sued him for the amount due. E. contended that the certificate was invalid in that it was given, not in connection with proceedings, but merely for the purpose of taking advice of counsel, and that, therefore, the Law Society could not sue in respect of the sum assessed as his contribution under the certificate.

Held: " proceedings ", in s. 1 (5) of the Legal Aid and Advice Act, 1949, meant not only proceedings which were in existence but also proceedings which were genuinely contemplated, and the effect of s. 1 (6) of the Act, read in conjunction with s. 1 (5), was that legal aid could be granted where there were reasonable grounds for taking counsel's opinion in regard to contemplated proceedings; on the facts, a civil aid certificate limited to obtaining opinion of counsel was rightly granted to E., and, therefore, the certificate was valid, and the Law Society were entitled to recover from E. the unpaid balance of the sum which had been assessed as his contribution.

Appeal dismissed.

[For the Legal Aid and Advice Act, 1949, s. 1 (5), (6), s. 5, and s. 7, see 18 HALSBURY'S STATUTES (2nd Edn.) 534, 539, 542.

For the Legal Aid (General) Regulations, 1950, reg. 5 and reg. 11, see 5 HALSBURY'S STATUTORY INSTRUMENTS 205, 211.]

Appeal.

The defendant, Ivan John Barry Elder, appealed from an order made by His Honour JUDGE PUGH at Bloomsbury County Court on Jan. 11, 1956, in proceedings brought by the Law Society to recover the sum of £35 15s. due to them from the defendant under the provisions of the Legal Aid and Advice Act, 1949, and/or under an agreement in writing, dated Jan. 5, 1954, and/or as money paid by the plaintiffs to the defendant's use and at his request. The Law Society were responsible for the administration of the legal aid scheme and the legal aid fund under s. 8 and s. 9 of the Act of 1949. The defendant, wishing to take proceedings in the Chancery Division for a declaration of citizenship, applied for legal aid, and, by an agreement in writing, dated Jan. 5, 1954, he agreed, in consideration of the issue to him of a civil aid certificate, to pay, at the time and in the manner stated therein, the contribution which he would be required to make to the legal aid fund. A civil aid certificate, dated Jan. 21, 1954, was granted to him in connection with the contemplated proceedings and was expressed to be limited to obtaining opinion of leading counsel. The defendant's contribution was assessed at £38, payable by a first instalment of £2 5s. on acceptance, which sum the defendant paid, and by eleven monthly instalments of £3 5s. Leading counsel advised that the defendant's claim was not sustainable A in the courts, and no proceedings were taken. The defendant having defaulted in payment of the monthly instalments, the Law Society gave notice to him in writing, dated Apr. 1, 1954, discharging the civil aid certificate, pursuant to reg. 11 (2) of the Legal Aid (General) Regulations, 1950, and, subsequently, brought proceedings against him in the county court for payment of the unpaid balance of the contribution due from him. The learned county court judge B gave judgment for the Law Society, and the defendant appealed on the ground that the certificate granted to him was not a valid certificate within the meaning of s. 1 of the Act of 1949 read with reg. 5 of the Regulations of 1950.

The defendant appeared in person.
Rodger Winn and *K. G. Jupp* for the Law Society. C

LORD EVERSHED, M.R.: The defendant, Mr. Elder, was sued for a sum of £35 or thereabouts representing the contribution which he was required to make under a civil aid certificate granted on Jan. 21, 1954. The form of the certificate is as follows:

> "This is to certify that [Mr. Elder, and his address is given] is entitled in accordance with the Legal Aid and Advice Act, 1949, and the regulations D and scheme made thereunder, to legal aid as plaintiff in connection with the following proceedings: as plaintiff in the High Court of Justice, Chancery Division, to take proceedings for a declaration granting full United Kingdom citizenship under the provisions of s. 12 (4) of the British Nationality Act, 1948. Limited to obtaining opinion of leading counsel versed in constitutional law." E

The certificate then allocated a firm of solicitors, and certified that Mr. Elder's contribution had been assessed at £38, which was to be payable as to £2 5s. on acceptance (that sum was, in fact, paid to the Law Society) and thereafter by further monthly payments of £3 5s. each.

The short facts are these. Mr. Elder was claiming that he was, by virtue of F the British Nationality Act, 1948, a United Kingdom citizen although he had been born in India, where also his father had been born. Following the grant of the civil aid certificate, the opinion was taken of a highly experienced leader of the Bar, Mr. D. N. Pritt, Q.C., who expressed great sympathy with Mr. Elder's contention, but he concluded that it was not sustainable in the courts, and advised Mr. Elder, therefore, that his best course was to apply for registration. G Mr. Elder, not unnaturally, was disappointed with that opinion, and, for that or other reasons, he did not pay the monthly instalments of £3 5s. which then fell due, and he has not paid any since. Pursuant to reg. 11 (2) (b) of the Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), the certificate was liable thereupon to be discharged. Regulation 11 (2) reads:

> "The appropriate area committee may discharge a certificate . . . H (b) where an assisted person has been required to make a contribution and any payment in respect thereof is more than twenty-one days in arrear."

The Law Society thereupon took out a summons in the county court, claiming the balance unpaid of £35 15s., although the total expenditure which they had incurred in obtaining counsel's opinion and so forth was over £80. Mr. Elder resisted the claim, but the learned judge was of opinion that there was no defence I to the action. It is from that conclusion that Mr. Elder now appeals.

Counsel for the Law Society takes the point that there is a short and conclusive answer to Mr. Elder's objection based on the fact that, pursuant to ordinary practice (and, indeed, to the regulations*), Mr. Elder executed a form (form B.2) of acceptance of an offer of a civil aid certificate which created a contract, whatever objections there are or may have been to the validity of the grant of the certificate. To my mind that seems a very formidable point. It is, however, desirable that I should express a view on the somewhat wider contention raised by Mr. Elder, which is of some public significance, and I, therefore, do not rest my conclusion on what I will call the contract point.

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* See reg. 5 (11), (12) of the Legal Aid (General) Regulations, 1950.

The wider point, on which, as Mr. Elder told us, he really rested his case, follows on the effect of s. 1 of the Act, and, in particular, of s. 1 (5), which reads:

> "Legal aid shall consist of representation, on the terms provided for by this Part of this Act, by a solicitor and so far as necessary by counsel (including all such assistance as is usually given by solicitor or counsel in the steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings)."

Briefly, the point taken by Mr. Elder is this. He says that the certificate which I have read was, in truth, an evasion of the purposes of the Act, a subterfuge, in that it merely granted, or purported to grant, legal aid for the purpose of taking advice of counsel, and not for or in connection with proceedings; and that, the certificate being, therefore, invalid, it is impossible for the Law Society to sue for the sum assessed as his contribution thereunder. I pointed out to Mr. Elder that, if he were right about this point, it would appear that he would be liable, not merely for the £35, but for the full costs incurred on his behalf by the solicitors concerned. I have, however, come to the conclusion that, although, at first sight, that argument might appear not without attraction, it is, in truth, unsound.

The form of the certificate was for the purpose of aiding Mr. Elder as plaintiff in proceedings in the Chancery Division. No proceedings were ever taken, and it is that fact that lends colour to the argument of Mr. Elder that the certificate was somewhat of a subterfuge. It is also to be noted that, under s. 5 and s. 7 of the Act, provision is made for the granting of advice (in each case by a solicitor only). Neither of those sections has as yet come into operation; but, as DENNING, L.J., observed during the argument, it is not irrelevant to have them in mind in construing s. 1 (5), and I have them in mind. Yet I am far from persuaded that s. 1 (5) can be related only to cases in which proceedings are actually started. Indeed, the circumstance that s. 5 and s. 7 are limited to advice by solicitors, that the matters referred to in s. 5 are concerned with questions when proceedings before a court do not arise or have not arisen, and that s. 7 is limited to oral advice on the part of a solicitor, make it plain that, if a sensible result is to be given to the statutory provisions, s. 1 must cover the case where proceedings are genuinely contemplated as being the appropriate step then to be taken, but have not yet, in fact, been taken. In other words, I think that the word "proceedings" in s. 1 (5) must mean proceedings in existence or then bona fide contemplated. That view, I think, is supported also by the parenthesis which I have already read: "(including all such assistance as is usually given by solicitor or counsel in the steps preliminary or incidental to any proceedings . . .)." Counsel for the Law Society told us that at one time, ex abundanti cautela, a writ or other process was issued so as to put proceedings in train, and then a limitation was imposed for getting advice before the real expenses of the proceedings were incurred. But now, in a case such as this, although the certificate is expressly related to contemplated proceedings, the advice which qualifies the certificate is to be taken first, for the very good purpose of seeing whether, in the end, it will be proper to expend public money on the prosecution of those contemplated proceedings. I, therefore, am of opinion that s. 1 (5) is not limited to cases where proceedings have actually been started.

It was then submitted by Mr. Elder that the course of events in this case involved the Law Society in something of a dilemma. Either the contemplated proceedings had reasonable grounds, or they had not. If they had not, then, by s. 1 (6), the grant of legal aid would be outside the scope of the Act. If they had reasonable grounds, then why were they not proceeded with? The opinion

of one counsel, said Mr. Elder, was not the same as the judgment of a court. A
Again I am not able to accept Mr. Elder's view. I think that what I have already said would satisfy most people that, in suggesting the initiation of proceedings to establish British citizenship, Mr. Elder was on reasonable grounds, and the committee of the Law Society rightly granted the certificate on that premise. But the weighty opinion which was received caused later the equally valid conclusion, as I think, that such proceedings which would have been B
regarded originally as reasonable could no longer be so regarded so as to involve the further expenditure of public money thereon. I, therefore, think that no ground of invalidity in the certificate is made out by Mr. Elder, and, that being the real substance of his appeal, it follows that we must dismiss it.

DENNING, L.J.: I agree. On the first reading of s. 1 (6) it would seem C
that Mr. Elder has a good point, for that sub-section says:

> " A person shall not be given legal aid in connection with any proceedings unless he shows that he has reasonable grounds for taking, defending or being a party thereto . . ."

Read by itself, that sub-section would seem to limit legal aid to proceedings D
which were actually in existence. That argument is reinforced by saying that legal aid or advice in matters not yet involving litigation is dealt with by s. 5 and s. 7, which are not yet in force. On reading, however, the whole of the sections to which my Lord has referred, it becomes clear that the word " proceedings " here means not only proceedings in being, but also contemplated proceedings; and that s. 1 (6), read in relation to s. 1 (5), means that a person can get legal aid E
when he has reasonable grounds for taking counsel's opinion in regard to contemplated proceedings. That being so, Mr. Elder's point turns out to be not a good one. I agree that the appeal should be dismissed.

BIRKETT, L.J.: I am entirely of the same opinion, and I do not desire to add anything to the judgments which have been delivered.

Appeal dismissed. F

Solicitors: *James & Charles Dodd* (for the Law Society).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

WILLIAMS *v.* PORT OF LIVERPOOL STEVEDORING CO., LTD. AND ANOTHER.

[LIVERPOOL ASSIZES (Lynskey, J.), February 13, 14, 15, 23, 1956.]

Master and Servant—Liability of master—Negligence of fellow servant—Common employment—Plaintiff one of a gang of workmen of equal status—Injury to plaintiff due to joint negligence of members of gang.

Negligence—Contributory negligence—Apportionment of liability—Common employment—Law Reform (Contributory Negligence) Act, 1945 (8 *&* 9 *Geo.* 6 *c.* 28), *s.* 1 (1).

The plaintiff was one of a gang of six men of equal status employed by the first defendants, a stevedoring company, in unloading bags of sodium carbonate from a barge. The gang were directed by the hatch foreman who was in charge of the operation and was also an employee of the stevedoring company to follow the usual and safe method of unloading, which at first they did. When the hatch foreman left to attend to other duties, however, the gang adopted a different and dangerous method of unstowing the bags. This they continued despite further direction from the foreman on his return to level off bags to avoid danger. Subsequently the foreman gave a direct order to the plaintiff to take bags off the top tiers which the plaintiff said that he would do. He did not do it. Other warnings by the master and the mate of the barge were disregarded. Eventually a pile of the bags collapsed and injured the plaintiff. In an action by the plaintiff against the stevedoring company for damages for personal injuries caused by the negligence of the company,

Held: (i) each member of the gang owed a duty to the other members to take reasonable care in the work of unstowing and in the method of work employed; and for the negligence of the members of the gang other than the plaintiff in adopting an unsafe method of work the stevedoring company as their employers were vicariously liable, although the plaintiff tacitly consented to the method of working and that method was contrary to orders given to him and the other members of the gang.

Stapley v. *Gypsum Mines, Ltd.* ([1953] 2 All E.R. 478) and *Laszczyk* v. *National Coal Board* ([1954] 3 All E. R. 205) applied.

(ii) the plaintiff was guilty of contributory negligence and, as the plaintiff's consent had been essential to the carrying out of the work by the dangerous method, his share of the responsibility was one-half and the damages recoverable would be reduced accordingly.

Per CURIAM: if a number of men engages in an occupation which is contrary to instructions and also is dangerous, the duty owed by one to the other is not abrogated by joining together and carrying out a common operation. Even the assent to carrying out that operation may in certain circumstances amount to a breach of duty to a man who is also carrying it out (see p. 72, letter F, post).

[As to contributory negligence between master and servant, see 22 HALSBURY'S LAWS (2nd Edn.) 190, para. 319 and Supplement; and as to apportionment of liability, see 23 HALSBURY'S LAWS (2nd Edn.) 680, para. 964 and Supplement; and for cases, see 36 DIGEST (Repl.) 34, *157*, 170, *912* et seq.

For the Law Reform (Contributory Negligence) Act, 1945, s. 1, see 17 HALSBURY'S STATUTES (2nd Edn.) 12.]

Cases referred to:

(1) *Stapley* v. *Gypsum Mines, Ltd.*, [1953] 2 All E.R. 478; [1953] A.C. 663; 3rd Digest Supp.

(2) *Laszczyk* v. *National Coal Board*, [1954] 3 All E.R. 205; 3rd Digest Supp.

Action.

The plaintiff, John Williams, sued the first defendants, the Liverpool Stevedoring Co., Ltd., and the second defendants, Imperial Chemical Industries, Ltd., for damages for personal injuries due to the negligence of both defendants and to a breach of reg. 41 of the Docks Regulations, 1934, by the second defendants. At the time of the accident the plaintiff was one of a gang of six men of equal status employed by the stevedoring company in unloading bags of sodium carbonate from a barge owned by the second defendants. The bags, which had been loaded by the barge owners, measured two feet by one foot five inches by seven inches. The normal method of unloading such a cargo was to make a " sink ", i.e., to remove four to seven layers of bags from the centre and level off the cargo to the bottom of the sink; then to make a further sink and level off again. By this method of unstowing there was never a higher layer of bags than seven which was unsupported and liable to fall. The plaintiff and the rest of the gang were directed by the hatch foreman, also an employee of the stevedoring company, who was in charge of the unloading, to follow this method of unloading and for a time they did so. When the hatch foreman was absent on other duties, however, the gang by mutual consent adopted another system. This consisted in removing one bag from the first layer, two from the second layer, three from the third, and so on, thereby making a sort of stairway from top to bottom of the pile, and leaving a high pile of bags without lateral support. When the hatch foreman returned he again instructed the gang to follow the normal method and warned them that there might be trouble if they did not do so. He also subsequently told the plaintiff personally to level off the bags and the plaintiff said that he would do so. The gang (including the plaintiff), however, continued to follow their own system of unloading. The master and mate and engineer of the barge also gave warnings, which were ignored. The result of the unstowing of the barge by the gang was that three tiers each of twelve bags high were left and in front of those tiers was a tier of bags seven bags high; behind those three tiers, as the gang (so the court found) knew or ought to have known, the bags were not stowed hard up against the bulkhead but there was four feet between the end of the stowage and the back of the bulkheads. The effect was to leave the bags in a position in which they were bound to be unstable. Eventually a pile of bags collapsed and the plaintiff was almost buried beneath them and was injured.

As originally pleaded the plaintiff's case was based almost entirely on bad stowage of the bags, which on the evidence, as the court held, would have failed against both defendants, and did fail as against the second defendants. At the trial the plaintiff, by leave, amended his statement of claim by pleading alternatively against the stevedoring company (i) an unsafe method of stowage by the stevedoring company's servants or agents (other than the plaintiff) and (ii) the failure of the company's servants or agents (other than the plaintiff) to observe the order of the hatch foreman and the warnings of the barge's officers. The stevedoring company, in their amended defence, put in issue, in effect, the question whether the members of the gang (other than the plaintiff) were in breach of any duty to him and alleged that the plaintiff voluntarily undertook the unstowing of the bags with full knowledge of the risks involved.

J. S. Watson, Q.C., and *G. J. Bean* for the plaintiff.

H. I. Nelson, Q.C., and *J. M. Davies* for the stevedoring company, the first defendants.

R. G. Clover for the barge owners, the second defendants.

LYNSKEY, J., having stated the facts and having held that the bags had not been stowed in an improper manner, continued: In any event I am bound to find for the barge owners because the only allegation against them is bad stowage. The plaintiff has failed to establish that, and there will be judgment for the barge owners. With regard to the stevedoring company, A counsel for the plaintiff in his final speech said that even although the court did not accept the evidence for the plaintiff, nevertheless he was entitled still to ask for partial damages at least, because the employers would be vicariously liable for the negligence of the other five men who, with the plaintiff, were engaged in the general operation of unstowing.

Counsel for the plaintiff applied to me for leave to amend his pleadings in B order to raise that case, which was, of course, an abandonment of his original case, and the setting up of a new case based on the defendants' own evidence. Counsel for the stevedoring company resisted the application, but I felt it right to grant it, because it seemed to me that it was the duty of the court to do justice as far as it could, and not to allow defects in pleading to prevent justice being done. Accordingly I reserved the question of costs, and gave C leave to amend. The plaintiff has now amended his pleadings by pleading:

> "(v) Alternatively, their servants or agents (other than the plaintiff) unstowed the said bags vertically downwards from only part of the forward section of the hold of the barge instead of removing the said bags uniformly by sinking and levelling off over the whole area of the said section and thereby left a wall of bags which were liable to fall; further or alter- D natively—
>
> "(vi) Their servants or agents (other than the plaintiff) failed to pay regard to or observe the order of their hatch foreman to work the top bags off the tiers and/or failed to heed the warnings of the master, the mate, and the engineer of the said barge that the tiers of bags were dangerously high and might fall and the suggestions of the said officers that such servants E or agents ought to step or level off the said tiers."

In other words, for the purpose of their alternative claim they are adopting the defendants' case and accepting it as being accurate; and on that they are entitled to make the employers pay at least partial compensation. In further and better particulars they set out the names of the five witnesses who appeared F in this case. The result is that the plaintiff now claims that his evidence, and that of all his witnesses, must be disregarded. It is a curious position to arrive at, but there it is.

The reply of the stevedoring company reads, so far as it is necessary to read for this purpose, as follows:

> G "They [the stevedoring company] admit and affirm that their servants or agents including the plaintiff unstowed the said bags vertically downwards . . . instead of removing the said bags uniformly by sinking and levelling off over the whole area . . . and they further allege that the plaintiff acted in concert and together with his said fellow servants, and that he and they together were in breach of their contract of employment and/or duty to the [stevedoring company] their employers, but of no H other duty."

The stevedoring company also say:

> "That the plaintiff tacitly agreed with their said servants or agents . . . to ignore and disobey the orders, warnings, and suggestions, and to unstow the said bags in a dangerous manner as aforesaid, and by reason of such I conduct and tacit agreement none of the said servants or agents owed any duty to the plaintiff with regard to the said method of unstowing. Further and/or in the alternative by his conduct and tacit agreement as aforesaid, and with a full knowledge and appreciation of the risks involved, the plaintiff voluntarily undertook to unstow the said bags in the said manner with the said servants or agents."

In other words, the stevedoring company is saying in that reply that the individual servants themselves had no duty to the plaintiff to take care, and as they had no duty to the plaintiff to take care, therefore the employer cannot be vicariously liable. Alternatively he says, in effect, even if that is not right, the plaintiff by joining in this dangerous system of work, was tacitly consenting to accept the risks of such work, and in those circumstances the doctrine of volenti non fit injuria applies.

There is authority of the House of Lords in *Stapley* v. *Gypsum Mines, Ltd.* (1) ([1953] 2 All E.R. 478), where very similar circumstances arose. This was a case where two miners of equal status were employed in the respondents' gypsum mine. They were directed by the foreman of the respondents to bring down the roof of a stope in which they were proposing to work, as it was unsafe and likely to fall. After attempting unsuccessfully to bring it down, they jointly agreed to cease their efforts and to carry on with their normal work. Shortly after resuming work the deceased was killed by a fall of part of the roof. The House of Lords by a majority held that the employer was liable, because the accident was purely caused or contributed to by the workman who was fortunately not killed, and although the deceased man himself was guilty of negligence in carrying on despite the foreman's order, nevertheless the employer was still liable for the negligence of the fellow employee, who had joined with him in carrying on in disobedience to the orders of the foreman.

It was said by counsel for the stevedoring company that the duty which one servant owed to another was not argued in that case; and if it had been argued, it would have been open to the court to come to the conclusion that where a number of men, jointly engaged in doing an act which is a negligent act and a dangerous act, no duty is owed each to the other; and therefore if no duty is owed, there cannot be any negligence. It may sound an attractive argument, but I think I am bound by the authority of *Stapley* v. *Gypsum Mines, Ltd.* (1).

In a case to which I have been referred by counsel for the plaintiff, *Laszczyk* v. *National Coal Board* (2) ([1954] 3 All E.R. 205), again that question was not argued; but it was said in that case also, that there was a duty owed by one employee to another, and in my view it must be so. It certainly is so in the ordinary case of individual negligence hurting another man, even though that is in disobedience of orders, as long as it is in the course of his employment. It seems to me that if a number of men engages in an occupation which is contrary to instructions and also is dangerous, there nevertheless is a duty owed by one to the other to use reasonable care, and that duty is not abrogated by joining together and carrying out a common operation. Even the assent to carrying out that operation may in certain circumstances amount to a breach of duty to a man who is also carrying it out; it is a breach of duty that one man owes to the other.

Having regard to *Stapley* v. *Gypsum Mines, Ltd.* (1) I am bound to hold that a duty was owed by each member of the gang of six to each of the others to take reasonable care in the actual work of unstowing, and in the method of work employed. In my view in this case, although the plaintiff, as it seems to me, gave tacit consent to the operation of unstowing in this way, contrary to orders given to himself personally at one time, nevertheless he is entitled to hold his employer liable vicariously for the negligence of his fellow workmen; the only test that one can apply being not whether it was contrary to orders, but whether it was work done in the course of his employment. The result is that the plaintiff is entitled to compensation for the damage he has sustained in an accident, which I hold was due to the negligence both of his fellow workmen and himself, and there is contributory negligence as far as he is concerned.

That being so, it is necessary that I should assess damages on the basis that he is not guilty of negligence*. [HIS LORDSHIP then reviewed the medical evidence, assessed the damages, on the basis that the plaintiff had not been guilty of negligence, at £1,947 6s. 9d., and continued:]

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* The obligation to assess damages on this basis is imposed by the Law Reform (Contributory Negligence) Act, 1945, s. 1 (2).

A That brings me to the final question: as the stevedoring company is vicariously liable for the negligence of the other members of the gang, and as the plaintiff is also guilty of negligence, in what proportion ought I to allocate responsibility for the damage? It is not by any means an easy question to decide. I was tempted at one time to say that as the employer had taken every step he could to try to avoid this accident, I ought to increase the plaintiff's responsibility
B in relation to the vicarious liability, but I am afraid the words of the Law Reform (Contributory Negligence) Act, 1945, prevent me from doing that, much as I would like to do it. I mention it, however, so that it can be taken up elsewhere, if it is thought worth while taking up.

Section 1 (1) of the Act provides, in effect, that in proceedings against any person for contribution, the amount of contribution recovered shall be such as
C may be found by the court to be just and equitable having regard to the claimant's share in the responsibility for the damage; and gives power to exempt from liability or award complete indemnity. That means that this court has to have regard to what is just and equitable in deciding that contribution, and regard has to be had to the claimant's responsibility for the damage.

I have to consider the responsibility of the plaintiff and the other members
D of the gang, but in doing so I am helped by the observations of LORD REID in *Stapley* v. *Gypsum Mines, Ltd.* (1) ([1953] 2 All E.R. at p. 486):

> " Normally one would not disturb such an award, but SELLERS, J., does not appear to have taken into account the fact that Stapley deliberately and culpably entered the stope. By doing so, it appears to me that he contributed to the accident much more directly than Dale. Section 1 (1)
> E of the Act directs that the damages '. . . shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.' A court must deal broadly with the problem of apportionment, and, in considering what is just and equitable, must have regard to the blameworthiness of each party, but ' the claimant's share in the responsibility for the damage ' cannot, I think, be assessed
> F without considering the relative importance of his acts in causing the damage apart from his blameworthiness."

In other words, one is directed to take more or less a jury view of responsibility in these cases, taking into account, first, the causation of the act, and, secondly, blameworthiness, and thirdly, trying to do what is just and equitable. The
G view I take in this case is not that put forward by counsel for the plaintiff. He says that if you have a gang of six working together, and they all tacitly agree to ignore instructions, or to indulge in a system of work which is dangerous, then they are all equally to blame, and the plaintiff is entitled to recover five-sixths of the damages. It does not seem to me that this is a mathematical problem, but one of doing what is equitable, having regard to the culpability.
H The view I take is that the employers are liable here, not for the individual acts of each individual person employed in the work, but for a dangerous method of work which was tacitly adopted by those six men. That was the real cause of this accident, and the employers are not liable for the individual acts of these men in carrying out the unstowing, but for the acts of the men as a gang, and as a group, tacitly agreeing to adopt a system of work which was contrary to the
I order of the hatch foreman, and was dangerous. Looking at it from that point of view, it seems to me that the plaintiff, although he was only of equal status with his fellow workers in the gang could, if he had liked, have seen that the foreman's method of work was carried out; and his tacit assent was essential to the carrying out of the work in the way it was done. That seems to me to be the fair inference to draw from the evidence of the hatch foreman, who told me that at eleven o'clock he actually spoke to the plaintiff himself, and told him to take the top bags off; and the plaintiff replied: " All right, I will do that ". It seems to me that the effect of that was that the plaintiff was saying: " Right

you are, I will see that that is done"; and if he had not been an assenting party to this method, it could have been stopped. I think that the plaintiff was equally responsible with the other five men in the gang in carrying out this wrong method of work, because it required the consent of all the gang to carry it out, and the plaintiff could have stopped it if he had wanted. In my view the proportion of responsibility is "fifty-fifty", and I reduce the amount the plaintiff is to recover by one-half.

Judgment for the second defendants, the barge owners, and for the plaintiff against the first defendants, the stevedoring company.

Solicitors: *Canter, Levin & Mannheim*, Liverpool (for the plaintiff); *Weightman, Pedder & Co.*, Liverpool (for the first defendants); *J. W. Ridsdale*, London (for the second defendants).

[*Reported by* K. Buckley Edwards, Esq., *Barrister-at-Law*.]

Re DICEY (*deceased*). JULIAN *v.* DICEY.

[Chancery Division (Danckwerts, J.), March 27, 1956.]

Equity—Election—Gift by testatrix of two freehold houses to plaintiff and of residue to defendant—Testatrix having only life interest in the houses—Defendant entitled, on death of testatrix, to a half share of the beneficial interest in the houses—Whether defendant put to his election.

A testatrix occupied and was entitled for her life to two freehold houses in B. road. Subject to her life interest the defendant was absolutely beneficially entitled to a half share in the two houses and the plaintiff and the plaintiff's brother were similarly entitled to a quarter share therein. The testatrix had no other property in B. road. By her will she devised to the plaintiff "my two freehold houses in [B.] Road, Walthamstow", and she gave another freehold house (which she did own) and her residuary estate to the defendant. The plaintiff's brother received no benefit under the will. The testatrix having died, the plaintiff claimed that the defendant was bound to elect whether he would take under or against the will. The defendant contended that he was not put to his election because (a) since the testatrix owned no freehold house in B. Road, there was nothing to identify the houses which were the subject of the purported devise to the plaintiff, and (b) the defendant could not give effect to the devise, as he was not the absolute owner of the two houses.

Held: the property which the testatrix purported to devise to the plaintiff was clearly identifiable, and, despite the fact that the defendant was entitled only to a half share of the beneficial interest in the houses in B. Road, he must elect whether he would give up his half share to the plaintiff or compensate the plaintiff in accordance with the ordinary principles of election.

Re Booth ([1906] 2 Ch. 321) and *Re Ogilvie* ([1918] 1 Ch. 492) applied.

[As to the doctrine of election where there is a claim under a will, see 14 Halsbury's Laws (3rd Edn.) 589, para. 1092, and as to the need of there being a clear intention to dispose of property over which the testatrix has no disposing power, see ibid., 592, para. 1097; and for cases on the subject, see 20 Digest 403-407, *1413-1438*, and 421-423, *1517-1532*.]

Cases referred to:

(1) *Brown* v. *Gregson*, [1920] A.C. 860; 89 L.J.P.C. 195; 123 L.T. 465; 20 Digest 439, *1654*.

(2) *Re Booth*, [1906] 2 Ch. 321; 75 L.J.Ch. 610; 95 L.T. 524; 20 Digest 424, *1547*.

(3) *Re Ogilvie*, [1918] 1 Ch. 492; 87 L.J.Ch. 363; 118 L.T. 749; 20 Digest 423, *1532*.

(4) *Rogers* v. *Jones*, (1876), 3 Ch.D. 688; 20 Digest 445, *1710*.

Adjourned Summons.

The plaintiff, James Julian, a beneficiary under the will of the testatrix, Selina Dicey, applied to the court by originating summons, dated Nov. 3, 1955, for the determination of the questions (i) whether the property referred to in the will as " my two freehold houses in Beresford Road Walthamstow aforesaid " consisted of the two freehold dwelling-houses known respectively as 68 and 70, Beresford Road, Walthamstow, Essex, and, if not, of what property it consisted; (ii) whether the devise to the plaintiff of the said dwelling-houses contained in cl. 4 of the will failed wholly; or, if not, whether it failed as to the one-quarter beneficial interest in the same of Charles Julian or as to some other and, if so, what part thereof; and (iii) whether the defendant, Charles Dicey, was bound to elect whether he would take under or against the will of the testatrix. The plaintiff went on to ask for, among other relief, a declaration that, if the defendant elected to take under the will, he was bound to convey to the plaintiff all his estate and interest in the said dwelling-houses.

The facts and the provisions of the will are stated in the judgment.

S. C. Silkin for the plaintiff.
J. Hamawi Hames for the defendant.

DANCKWERTS, J.: The testatrix made her will on Oct. 18, 1950, and she died on Sept. 10, 1954. By her will she appointed her son, Charles Dicey, the defendant, to be the executor and she bequeathed to her grand-daughter, Mrs. Alice Gertrude Kent, the whole of her jewellery. She gave to her daughter-in-law, Mrs. Elsie Maude Dicey, her business as a greengrocer and fruiterer, and also the freehold property known as 301, Higham Hill Road, from which the business was carried on. Then, by cl. 4, she devised to her grandson James Julian, the plaintiff, in these words:

> ". . . my two freehold houses in Beresford Road Walthamstow aforesaid and I also bequeath to my said grandson my piano and my radio set."

By cl. 5 she devised to the defendant her freehold house known as No. 268, Higham Hill Road, Walthamstow, aforesaid, and she gave, devised and bequeathed

> " the rest residue and remainder of my estate both real and personal whatsoever and wheresoever situate after payment thereout of my just debts funeral and testamentary expenses unto my said son Charles Dicey [the defendant] absolutely."

In fact, the testatrix had no disposable interest in two freehold houses which she occupied in Beresford Road, Walthamstow. She was a life tenant only of those houses under a title derived in the following way. Her husband, Charles Dicey, the father of the defendant and the grandfather of the plaintiff, died intestate on Oct. 25, 1938, leaving a widow, the testatrix, a son, the defendant, and two grandsons, the plaintiff and his brother, Charles Julian, sons of a deceased daughter, Selina Alice Julian. In April, 1939, a deed of family arrangement was drawn up by those parties interested under the intestacy, but it was destroyed by enemy action during the last war and there is no copy of it. Apparently, the terms of the family arrangement reached were that the testatrix should occupy during her life two freehold houses known as 68 and 70, Beresford Road, Walthamstow, which her husband owned, and on her death the defendant should become entitled to a half-share of the beneficial interest therein and the two sons of the deceased daughter, the plaintiff and his brother Julian, should be entitled each to a quarter.

It is contended that, in these circumstances, the defendant, who takes an interest under the will, is put to his election either to give effect to the devise contained in cl. 4, so far as he can, or compensate, to the extent of his interest received under the will, in respect of the disappointment of the plaintiff in not receiving the properties in question. It is to be observed that the plaintiff cannot be compensated in full, because his brother takes no interest under the will and the brother's quarter cannot be affected by the question of election. It is also to be observed that in any case the plaintiff is beneficially entitled to one-quarter interest in the houses. Therefore, the question of election can, at the most, apply only to the extent of the half-share in the houses to which the defendant is beneficially entitled. The houses are said to be worth some £750 each in value.

The defendant contended that he was not put to any election, and a number of arguments were submitted on his behalf. Counsel for the defendant contended, first, that there was no effective devise of the two houses, even apart from the fact that the testatrix did not own any devisable interest, because there was nothing to identify the houses which were said to be the subject of the devise contained in cl. 4. It was said, in effect, that she had no houses in Beresford Road, and, therefore, there was nothing to which the description " my two freehold houses in Beresford Road Walthamstow aforesaid " could apply. That contention did not appeal to me, because it seems to me that, when the history of the matter is known and it is found that the testatrix was in occupation of two houses, it is obvious what she meant by the words " my two freehold houses in Beresford Road Walthamstow ". She meant the two houses which she occupied as tenant for life. She was mistaken, of course, in her belief that she could dispose of them after her death, but there seems to be not the slightest difficulty in identifying the houses of which she attempted to dispose.

Among the various contentions of counsel for the defendant, the one which appealed to me somewhat was one in which he submitted that this was an example of the rule laid down in *Brown* v. *Gregson* (1) ([1920] A.C. 860) and other cases, particularly a number of Scottish cases, that there was no case of election where the person whose property was concerned was incapable of giving effect to the intention of the devise or bequest by the testator or testatrix. In the present case it was contended that the defendant could not give effect to the bequest or devise in question, because he did not own the two freehold houses absolutely. He only has an interest in the proceeds of sale to the extent of a half, and the entirety of the houses could not be secured to the plaintiff except with the concurrence of the plaintiff himself and of the plaintiff's brother, who is not put to any election. That contention seemed to me to have some force, but I think that it cannot prevail in face of *Re Booth* (2) ([1906] 2 Ch. 321) and *Re Ogilvie* (3) ([1918] 1 Ch. 492). In *Re Booth* (2) ([1906] 2 Ch. at p. 325) the doctrine of election is stated very well by Swinfen Eady, J., citing a passage from the judgment of Sir George Jessel, M.R., in *Rogers* v. *Jones* (4) ((1876) 3 Ch.D. at p. 689):

> " ' If a person whose property a testator affects to give away takes other benefits under the same will, and at the same time elects to keep his own property, he must make compensation to the person affected by his election to an extent not exceeding the benefits he receives '."

A That is plainly the correct way of stating the principle. It is not a question of forfeiture but simply a question of compensation.

It is true that *Re Booth* (2) was concerned principally with the question of the amount of compensation and the persons who were liable to compensate, rather than with the question who was put to election; but it seems to me that, in view of *Re Booth* (2), the contention of counsel for the defendant is not really sustain-
B able. The matter becomes even clearer if one looks at the decision of YOUNGER, J., in *Re Ogilvie* (3). There the testatrix attempted to deal with property which she owned in Paraguay, but, under the law of Paraguay, she could dispose only of one-fifth and the remaining four-fifths would be the portion of the obligatory heirs according to the law of Paraguay. It seems to me that the situation in that case and the observations of YOUNGER, J., are quite inconsistent with the
C contention put forward by counsel for the defendant, and, therefore, I must come to the conclusion that the doctrine of election does apply in the present case. To the extent of his half interest in the property of which the testatrix attempted to dispose, the defendant is put to his election whether to give effect, in so far as he can, to the whole of the terms of the will: that is to say, he may decide to elect in favour of the will (or "approbate", as the Scottish lawyers put it) and he
D would then have to give up the whole of his share in the property in question. On the other hand, if he decides to "reprobate", or elect against the will, he is under an obligation to compensate to a maximum which is limited, on the one hand, by the value of a half interest in the two houses in question and, on the other hand, by the total value of the interest which he takes under the provisions of the will. He has not yet elected, but it seems to me that he is bound, within
E a reasonable time, to decide one way or the other. I will declare, first, that the property of which the testatrix attempted to dispose by cl. 4 of her will is the two freehold houses in Beresford Road, Walthamstow, known respectively as No. 68 and No. 70, Beresford Road. I do not think that I need make a declaration in the terms of question (ii) of the summons. I will make a declaration that the defendant, Charles Dicey, is put to his election whether to affirm the terms of
F the said devise or compensate the plaintiff in accordance with the ordinary principles of election.

Declaration accordingly.

Solicitors: *Montlake & Co.* (for the plaintiff); *Craigen, Wilders & Sorrell* (for the defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

FISHER *v.* TAYLORS FURNISHING STORES, LTD.

[COURT OF APPEAL (Denning, Morris and Parker, L.JJ.), March 19, 20, 1956.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Proposed demolition and reconstruction of premises—Intention to use for landlord's own business—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 30 (1) (*f*), (*g*).

In September, 1955, the landlords bought two adjoining shops which were about 250 years old and near the end of their life. They intended to undertake the demolition of the premises for which it was necessary to obtain possession, to rebuild on the site and to occupy the new buildings for the purpose of their business as furniture retailers. They gave notice to the tenant of one shop terminating his tenancy on Dec. 25, 1955, under the Landlord and Tenant Act, 1954, and to the tenant of the other shop terminating her tenancy on Mar. 25, 1956. When the tenant of the first shop applied for a new lease under the Act they opposed the application under s. 30 (1) (f)* on the ground that they intended to demolish and reconstruct the premises. The county court judge held that the case was indistinguishable from *Atkinson* v. *Bettison* ([1955] 3 All E.R. 340) and ordered the grant of a new lease on the ground that the landlords intended to occupy the premises for the purposes of their business under s. 30 (1) (g) for which they were debarred from obtaining possession as purchasers of the property within five years.

Held: a new lease ought not to be granted since the landlords had satisfied the requirements of s. 30 (1) (f) by showing a genuine intention to demolish the premises, notwithstanding their intention also to occupy the newly constructed premises for the purposes of their business.

Atkinson v. *Bettison* ([1955] 3 All E.R. 340) explained and distinguished.

Appeal allowed.

[For the Landlord and Tenant Act, 1954, s. 30 (1), see 34 HALSBURY'S STATUTES (2nd Edn.) 414.]

Cases referred to:

(1) *Atkinson* v. *Bettison*, [1955] 3 All E.R. 340.

(2) *Smart* (*J. W.*) (*Modern Shoe Repairs*), *Ltd.* v. *Hinckley & Leicestershire Building Society*, [1952] 2 All E.R. 846; 3rd Digest Supp.

(3) *Cunliffe* v. *Goodman*, [1950] 1 All E.R. 720; [1950] 2 K.B. 237; 31 Digest (Repl.) 378, *5070*.

(4) *Young* v. *Bristol Aeroplane Co., Ltd.*, [1946] 1 All E.R. 98; [1946] A.C. 163; 115 L.J.K.B. 63; 174 L.T. 39; 38 B.W.C.C. 48; 2nd Digest Supp.

Appeal.

Appeal by the landlords from an order of His Honour JUDGE HOWARD, at Brentwood County Court, dated Dec. 14, 1955, granting to the tenant of shop premises a new lease under the Landlord and Tenant Act, 1954, s. 29 (1).

H. V. Lloyd-Jones, Q.C., and *Lord Vaughan* for the landlords.

J. Stirling, Q.C., and *J. W. Miskin* for the tenant.

DENNING, L.J.: This case concerns some old shop premises at No. 72, High Street, Brentwood. In 1941 the then owner let the premises to a Mr. Townend for one year and thereafter from year to year at a rent of £30 a year. In 1949 Mr. Townend assigned this tenancy to Mr. Fisher, the tenant, who has since carried on business on the premises as a retailer of electrical goods. Next door, at No. 74, there was a wool shop belonging to the same owner and let to a Miss Goodman. On June 22, 1954, the then owner gave notice to quit to the tenant expiring on Dec. 25, 1954. In September, 1954, the owner put both Nos. 72 and 74 up for auction and they were bought by Taylors Furnishing Stores, Ltd., the landlords. In October, 1954, the Landlord and Tenant Act, 1954, came into operation and automatically extended the tenancy of each shop until the landlords gave notice of termination in accordance with the Act. On June 10, 1955, the new owners gave notice to the tenant terminating the tenancy on Dec. 25, 1955. The tenant duly applied for a new lease. The landlords opposed the application on the ground that they intended to demolish and reconstruct the premises. They have also given notice to terminate Miss Goodman's tenancy of the next shop, No. 74, on Mar. 25, 1956. They wish to obtain possession of both Nos. 72 and 74, pull them both down, and put up a new shop for their furnishing business at a cost of some £20,000. The premises are about 250 years old and are very near the end of their useful life. They have no historic interest, and in any case they ought to be demolished in about five years' time.

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* The terms of this paragraph are printed at p. 80, letter I, post.

The judge made the following findings of fact:

> " 1. That on the determination of the tenancy at Christmas 1956 the respondent landlords do intend to demolish the whole of No. 72. 2. That they cannot reasonably do so without obtaining possession of the holding. 3. That their object in demolishing is not to occupy the old building but to rebuild on the site and to occupy the new buildings for the purpose of their business as furniture retailers. 4. That they would not have bought either 72 or 74 unless they had had that ultimate object in mind. 5. That while they intend to pull down both buildings, they would immediately pull down 72 in the hope of obtaining possession in March next of No. 74. 6. That even if they were ultimately frustrated in their desire to obtain possession of No. 74 they would nevertheless pull down No. 72 and make a new building there for their own purposes with some inevitable modification in their plans."

On those findings it would seem clear that the landlords have satisfied all the requirements of s. 30 (1) (f) of the Act, but the judge went on to say:

> " It is impossible for me to distinguish this case from *Atkinson* v. *Bettison* (1) ([1955] 3 All E.R. 340) and therefore I must hold, however reluctant I feel to do so, that the present application [for a new lease] succeeds."

He granted the tenant a new lease for five years at £500 a year.

We have to consider, in these circumstances, the decision of this court in *Atkinson* v. *Bettison* (1). I am sorry to find that that decision has given rise to difficulties, and, inasmuch as I was a party to that decision, I should like to explain it. The correct ground of the decision was that the proposed work was not "substantial" within s. 30 (1) (f); but the court considered also s. 30 (1) (g) and (2), which says that, if the landlord wants to get possession for his own purposes, he must have been owner for the last five years. In this connection, the court gave an emphatic warning against allowing a landlord too easily to escape from the five-year rule. That is the full extent of *Atkinson* v. *Bettison* (1) and it should not be taken to decide anything more. I there said that (ibid., at p. 342):

> ". . . [the landlord] should not be allowed to circumvent that provision [the five-year rule] by putting forward a secondary purpose as though it were the main purpose."

The sort of case which I had in mind was where a landlord wants to get possession of a shop for his own business and for that reason buys it over the tenant's head a year or so before the lease comes to an end. He knows that he cannot oppose a new lease under s. 30 (1) (g) because he bought the property less than five years before the end of the tenancy. So he puts forward a case for reconstruction under s. 30 (1) (f), hoping to get possession on that ground. In such circumstances the court must be careful to see that s. 30 (1) (f) is fully satisfied before it allows him to get possession. For this purpose the court must be satisfied that the intention to reconstruct is genuine and not colourable; that it is a firm and settled intention, not likely to be changed; that the reconstruction is of a substantial part of the premises, indeed so substantial that it cannot be thought to be a device to get possession; that the work is so extensive that it is necessary to get possession of the holding in order to do it; and that it is intended to do the work at once and not after a time. Unless the court were to insist strictly on these requirements, tenants might be deprived of the protection which Parliament intended them to have. It must be remembered that, if the landlord, having got possession, honestly changes his mind and does not do any work of reconstruction, the tenant has no remedy. Hence the necessity for a firm and settled intention. It must also be remembered that the Act is intended for the protection of shopkeepers, and that this protection would be nullified if a big concern could buy the property and get possession by putting in, say, a new shop-front. Hence the necessity for the work being substantial.

Whilst I adhere to the view that the landlord should not be allowed to circumvent the five-year rule by putting forward a colourable case of reconstruction, nevertheless I think that it is going too far to say that the work of reconstruction must be the primary purpose. The word " primary " is taken from the judgment of this court in *J. W. Smart (Modern Shoe Repairs), Ltd.* v. *Hinckley & Leicestershire Building Society* (2) ([1952] 2 All E.R. 846). It was perfectly accurate in that connection. The Leasehold Property (Temporary Provisions) Act, 1951, contained temporary provisions which only extended the lease for a year or two, and so a landlord ought not to be allowed to get possession unless there was an overpowering necessity for the work to be done at once. The Act of 1954 contains permanent provisions to which different considerations apply.

In many cases the landlord will have two purposes, both of which are genuine and important: the one is to get possession for his own business, and the other is to reconstruct the premises. He does not lose the benefit of s. 30 (1) (f) simply because he bought the premises less than five years before. Suppose a man buys up derelict premises and the only sensible thing is to pull them down at once and re-build. If he intends to let them to a new tenant, he clearly can rely on s. 30 (1) (f). He should not be debarred from so doing simply because, instead of letting them, he intends to occupy them himself. The legal position is made clear by s. 31 (1), which says that, if the landlord establishes *any* of the grounds set out in s. 30 (1), a new lease must be refused. The fact that he cannot establish one ground does not prevent him from relying on another.

Applying these principles, I think *Atkinson* v. *Bettison* (1), properly understood, did not prevent the judge giving effect to the view which he had formed. I think the appeal should be allowed and a new lease refused.

MORRIS, L.J.: The learned county court judge made clear findings of fact. My Lord has read the tabulated reasons which are recorded in the judgment of the learned county court judge and therefore I do not repeat them. On those findings, the ground of opposition referred to in s. 30 (1) (f) of the Landlord and Tenant Act, 1954, was in my judgment established. Section 30 (1) (f) reads:

> " that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding."

The opening words are to be noted—the words " that on the termination of the

A current tenancy the landlord intends ". There must, therefore, be an intention and it must be an intention which in point of time is related to the termination of the current tenancy. It seems to me that the intention must be to do one of the following things: (i) to demolish the premises comprised in the holding; or (ii) to reconstruct the premises comprised in the holding; or (iii) to demolish a substantial part of the premises comprised in the holding; or (iv) to recon- B struct a substantial part of the premises comprised in the holding; or (v) to carry out substantial work of construction on the holding; or (vi) to carry out substantial work of construction on a part of the holding. If the landlord prove an intention to do one of those things, and to do it on the termination of the current tenancy, he must then prove that he could not reasonably do it without obtaining possession of the holding. It is to be noted that in s. 23 (3) C is a definition of the expression " the holding ", which is as follows:

> " In the following provisions of this Part of this Act the expression ' the holding ', in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business D by reason of which the tenancy is one to which this Part of this Act applies."

Section 31 (1) provides:

> " If the landlord opposes an application under s. 24 (1) of this Act on grounds on which he is entitled to oppose it in accordance with the last foregoing section and establishes any of those grounds to the satisfaction of E the court, the court shall not make an order for the grant of a new tenancy."

Words to be noted are " and establishes any of those grounds to the satisfaction of the court ". In the present case the first two findings of the learned county court judge were as follows:

> " 1. That on the determination of the tenancy at Christmas, 1955, F the respondent landlords do intend to demolish the whole of No. 72. 2. That they cannot reasonably do so without obtaining possession of the holding."

Why then should the landlords not succeed in opposing their tenant's application ? Counsel for the tenant submits two reasons. In the first place he submits that a landlord can only succeed in his opposition under s. 30 (1) (f) G if the proposed works owe their planning and inception to the dictates of sound estate management, or, stated otherwise, if, viewed in detachment and unrelated to any intention to occupy, the landlord has the objective aim of protecting the asset of which he is owner. But I do not find in the section any wording which warrants these submissions. The landlord must show that he has an intention as laid down. If he shows that he has that intention and that H he could not reasonably carry it out without obtaining possession of the holding, then he succeeds in his opposition.

In the second place, counsel submits that the decision in *Atkinson* v. *Bettison* (1) is of assistance to him. In my judgment, it is not. That case must be read in relation to its own facts. It was a case where there was an attempt to circumvent the provisions of the Act. It cannot be interpreted in a way which I would run counter to the language of the Act. The case might have been decided solely on the ground that there was evidence to support the finding of the county court judge that the works proposed did not constitute a reconstruction of a substantial part of the premises. It was a case where the landlord wanted to occupy the premises himself in order to carry on his business there. He could not rely on s. 30 (1) (g) because he had not owned for five years. His case was, therefore, put forward under s. 30 (1) (f). In dealing with his appeal, this court made reference to an earlier decision of the court in *J. W. Smart (Modern Shoe Repairs), Ltd.* v. *Hinckley & Leicestershire Building Society* (2), which was a case arising under the Leasehold Property (Temporary Provisions) Act, 1951. Citations were made from the judgments there delivered. When analysed it seems to me that the passages cited had reference to the question whether the landlords had proved what it was necessary for them to prove. So in *Atkinson* v. *Bettison* (1) the citations were similarly directed to that question. In *Smart's* case (2) the statutory provision in question (s. 12 (3) (c) of the Act of 1951) was as follows:

> "that the landlord reasonably requires possession in order that the premises the subject of the expiring tenancy, or a substantial part of those premises, may be demolished or reconstructed."

Sir Raymond Evershed, M.R., said ([1952] 2 All E.R. at p. 848):

> "When, however, we come to para. (c) it is said (as regards the reasonableness there imported) that it is particularly referable to the landlord's side of the matter, so to speak. The language is: 'the landlord reasonably requires', and counsel for the building society put it somewhat in this fashion, that the requirement must not be capricious, but for good sound business reasons. I find it unnecessary to attempt anything by way of a definition (which would, perhaps, but tend to confuse), for the learned judge has made it plain that, whether or not in other respects the landlords were reasonable . . . it cannot be said that the possession of these premises is required in order that they may be demolished or re-constructed."

In other words, the landlords had not proved that they reasonably required possession in order that the premises or a substantial part of them might be demolished or reconstructed. Later the Master of the Rolls said (ibid., at p. 849):

> "When the evidence is examined, I think it is plain that that kind of condition is not satisfied. It is quite true that, if possession of Smart's shop is obtained, by the necessary internal re-arrangements, including some structural work, the office premises, now, no doubt, somewhat cramped, of the building society will be expanded and made much more commodious, and all the more so since their agent . . . appears to carry on, in addition to acting on behalf of the building society, the independent profession of an estate agent or an accountant on the premises. But, as the judge himself has stated, this work of adaptation with its structural components is, after all, but ancillary to the desire of the landlords themselves to occupy the shop and to make that occupation more commodious, and it is, I think, untrue to say on the evidence, in the ordinary use of language, that there is here in immediate prospect a re-construction scheme. As the witnesses conceded, though the plans have been prepared, that is as far as the matter has progressed. There is no evidence that any costing has been done, and, indeed . . . the architect, said that he has not been asked to cost the work . . . That vital matter has not yet been decided . . . It is obvious, therefore, that the question of this work is still in a very early stage, and as I think (and as the learned judge said) it becomes impossible to say that to grant an extension of Smarts' occupation for twelve months could, in any proper sense of the term, stand in the way of or defeat a re-construction."

Again it seems to me this shows that the landlords had not proved what it was necessary for them to prove. The Master of the Rolls later quotes (ibid.) the two following passages from the judgment of the county court judge: first,

> "The tenants say that the landlord must show that he requires possession for the purposes of re-construction, and that such requirement is reasonable. The sub-section does not say that the landlord is entitled to possession if he reasonably requires it for his own occupation. There is no provision in the Act comparable to provisions in the Act of 1927 and the Rent Restrictions

> Acts, that a landlord who reasonably requires possession for his own occupation is entitled thereby to defeat an application for a new tenancy . . ."

And, secondly (ibid.):

> " In my view, the construction placed on the sub-section by the tenants is the correct one. . . . I think that in the present case the primary and real object for which the respondents require possession of these premises is for occupation by Cockshaw [the agent], and that the reconstruction contemplated by them is only ancillary to that occupation, and is, therefore, not the real reason for requiring possession."

If the landlords' real reason for wanting possession was that they wanted to occupy them, then they failed to prove that their reason was that they reasonably required possession for purposes of demolition or reconstruction. The phrases which have their origin in the judgment of the learned county court judge in *Smart's* case (2) and which were repeated and were employed in *Atkinson* v. *Bettison* (1) are only of assistance where employed in the process of deciding whether necessary proof is forthcoming. Where, as in s. 30 (1) (f), proof of an intention is to be supplied, and of an intention related to a particular time, then the genuineness of a declared intention may have to be decided. Considerations as to what may be a landlord's " primary purpose ", or his " real intention ", or his " main purpose ", or his " secondary purpose ", or his " real reason " (to quote phrases which have been used) are only of relevance and assistance in the course of deciding whether the landlord has proved that he genuinely has an intention of doing one of the things specified in s. 30 (1) (f), and of doing it on the termination of the current tenancy. If the landlord proves his intentions to the satisfaction of the court, and proves that in order to carry them out he must have possession of the holding, then his opposition succeeds, and it matters not that after demolition or reconstruction or construction according to his proved intention he proposes himself to be in occupation; but his intentions under s. 30 (1) (f) must be genuine and not spurious or specious, and they must be to do what the words of the section describe, and to do it at the time denoted.

If a case occurs in which it appears that a landlord had a desire to obtain possession for his own occupation and had no thought at all of making any alteration to the premises, but if, after realising that, because he had not owned for five years, he could not oppose an application of his tenant for a new lease, he then proclaimed an intention to reconstruct, the court would have to decide whether the newly proclaimed intention was genuine. It certainly could be entirely genuine even though it owed its birth to a realisation of the effect of s. 30 (2) on a desire and intention coming within s. 30 (1) (g); but the circumstances would call for careful examination. Intentions can easily be asserted: their genuineness must be established. In such examination the only inquiry would be and must be whether the landlord has proved an intention which brings him within the language of s. 30 (1) (f). Any consideration of primary and secondary purposes, where any such consideration can occur and is helpful, must always be subordinate to an inquiry directed to the actual words of the section.

Accordingly I would allow the appeal.

PARKER, L.J.: I have come to the same conclusion. So far as this appeal is concerned, the relevant provisions of the Landlord and Tenant Act, 1954, are s. 29 (1), s. 30 and s. 31 (1). Section 29 (1) provides that:

> " Subject to the provisions of this Act, on an application under s. 24 (1) of this Act for a new tenancy the court shall make an order for the grant of a tenancy comprising such property, at such rent and on such other terms, as hereinafter provided."

Section 30 (1) provides:

> " The grounds on which a landlord may oppose an application under s. 24 (1) of this Act are such of the following grounds as may be stated in the landlord's notice under s. 25 of this Act or, as the case may be, under s. 26 (6) thereof, that is to say . . ."

And thereafter are set out seven grounds of opposition, many of which leave a certain discretion in the courts; others do not. The only two grounds relevant to this appeal are contained in para. (f) and para. (g). Paragraph (f) is:

> " that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding."

Paragraph (g) is:

> " subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence."

By sub-s. (2) a landlord is debarred from relying on para. (g) if, broadly speaking, he has become the landlord within the preceding five years. Finally, s. 31 (1) provides that:

> " If the landlord opposes an application under s. 24 (1) of this Act on grounds on which he is entitled to oppose it in accordance with the last foregoing section and establishes any of those grounds to the satisfaction of the court, the court shall not make an order for the grant of a new tenancy."

From the scheme of the Act as there laid down I should have thought that it was clear, apart from authority, that, if any of those grounds of objection is established, the tenant's application for a new lease must fail. Each ground is entirely separate and independent, and each, if proved, entitles the landlord to succeed. Thus, if the ground specified in para. (f) is proved to the satisfaction of the court, it matters not to what use the landlord ultimately intends to put the holding. He may intend to let it when the work is done to a third party; he may intend ultimately to occupy it himself for his own business; or he may not have made up his mind at all. To suggest that, if his intention is ultimately to occupy it himself and he cannot by reason of s. 30 (2) rely on para. (g), he is thereby debarred from relying on para. (f), is to apply a proviso to the operation of para. (f) which is not there and for which there is no warrant. Of course, if he finds himself debarred from relying on para. (g) and is forced to rely on para. (f), his task will not be an easy one; it will at once be suspected that his alleged intention is not genuine and that it is merely put forward to circumvent his inability to rely on para. (g). But, assuming that he satisfies the court that the intention is genuine, I can see no reason why he should be debarred from relying on para. (f). To succeed, however, he must establish his case under the paragraph. Thus he must satisfy the court, not only that the intention is genuine, but also that it was firm and settled, and that (to use the words in *Cunliffe* v. *Goodman* (3), [1950] 1 All E.R. at p. 725), it had " moved out of the zone of contemplation—out of the sphere of the tentative, the provisional and the exploratory—into the valley of decision ".

He must further prove, not only that he intends to demolish or reconstruct, as there set out, but also that " he could not reasonably do so without obtaining possession of the holding ". This latter stipulation qualifies the nature and extent of the work. If, however substantial the operation, it can be done with the tenant still in possession, the landlord has not made out his ground of objection. Thus, if it is shown that the landlord intends to occupy the holding

A at once for the purposes of his business and thereafter, while he is carrying on business, to do substantial work, he has not made good his ground of objection. For, if it is reasonably possible to do the work while he is in occupation, it is equally reasonably possible for him to do it while the tenant is in occupation.

Counsel for the tenant, however, urged that, in order to rely on para. (f), the landlord must show that his intention to do the work is based on principles
B of good business management or of sound economics. Again I can see no warrant for introducing any such implied limitation on the express words of the paragraph. No doubt if a landlord alleged an intention to pull down perfectly sound and useful buildings, that intention would be suspect and make it harder for him to establish the genuineness of his alleged intention, but it is another thing to say that, however genuine his intention, he cannot succeed unless he can show
C that the proposed work is consistent with good business management.

In the present case, the county court judge has found, and indeed it is conceded, that the landlords genuinely intend to demolish the premises, which clearly cannot reasonably be done without obtaining possession of the holding. For the reasons I have given, I cannot think that it can make any difference that the landlords ultimately intend to occupy the holding for the purpose of
D their business. The county court judge, however, held and it was urged before us that the question was concluded by authority against the landlords. It was said that this court in *Atkinson* v. *Bettison* (1) had, to use the words of VISCOUNT SIMON in *Young* v. *Bristol Aeroplane Co., Ltd.* (4) ([1946] 1 All E.R. 98 at p. 110), ". . . pronounced on a point of law which necessarily covers a later case coming before the court . . ." namely, the present case.

E Having regard to what my Lords have said about *Atkinson* v. *Bettison* (1), with which I entirely agree, I do not propose to consider the words used in that case in detail. It is enough for me to say that I am quite clear that that case cannot be read as laying down that, where a landlord desires ultimately to occupy the holding, but cannot rely on para. (g), he is automatically debarred from relying on para. (f), even though he proves that his genuine and settled intention
F is to demolish the whole of the premises forthwith on the determination of the current tenancy.

I would allow the appeal.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Bird & Bird*, agents for *H. J. Jefferies & Co.*, Southend-on-Sea (for the landlords); *Stamp Wortley & Co.*, Brentwood (for the tenant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

R. *v.* MARTIN AND OTHERS.

[Central Criminal Court (Devlin, J.), March 21, 22, 1956.]

Criminal Law—Jurisdiction—British aircraft outside England—Unlawful possession of raw opium—Plea to jurisdiction before arraignment—Indictment quashed—Civil Aviation Act, 1949 (12, 13 *&* 14 *Geo.* 6 *c.* 67), *s.* 60, *s.* 62 (1)—*Dangerous Drugs Regulations,* 1953 (*S.I.* 1953 *No.* 499), *reg.* 3.

By the Civil Aviation Act, 1949, s. 62 (1), any offence whatever committed on a British aircraft is, for the purpose of conferring jurisdiction, deemed to have been committed in any place where the offender may for the time being be.

The defendants, who were employed as part of the personnel on British aircraft, were charged on indictment with offences against the Dangerous Drugs Act, 1951, and with being in unlawful possession of drugs contrary to the Dangerous Drugs Regulations, 1953, reg. 3, between Jan. 1, 1954, and Aug. 18, 1955, on British aircraft. It was alleged that they took quantities of raw opium from Bahrein to Singapore, and it was conceded both that none of the British aircraft was in England at a time when the accused were alleged to be in unlawful possession of opium and that the offence created by reg. 3 itself applied only to acts done in England*. Before the defendants were put up to plead it was submitted on their behalf that the indictment should be quashed because the court had no jurisdiction to try the offences charged.

Held: section 62 (1) of the Civil Aviation Act, 1949, on its true construction did not apply unless the acts alleged to have been done, considered apart from the enactment, constituted an offence; therefore, as it was conceded that the acts alleged in the present case were not, if considered apart from s. 62 (1), a breach of reg. 3 of the Dangerous Drugs Regulations, 1953, as they were not done in England, s. 62 (1) had no application, and accordingly the depositions did not disclose that any criminal offence had been committed, the committal was bad and the indictment must be quashed.

Per Curiam: a distinction may be drawn between offences which are crimes wherever they are committed (such as murder or theft) and offences which are crimes only if they are committed in a particular place. Over acts which are offences wherever they are done s. 62 (1) of the Civil Aviation Act, 1949, may give jurisdiction to the English courts (see p. 92, letter F, and p. 93, letter C, post).

[**Editorial Note.** Section 62 of the Civil Aviation Act, 1949, and its predecessor s. 14 of the Air Navigation Act, 1920, have been open to two constructions. They may have been directed to the venue for prosecutions or they may have conferred substantive criminal jurisdiction in relation to acts in British aircraft wherever the aircraft might be at the time when the act was done. Acts done on board a British ship are subject to the criminal jurisdiction of the English court, subject to exception in the case of acts done within the territorial waters of foreign states and done in pursuance of lawful orders of the foreign state; see 10 Halsbury's Laws (3rd Edn.) 319, 321. The present case shows that the law is not the same as regards acts done on British aircraft. Murder and certain other offences committed outside the United Kingdom are by statute cognisable by the English courts; see 10 Halsbury's Laws (3rd Edn.) 324.

As to jurisdiction over offences committed in British aircraft out of England, see 5 Halsbury's Laws (3rd Edn.) 17, para. 22, note (f).

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* Regulation 3 applies, it is thought, throughout Great Britain (cf. reg. 39 of the Dangerous Drugs Regulations, 1953), but for the purposes of the present case it was immaterial whether the regulation applied to the part of Great Britain which is outside England.

As to jurisdiction in respect of crimes committed out of England, see 10 Halsbury's Laws (3rd Edn.) 322 et seq.

For the Civil Aviation Act, 1949, s. 60, s. 62, see 28 Halsbury's Statutes (2nd Edn.) 252, 253; and for the Dangerous Drugs Act, 1951, s. 4, see 30 Halsbury's Statutes (2nd Edn.) 228.]

Motion to quash indictment.

The defendants, Matthew Martin, John William Marns, and George Bellamy, were charged on indictment with conspiring with certain persons unknown to contravene provisions of the Dangerous Drugs Act, 1951, and the Dangerous Drugs Regulations, 1953, between Jan. 1, 1954, and Aug. 18, 1955, in Hertfordshire, Middlesex, and elsewhere and on British aircraft by having in their possession raw opium. They were further charged with being in unlawful possession of drugs contrary to the Dangerous Drugs Regulations, 1953, reg. 3. It was alleged that while employed on British aircraft they were responsible for carrying raw opium from Bahrein to Singapore. Before the defendants were put up to plead counsel on their behalf submitted that the indictment should be quashed because the offences, if any, were committed outside England and therefore the court had no jurisdiction although it was conceded that the defendants were at the material time on a British aircraft.

Christmas Humphreys and *E. J. P. Cussen* for the Crown.

J. G. Foster, Q.C., and *A. R. Campbell* for the defendant Martin.

S. C. Silkin for the defendant Marns.

Melford Stevenson, Q.C., *A. S. Orr* and *W. A. B. Forbes* for the defendant Bellamy.

DEVLIN, J.: The prisoners at the Bar are arraigned on an indictment which alleges that they committed offences against the Dangerous Drugs Act, 1951, and the Dangerous Drugs Regulations, 1953, which were made under the Act. The gist of these offences is that as persons who were employed as part of the personnel on British aircraft they took raw opium from Bahrein to Singapore. For the purposes of this case it is quite irrelevant whether the export of opium from Bahrein or the import into Singapore is prohibited, because these men are not arraigned on an indictment which charges them with offences against the law of Bahrein or the law of Singapore, but one which charges them with offences against the law of England. I must assume, therefore, though in fact the assumption makes no difference, that the export and import of opium would not be contrary to any foreign law. The offence alleged under English law is a breach of reg. 3 of the Dangerous Drugs Regulations, 1953, which provides:

> " A person shall not be in possession of a drug unless he is generally so authorised . . . "

" A drug " includes raw opium, and reg. 3 is in that part of the regulations which is intended to control raw opium. It is not suggested that any of these men had any authorisation to be in possession of the drug. Accordingly, the offence alleged against each is simply this, as is stated in the indictment, that on a British aircraft he was in unlawful possession of raw opium.

The prosecution concede, for the purposes of the present case, that that regulation by itself applies only to acts committed in England (i.e., only to the possession of raw opium in England) and that if necessary the indictment could be framed more specifically to show that none of these British aircraft were in England at the time when the accused were alleged to be in unlawful possession of the opium. Accordingly counsel for the three defendants have all moved that I should quash the indictment on the ground that this court has no jurisdiction to try the offences alleged in it. Counsel for the prosecution relies on a section in the Civil Aviation Act, 1949, as giving the court jurisdiction to try this offence. The whole question which arises now for my determination is whether that section on its true interpretation does have the effect which the prosecution contends for it. It is s. 62 in the " General " part of the Civil Aviation Act, 1949. The marginal note is " Jurisdiction ", and sub-s. (1) reads as follows: A

> " Any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be."

That is to say, that if an offence is committed on a British aircraft then, if the B aircraft lands down at London airport and the prisoner is there arrested, the offence can be deemed to have been committed in London. That is the effect which the prosecution contend that the section has.

Counsel for the defence submit that the section is dealing only with the question of venue, or with the question of what court has jurisdiction to try an offence that has already been committed. If the prosecution is right, they say, C then s. 62 (1) must be construed as an enactment which itself creates the offence. That must be, the defence submit, the construction which has to be put on it if the prosecution is to succeed in its argument, because without this section it is conceded that there is no offence. The true meaning of s. 62 (1), however, the defence allege, is that it is only dealing with matters that are already offences by virtue either of some other statute or of some other provision of the law; D if the act is such that it is already an offence, then s. 62 (1) is simply providing for the venue. Thus (according to the defence) s. 62 (1) is really only procedural and in effect it is saying: " Here is an offence committed in a British aircraft; the British aircraft may be anywhere in the air at the time when the offence was committed—it may be over several countries, it may be over the high seas, it may be over several counties in England—and the question is bound to arise E what is the proper venue for the trial and which courts have jurisdiction." That is the problem and the only problem, the defence say, which s. 62 (1) is designed to solve.

That is the issue, therefore, between the parties. Stated in that way it becomes a point of very great importance far exceeding the importance of the enforcement of the Dangerous Drugs Regulations, 1953, important though they F may be. The prosecution submit that, if this section has not got the meaning which they contend that it has, there is no law on board a British aircraft; that those who are in it may do what they like with impunity so far as English law is concerned; because (with a few exceptions) s. 62 is the only section which applies the British criminal law to acts done in British aircraft. They point to the inconvenience of any construction which in effect meant that people could behave G in British aircraft with impunity. The defence, on the other hand, say that if the prosecution is right it applies the whole of the British criminal law to British aircraft; that means that, irrespective of his nationality, anybody who happens to be on board the aircraft, even perhaps when it is grounded for several days, has to be treated as if he had committed an act in this country and so might unwittingly offend against numerous regulations which now govern our lives H and about which he may be unlikely to know. For example, the defence submit that if a foreign doctor were taking a drug from one point to another in a British aircraft abroad, perhaps for some urgent medical purpose, he would commit an offence in this country because, although a duly qualified medical practitioner in his own country, he would not be duly qualified here and so not " generally authorised " to have possession of the drug.

I

These are the contentions on each side. It is a point of considerable importance and one which does not seem to have been decided before. It is not very satisfactory that it has to be decided now on motion, and summarily, because jurors and witnesses are waiting to proceed with the trial, if trial there is to be; and that if it is decided in favour of the defendants, no appeal lies. That is not a very satisfactory position, but it is part of the necessary procedure; therefore I must decide it, summarily, having had much assistance from the arguments of counsel in the case.

A It is convenient before I look again at s. 62 of the Civil Aviation Act, 1949, that I should consider the general background of the law against which, as it were, it has to be construed. I have had a number of statutes and cases cited to me which show what the position is in relation to offences that are committed abroad on foreign land. I think that the position is conveniently summarised in ARCHBOLD'S CRIMINAL PLEADING EVIDENCE AND PRACTICE (33rd Edn.), at p. 28, B where it says this:

> " No British subject can be tried under English law for an offence committed on land abroad, unless there is a statutory provision to the contrary . . . A foreigner is not liable under English law for an offence committed on land abroad . . ."

C That is the position under common law. Various statutes have modified the general principle so that English criminal law may apply to acts done abroad in specific cases. I shall refer to one which I can take as an example, the case of murder. There it is provided by the Offences against the Person Act, 1861, s. 9:

> " Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without, and D whether the person killed were a subject of Her Majesty or not, every offence committed by any subject of Her Majesty in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in any county or place in England . . . in which such person shall be apprehended or be in custody, E in the same manner in all respects as if such offence had been actually committed in that county or place . . . "

Generally speaking, even where the jurisdiction is extended by statute, it applies only to British subjects, whereas the contention of the prosecution here is, and must be, that it applies to every person on a British aircraft whether he be a British subject or not.

F How far does English criminal law apply to British ships which are outside this country? The position is dealt with generally, and sufficiently for my purpose, in ARCHBOLD'S CRIMINAL PLEADING EVIDENCE AND PRACTICE (33rd Edn.), at p. 33, where the author says this:

> " By the Offences at Sea Act, 1536, s. 1 [28 Hen. 8 c. 15], it was provided that treasons, felonies, robberies, murders and confederacies thereafter G committed in or upon the sea, or in any other haven, river, creek, or place, whereon the admiral had or pretended to have jurisdiction should be inquired of, etc., in such shores and places in the realm as should be limited for that purpose by the King's commission."

Then the author sets out various other statutes which have applied the same H method of trial principally to cases of piracy and so forth. Moreover all the Criminal Law Consolidation Acts of 1861 made provision for the trial of offences which were within the jurisdiction of the Admiralty to be tried as if they had been committed on land in England and to be dealt with in any county or place. at which the offender should be apprehended or be in custody in the same manner as if the offence had been committed in that county or place. I have not noticed I any case in which a statutory regulation of this sort has been applied to a British ship.

This is the position so far as foreign land is concerned and so far as British ships abroad are concerned. The similar problems that arise in relation to British aircraft are all left to be settled by the Civil Aviation Act, 1949, s. 62. The prosecution submit that, unless the section is given the meaning which they contend it should have, it is virtually meaningless. For, they say, at common law no act done outside England is an offence against English law. Statutes which provide for giving the court jurisdiction in the case of crimes committed on land abroad are immaterial, because unless the aircraft happened to be touched down at the time the act is not committed on land. The defence largely accept this; but they say that there are one or two statutes which are phrased widely enough to create an offence to which on their construction of it, s. 62 could apply. The Treachery Act, 1940, is one which makes specific provision for an offence committed on British aircraft. The earlier part of the Act lays down the offence of treachery, and s. 4 says this:

> " This Act shall apply to anything done . . . (c) by any person in the United Kingdom, or in any British ship or aircraft, not being a Dominion ship or aircraft ";

and s. 3 (3) provides:

> " A person charged with an offence against this Act who is in the United Kingdom may, whether or not the offence was committed in the United Kingdom or in any British ship or aircraft, be taken in custody to any county or place in the United Kingdom, and may be proceeded against, indicted, tried and punished in any county or place in the United Kingdom, as if the offence had been committed in that county or place, and for all purposes incidental to or consequential on the trial or punishment of the offence it shall be deemed to have been committed in that county or place."

Other examples are further to seek: counsel for the defendant Martin cited, as I think the best that he could do, the case of bigamy, which is not a very convincing one since bigamy is hardly a crime which is likely to be committed in the course of an air flight. The Offences against the Person Act, 1861, s. 57, provides:

> " Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony . . . ";

and there the word " elsewhere " might well be wide enough to cover the offence committed in a British aircraft. I see no reason why it should not be, and indeed I see no reason, although the point has not been argued, why offences under reg. 2 of the Dangerous Drugs Regulations, 1953, should not be the ones to which, on any view, the Civil Aviation Act, 1949, s. 62, applies. Regulation 2 (1) provides:

> " A person shall not supply or procure, or offer to supply or procure, to or for any person, including himself, whether in Great Britain or elsewhere, or advertise for sale, a drug . . ."

The prosecution say that, apart from these few statutes, s. 62 is the only enactment that can make a criminal act done in the air an offence. Accordingly the prosecution say that s. 62 must be given a construction which is wide enough to make it an offence-creating section. It begins with the words " Any offence whatever committed on a British aircraft ", and, since it thus starts by apparently assuming that the act to be considered is an offence before the words of the section operate on it, the prosecution say that the word " offence " must be construed as if it read " any act which if done in England would be an offence." No doubt so wide a construction would sustain the prosecution's submission.

The defence say that that construction is not permissible. They point to the large number of statutes (some of which I have already cited) which make that sort of provision in specific terms, saying that an act committed in such-and-such a place should be treated in the same way as if it had been an act committed in England or in the place where the man was apprehended or tried. Those are the sort of words, counsel for the defendant Martin submitted, that are used by the legislature when it intends to achieve the result the prosecution contends for here; such words are not present in this Act. As another example, the defence refer to the Criminal Justice Act, 1948, s. 31 (1), which provides:

> " Any British subject employed under His Majesty's Government in the

> United Kingdom in the service of the Crown who commits, in a foreign country, when acting or purporting to act in the course of his employment, any offence which, if committed in England would be punishable on indictment shall be guilty of an offence of the same nature, and subject to the same punishment, as if the offence had been committed in England."

The defence also pray in aid in support of their narrower construction the provisions of s. 60 of the Civil Aviation Act, 1949, which provides:

> "Any offence under any enactment to which this Part of this Act applies or under an Order in Council or regulation made under either any such enactment or this Part of this Act shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be."

Here similar words to those in s. 62 are used, so the defence submit, in a section which clearly is not doing more than providing for venue, because the offence there is not an offence that is created by the section; it is specified as an offence which is created under any enactment to which this Part of the Act applies or under any Order in Council or regulation.

Those are the contentions on either side, and both sides place great reliance on the inconvenience, and worse than inconvenience, that would be caused if the view on the other side were accepted. It is most unsatisfactory if there is to be complete lawlessness on British aircraft, but, on the other hand, it can hardly be satisfactory if a foreigner travelling from one place to another, thousands of miles from England, is to be held liable for infringing regulations about which he cannot have any possible knowledge at all. Where inconvenience is alleged on both sides, the only safe course, and perhaps the only safe course in any event, is to look at the words of the statute and apply a strict grammatical construction. I say " strict " construction, because this is a statute which, in the submission of the prosecution, is itself creating a criminal offence where no criminal offence would otherwise be, and also because it is a statute which is, if the prosecution are right, stretching the jurisdiction of the English courts to acts done abroad by persons who are not subjects of the Queen. Both those considerations make it proper that a strict construction should be applied to the words of the statute.

In my judgment, if the prosecution is to succeed, it can only succeed if a very free construction is applied to the words of the statute. It can only succeed if in lieu of the words " any offence whatever " there is read " any act which if done in England would be an offence ". That is a free construction. It is not a construction which emerges from the grammar of the Civil Aviation Act, 1949, and it is not one which I find myself willing to accept. What the Act appears to postulate is this, that before the section operates at all there must be inquiry whether any offence has been committed; if an offence has been committed, then s. 62 (1) of the Civil Aviation Act, 1949, determines the place where it should be tried. If, however, it is conceded, as it is in this case, that apart from s. 62 (1) no offence has been committed, it must follow that the section has no operation at all.

Having reached this conclusion, I wish to make it clear that I do not think that it necessarily follows that any act that is committed on board a British aircraft cannot be made subject to British criminal law. I propose to explain the distinction that I have in mind, not only because I must satisfy myself that this case does not fall within it, but also because it would be most undesirable if it were thought it necessarily followed from this decision that anything could be done on board a British aircraft with impunity.

There is a distinction in my judgment between what I may call the nature of an offence and the ingredients which have to be present before an offence is committed at all on the one hand, and, on the other hand, the question of what courts are to assume, or are to be given, jurisdiction when the offence has been

committed. I can perhaps explain the distinction more easily in relation to A
civil law than in relation to criminal law. Take the case of trespass that is
committed to land abroad. There is no doubt that the courts of England will
not exercise jurisdiction over such a trespass. But if the cases are examined,
which I have not had time to do, it may well be found that the grounds on
which the English court refrains are not that the act is not a trespass, but that
it is not a trespass over which the court will exercise jurisdiction. What the B
court is saying in effect is: " Yes, certainly this is a trespass, but because international comity requires it, the court will curtail the jurisdiction which it might
otherwise exercise ". If that is the right view, then the position is that a trespass
has been committed, that the offence is there, but the court will not assume
jurisdiction over it.

A similar distinction may be made in criminal law. In a crime that is the C
creation of statute, regard must be had to the terms of the statute for a definition
of the nature of the crime; and if the effect of the statute is limited territorially,
then so is the nature of the crime. Crimes conceived by the common law,
however, which are mostly offences against the moral law, such crimes as murder
and theft, are not thought of as having territorial limits. They are universal
offences. Murder is a crime whether done in France or in England; but if done D
in France the English courts would not under the common law assume jurisdiction to punish it because that would be an infringement of French sovereignty.
It looks as if this principle was at the back of the application of English law to
English ships on the high seas. It will have been observed from the terms of the
old statute which I quoted—the Offences at Sea Act, 1536—that it does not say
that certain things which if done in England would be treasons, felonies, robberies, E
and so on, are also to be treasons, felonies, robberies, and so on, if committed
on a British ship. The statute assumed that they were felonies and that the only
question was whether the admiral had jurisdiction over them.

A distinction may therefore be drawn between the sort of situation where an
act is to be regarded as an offence wherever it is committed and the sort of
statutory offence which is created only in relation to a particular place. Murders F
are offences against the moral law in the broad sense wherever they are committed; but if a statute provides that something may not be done in a public
house, it is an offence only if it is committed in a public house. No one would
treat it as an offence everywhere and say that the court assumes jurisdiction
over it only if it is committed in a public house. In the same way, if a statute
says that something shall be an offence if done in the county of Middlesex, G
it is an offence only if committed in the county of Middlesex and is not
an offence if committed anywhere else: again it is not a question of assuming jurisdiction only if it is done in Middlesex; it is a case of the statute that
creates the offence making it an offence only within limits. Where limits are
imposed as to place or in some other form, the limits prescribe the nature of
the offence. Broadly speaking, therefore, distinction can be drawn between H
offences which are offences against the moral law and to be regarded as wrong
wherever they are committed, and offences which are merely breaches of regulations that are made for the better order or government of a particular place
such as a public house, or a particular area such as the county of Middlesex, or a
particular country such as England.

Now with regard to the offence charged here—whatever may be the position in I
regard to other statutory offences—it is perfectly clear that this offence is an
offence only if it is done in England. Apart from the Civil Aviation Act, 1949,
s. 62 (1), that is conceded, and it is abundantly plain from the provisions of the
Dangerous Drugs Regulations, 1953, reg. 3 itself. In the first place it has to be
construed in contrast to reg. 2, which I have already read, which makes certain
things an offence whether in Great Britain or elsewhere. Secondly, it is quite
plain that if one looks at the terms of the general authorisation under reg. 3

they are terms which contemplate that the section is to have effect simply in Britain. The persons who are allowed to be in possession of it are all persons whom one would normally expect to be in Britain and who can get their qualifications for being in possession of it only in Britain*. Duly qualified medical practitioners means those duly qualified according to English law†; veterinary surgeons are specifically set out and mean those who are registered under the Veterinary Surgeons Act, 1948, and authorised sellers of poisons means those authorised under the Pharmacy and Poisons Act, 1933‡, and so on. It is abundantly plain, as it is indeed conceded, that this by its nature is only an offence if the act done takes place in England. That is the concession that is made, and very properly made, for the contrary could not be argued.

In my judgment, that concession is decisive in this case. Under the Civil Aviation Act, 1949, s. 62, the act alleged must be examined first of all; one must proceed on the basis that the section does not itself create any offence. Before applying the section the act alleged must be examined and the question must be asked: "Is this act an offence committed on a British aircraft ?" In the case of theft the answer might well be yes; for theft in the eyes of the law may be an offence wherever it is done and, therefore, an offence on board a British aircraft. Then the only question is whether the English courts are to have jurisdiction over an act which is an offence wherever it is done and s. 62 says that they are. If, however, in the case of a statutory offence, as here, it is found to be an offence only if it is done in Great Britain, then it is not an offence if it is committed on a British aircraft that is not in Great Britain, and consequently the section does not apply at all.

I am not saying that s. 62 applies to offences at common law. I have not heard that point argued and it may have to be argued hereafter. What I am saying is that s. 62 does not apply to a statutory offence which by the terms of the statute that creates it is local and not universal in character. Moreover, although counsel for the Crown has properly conceded in this case that by the statute which creates the offence here charged, it is an offence only if done in Great Britain, yet it does not necessarily follow that the prosecution will make a similar concession in respect of offences such as theft and murder that may arise hereafter. I wish, therefore, to make it clear that the decision which I have given is a decision which is to be regarded as applying to the particular offence which I have had to consider under the Dangerous Drugs Regulations, 1953.

For the reasons which I have given I shall quash the indictment. I do so on the ground that this is not an offence committed on a British aircraft, because the regulation creating the offence does not apply to acts done on British aircraft outside England. Accordingly, it follows that the depositions do not show or disclose that any criminal offence has been committed, and therefore the committal is bad, and on that ground I quash the indictment.

I do not, however, quash the indictment on the ground that I have no jurisdiction. I think that this court has got jurisdiction to try offences that are committed on British aircraft, and I think that that is the effect of s. 62 of the Civil Aviation Act, 1949.

Indictment quashed.

Solicitors: *Director of Public Prosecutions* (for the Crown); *Theodore Goddard & Co.* (for the defendant Martin); *Lewis Silkin & Partners* (for the defendant Marns); *J. H. Milner & Son* (for the defendant Bellamy).

[*Reported by* T. J. KELLY, ESQ., *Barrister-at-Law.*]

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* For the list of persons having general authority to possess raw opium, see reg. 4 of the Dangerous Drugs Regulations, 1953.

† The term "legally qualified medical practitioner" or any words importing a person recognised by law as a medical practitioner, when used in an Act of Parliament, mean a person registered under the Medical Acts (Medical Act, 1858, s. 34, as amended by the Medical Act, 1950, s. 35, Sch. 2).

‡ See reg. 37 (1) (c) of the Dangerous Drugs Regulations, 1953.

Re A DEBTOR (No. 66 of 1955), *Ex parte* THE DEBTOR *v.* THE TRUSTEE OF THE PROPERTY OF WAITE (a bankrupt).

[CHANCERY DIVISION (Harman and Danckwerts, JJ.), March 19, 26, 1956.]

Bankruptcy—Set-off—Mutual dealings—Guarantee of creditor's bank overdraft—Deposit of title deeds by guarantor—Bankruptcy of guarantor—Trustee paying off creditor's overdraft—Whether creditor entitled to set off debt due to him from guarantor against amount paid by trustee—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5 *c.* 59), *s.* 31.

Bankruptcy—Petition—Dismissal—Discretion of court—Sufficient cause—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5 *c.* 59), *s.* 5 (3).

In January, 1952, C. borrowed money from a bank in order to purchase goods which he supplied to W. on trade terms involving some months' credit. On Jan. 14, 1952, in consideration of the credit, W. guaranteed C.'s overdraft up to £200, and deposited with the bank title deeds of property belonging to him. During 1952, C. supplied goods to W. of the value of £201 14s. 6d. and W. paid £100 into C.'s bank. On Oct. 1, 1954, a receiving order was made against W. who still owed £101 14s. 6d. to C. On July 20, 1955, in order to obtain the release by C.'s bank of W.'s title deeds, W.'s trustee in bankruptcy paid to the bank £133 14s., the then amount of C.'s overdraft, and on Oct. 6, 1955, W.'s trustee obtained leave to sign judgment against C. for £133 14s. and £16 16s. costs. C. failed to comply with a bankruptcy notice issued in respect of the judgment debt, and on Dec. 22, 1955, W.'s trustee filed a petition in bankruptcy against C. based on the judgment debt. On Feb. 9, 1956, a receiving order was made against C. C. appealed, claiming to be entitled to set off (in W.'s bankruptcy) under the Bankruptcy Act, 1914, s. 31*, the sum which he alleged was owed to him by W. (£101 14s. 6d.) against the debt for which judgment was signed against him by W.'s trustee, so reducing the debt on which the trustee relied in the petition against C. to less than the £50 required to support the petition. The amount of W.'s indebtedness to C. was not proved or agreed.

Held: (i) C. had no right of set-off under s. 31 because the relevant date for the consideration of mutual debts was the date of the receiving order made against W., and at that date there was no debt due from C. to W., for the indebtedness arose only when, at a later date, W.'s trustee paid off C.'s overdraft, and the debt was due not to W. but to his trustee; the judgment debt was, therefore, a proper foundation for a bankruptcy notice.

Re Daintrey, Ex p. Mant ([1900] 1 Q.B. 546), *Peat* v. *Jones & Co.* ((1881) 8 Q.B.D. 147), and *Re Moseley Green Coal & Coke Co., Barrett's Case* ((1865) 34 L.J.Bcy. 41) distinguished.

Kitchen's Trustee v. *Madders* ([1949] 2 All E.R. 1079) and dicta of LAWRENCE and ROMER, L.JJ., in *Re Fenton, Ex p. Fenton Textile Assocn., Ltd.* ([1931] 1 Ch. at pp. 113, 116) applied.

(ii) the petition ought not to be dismissed under s. 5 (3)† of the Act of 1914 because (a) although C. might be entitled to set off W.'s debt to him against the proof of W.'s trustee in C.'s bankruptcy, yet W.'s indebtedness to C. had not been proved, (b) W.'s trustee, being a judgment creditor for £150, was prima facie entitled to have a receiving order made on his petition, and (c) even if the set-off were allowed in C.'s bankruptcy, a debt would remain.

Appeal dismissed.

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* For the terms of this section see p. 97, letter D, post.

† For text of this sub-section so far as relevant, see p. 100, letter E, post.

Bankruptcy—Bankruptcy notice—Form—Notice to pay trustee in bankruptcy—Statement as to capacity of claimant.

A bankruptcy notice was issued against C. in respect of a debt for which W.'s trustee in bankruptcy had obtained judgment and which had never been owed to W. personally. The bankruptcy notice gave notice to C. to pay " to the trustee of the property of [W.] a bankrupt " the judgment debt " claimed by him " or, among other things, to " satisfy this court that you have a counterclaim set-off or cross-demand against him ". The name of W.'s trustee did not appear in the notice. C. contended that the bankruptcy notice was defective because the words " as such trustee " or similar words were lacking.

Held: the notice was good because it was plain that the notice was given by W.'s trustee as such and not in his personal capacity.

[As to the date determining rights of set-off in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 482, para. 955; and for cases on the subject, see 4 DIGEST 411-414, *3719-3744*.

As to sufficient cause for refusal to make a receiving order, see 2 HALSBURY'S LAWS (3rd Edn.) 317-319, paras. 601-607.

For the Bankruptcy Act, 1914, s. 5 (3) and s. 31, see 2 HALSBURY'S STATUTES (2nd Edn.) 334, 365.]

Cases referred to:

(1) *Re A Debtor* (*No. 41 of 1951*), *Ex p. Debtor* v. *Hunter* (*Liquidator of Marvel Paper Products, Ltd.*), [1952] 1 All E.R. 107; [1952] Ch. 192; 3rd Digest Supp.

(2) *Re Fraser, Ex p. Central Bank of London*, [1892] 2 Q.B. 633; 67 L.T. 401; 4 Digest 324, *3038*.

(3) *Re Daintrey, Ex p. Mant*, [1900] 1 Q.B. 546; 69 L.J.Q.B. 207; 82 L.T. 239; *affd.* C.A., [1900] 1 Q.B. 571; 4 Digest 389, *3562*.

(4) *Peat* v. *Jones & Co.*, (1881), 8 Q.B.D. 147; 51 L.J.Q.B. 128; 4 Digest 402, *3661*.

(5) *Re Moseley Green Coal & Coke Co., Barrett's Case*, (1865), 34 L.J.Bcy. 41; 12 L.T. 193; 4 Digest 412, *3727*.

(6) *Kitchen's Trustee* v. *Madders*, [1949] 2 All E.R. 54; [1949] Ch. 588; *affd.* C.A., [1949] 2 All E.R. 1079; [1950] Ch. 134; 2nd Digest Supp.

(7) *Hole* v. *Cuzen*, [1953] 1 All E.R. 87; sub nom. *Bradley-Hole* v. *Cusen*, [1953] 1 Q.B. 300; 3rd Digest Supp.

(8) *Alloway* v. *Steere*, (1882), 10 Q.B.D. 22; 52 L.J.Q.B. 38; 47 L.T. 333; 47 J.P. 55; 4 Digest 394, *3609*.

(9) *Re Fenton, Ex p. Fenton Textile Assocn., Ltd.*, [1931] 1 Ch. 85; 99 L.J.Ch. 358; 143 L.T. 273; Digest Supp.

(10) *Re Mitchell*, [1913] 1 Ch. 201; 82 L.J.Ch. 121; 108 L.T. 34; 26 Digest 128, *915*.

(11) *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514; 62 L.J.Ch. 773; 68 L.T. 753; 26 Digest 146, *1099*.

(12) *Re Bankruptcy Notice* (*No. 171 of 1934*), [1934] Ch. 431; 103 L.J.Ch. 253; sub nom. *Re Judgment Debtor* (*No. 171 of 1934*), 151 L.T. 107; Digest Supp.

Motion.

Appeal by a debtor against a receiving order dated Feb. 9, 1956, made against the debtor by the registrar of the Brighton County Court on the petition of the respondent presented on Dec. 22, 1955. The debtor sought an order rescinding the receiving order made against him, dismissing the petition, and setting aside the bankruptcy notice on which the petition was founded.

Muir Hunter for the appellant, the debtor.
John K. Wood for the respondent, the petitioning creditor. *Cur. adv. vult.*

Mar. 26. **DANCKWERTS, J.**, read the judgment of the court: This is an appeal against a receiving order made by the registrar of the Brighton County Court on Feb. 9, 1956, against the appellant. The principal ground of the appeal is the refusal of the registrar to give effect to a set-off claimed to be effective under the provisions of the Bankruptcy Act, 1914, s. 31. The petitioning creditor in this case is the trustee of the property of Ernest Edward Waite, a bankrupt, and it is in the bankruptcy of Ernest Edward Waite that the set off is alleged to be operative.

The receiving order in Waite's bankruptcy was made in the Brighton County Court on Oct. 1, 1954. It appears that at that date the position was as follows. In January, 1952, the appellant had agreed to supply Mr. Waite with goods which had to be paid for by the appellant with cash, but were to be sold to Mr. Waite in the normal course of business (whatever that may mean)—presumably on trade terms with some months' credit. Accordingly the appellant had to borrow money from his bank. In consideration of the credit which he thus received, Mr. Waite agreed to guarantee the appellant's overdraft to an extent not exceeding £200. He gave this guarantee on Jan. 14, 1952, and apparently backed it by the deposit of title deeds of property of his. During 1952 the appellant supplied goods to Mr. Waite of the value of £201 14s. 6d., and Mr. Waite paid £100 into the appellant's bank, leaving a balance due to the appellant from Mr. Waite of £101 14s. 6d. That was the position on Oct. 1, 1954, or must for present purposes be taken to be the position. The amount of Mr. Waite's indebtedness has not been proved or agreed, but the appellant had a right of proof in the bankruptcy.

Waite's trustee, in the course of realising his assets and in order to complete a sale by him of the property mentioned above, had to obtain a release of the title deeds, and, accordingly, on July 20, 1955, he paid the sum of £133 14s., the amount of the appellant's overdraft, to his bank and secured the release of the deeds. On Sept. 9, 1955, Waite's trustee started an action in the Brighton District Registry of the High Court of Justice against the appellant to recover the sum of £133 14s. " paid for the defendant as his surety ". The appellant appeared and put in an affidavit when the plaintiff applied for judgment under R.S.C., Ord. 14, claiming to set off the sum of £101 14s. 6d. for the goods supplied to Mr. Waite and interest on the overdraft, but on Oct. 6, 1955, the district registrar (who was the same person as the registrar of the Brighton County Court) gave leave to Waite's trustee to sign judgment for the sum of £133 14s. and £16 16s. costs, a total of £150 10s.

On Oct. 15, 1955, Waite's trustee in bankruptcy obtained the issue of a bankruptcy notice to the appellant claiming payment of the sum of £150 10s. to " him " and referring to " a counterclaim set-off or cross demand against him ". It is contended on behalf of the appellant that this notice is defective because the words " as such trustee ", or something of that kind, showing that it is not a personal claim by the individual who is Waite's trustee, are lacking. We can dispose of this point at once by saying that in our view this objection is without foundation. It is quite plain that the notice is by Waite's trustee as such (his personal name does not appear) and the case in no way resembles *Re A Debtor* (*No. 41 of 1951*), *Exp. Debtor* v. *Hunter* (*Liquidator of Marvel Paper Products, Ltd.*) (1) ([1952] 1 All E.R. 107).

This bankruptcy notice was not complied with, and on Dec. 22, 1955, Waite's trustee filed a petition in bankruptcy against the appellant based on the judgment debt of £150 10s. due " to me ". The petition was plainly presented by the trustee of the property of Ernest Edward Waite, but an objection was taken to the form of the petition, similar to that taken in respect of the bankruptcy notice. Both these objections were rejected by the registrar on Jan. 20, 1956, and, in our view, his decision was plainly right.

On Feb. 2, 1956, at a further hearing the registrar was asked on behalf of the appellant to go behind his decision as district registrar in his judgment of Oct. 6, 1955, and allow the set-off claimed by the appellant. The point was that if the set-off was allowed the debt on which the petitioning creditor relied would be reduced below the sum of £50 required to support the petition. On Feb. 6, 1956, the registrar in a judgment declined to go behind his previous judgment. The ground for this judgment was that the proper way to test his previous judgment was by appeal and the debtor had not availed himself of this procedure. In this respect it seems that the registrar was undoubtedly wrong, as even if the debtor had appealed, and even if he had lost in the Court of Appeal, it would still have been open to the bankruptcy court to go behind the judgment and reopen the matter. This is clear from *Re Fraser, Ex p. Central Bank of London* (2) ([1892] 2 Q.B. 633).

A further hearing before the registrar took place on Feb. 9, 1956, and the receiving order now appealed against was made that day.

The first point for us is that which the registrar decided in the action and refused to reopen, viz., whether the appellant was entitled to rely on the provisions as to set-off, contained in s. 31 of the Act, in Waite's bankruptcy as against Waite's trustee. Section 31 provides:

> " Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively . . ."

The material date for the purpose of the set-off under this section is the date of the receiving order in Waite's bankruptcy, i.e., Oct. 1, 1954. At that date, the appellant had a right to prove for the debt due to him from Mr. Waite £101 14s. 6d. At that date, beyond the £100 which Mr. Waite had paid in respect of the goods purchased from the appellant, no payments had been made by Mr. Waite; he was a debtor for the balance due on the goods and he was a surety for the appellant's overdraft at the bank by reason of the guarantee which he had given. It is much later that Waite's trustee, in order to complete the sale of an asset of Waite's estate, is compelled to pay the appellant's bank £133 14s. Thus, while it is true that there had been mutual dealings between the appellant and Mr. Waite, there were at the date of Waite's receiving order no mutual debts to be set off. It appears to us to be a very odd result, if the expenditure by the trustee of £133 14s. of Waite's creditors' money, in order to complete the sale of an asset, enables the appellant to secure payment in full of the debt for which up to that time he had only a right of proof, while at the same time he has been freed from his overdraft at the bank. But this, it is said, is the result of the authorities.

Counsel for the appellant relied on *Re Daintrey, Ex p. Mant* (3) ([1900] 1 Q.B. 546). In that case, Mr. Daintrey, a solicitor, was indebted to Mr. Mant for £86. He then sold his practice to Mr. Mant under an agreement whereby Mr. Mant was to pay him a portion of the profits at the end of three years. A receiving order was made against Mr. Daintrey, at which date no profits had been earned. At the end of the three years a sum of £300 was found to be payable by Mr. Mant to Mr. Daintrey. It was held by the Court of Appeal that, though the date of the receiving order was the relevant date for the purposes of the section, the £86 and the £300 ought to be set off, because the amount of £300 was payable under an agreement which existed at the date of the receiving order, though the amount due was not ascertainable till later. This seems to us to be a different case from the present: there was an existing obligation by Mr. Mant to Mr. Daintrey at the date of the receiving order; it was merely the amount due which came to be quantified when the accounts were subsequently taken. A

Peat v. *Jones & Co.* (4) ((1881) 8 Q.B.D. 147) seems to us to present no difficulty. It is true that unliquidated damages for non-delivery of goods under a contract were set off against a claim for the price of the goods which had been delivered. But both claims arose out of the same contract, and it was merely a matter of quantification; and it seems, therefore, to be an obvious case for the B application of a set-off.

Re Moseley Green Coal & Coke Co., Barrett's Case (5) ((1865) 34 L.J.Bcy. 41) at first sight seems to give some support to the claim of a set-off. The facts, however, are very unusual. Mr. Corbett mortgaged coal mines to Mr. Lee, with Mr. Barrett as surety. Mr. Corbett then sold the equity of redemption to a company which covenanted to indemnify Mr. Corbett against the mortgage. C In order to satisfy Mr. Lee, the company gave him their promissory note for £7,000. The company subsequently went into liquidation. Mr. Barrett's sister took an assignment from Mr. Lee of the mortgage debt and all securities for it, including the company's note for £7,000. It appears that Mr. Barrett was liable as a shareholder and contributory of the company, and he took an assignment of the mortgage and the company's note for £7,000 from his sister and gave her D his own promissory note for £7,000. He then claimed to set off the liability of the company on the company's note for £7,000 against the claim by the liquidator for calls on his shares, and it was held by LORD WESTBURY, L.C., that the set-off applied. The basis of the decision was that Mr. Barrett as surety had before the liquidation a right to have the security transferred to him; his rights, therefore, accrued before the liquidation and as one of the securities happened to be the E company's promissory note he was held entitled to use it as a set-off. It is to be observed that in the present case, it was the surety who was insolvent (Waite), and it was not he who paid off the debt, but his trustee in bankruptcy after the date when the property of the surety had vested in the trustee. These circumstances seem to us to distinguish the present case from *Re Moseley Green Coal & Coke Co., Barrett's Case* (5). F

There are, on the other hand, authorities which seem to show that the set-off section is not applicable in circumstances like the present case. *Kitchen's Trustee* v. *Madders* (6) ([1949] 2 All E.R. 1079) was rather a complicated case. A trustee in bankruptcy was claiming arrears of rent for five quarters, three of which accrued after the date of the receiving order, and it was sought to set off G against this claim a large sum of damages (for which judgment had been obtained) for fraudulent misrepresentation. In the Court of Appeal a further claim to set off rent improperly overpaid by reason of the Rent Restrictions Acts was allowed to be put in. Some observations of COHEN, L.J. (ibid., at p. 1085) have been misunderstood, as pointed out by JENKINS, L.J., in *Hole* v. *Cuzen* (7) ([1953] 1 All E.R. 87 at pp. 88-90) in so far as they have been applied to the claim for H rents overpaid. The set-off of these was properly allowable against the trustee's claim for arrears of rent, as they arose out of the same transaction. But the real basis of the decision that, subject to this, no set-off was allowable against the trustee's claim in respect of the rent for the three quarters which accrued after the date of the receiving order, appears from the judgment of HARMAN, J., in the court below (*Kitchen's Trustee* v. *Madders* (6), [1949] 2 All E.R. at pp. 55, 56). I HARMAN, J., was only dealing with the claim to set off the judgment for damages for fraudulent misrepresentation (as the other claim had not then been put forward). He points out that the three quarters' rents had never been due to the bankrupt but had become due to the trustee in bankruptcy after the date of the receiving order, and so there was no such mutuality as would permit of a set-off of the judgment for damages against them. See also *Alloway* v. *Steere* (8) ((1882) 10 Q.B.D. 22).

The claim in the present case for a set-off also seems to be contrary to the statement of the law made by the Court of Appeal in *Re Fenton, Ex p. Fenton Textile Assocn., Ltd.* (9) ([1931] 1 Ch. 85). Mr. Fenton had guaranteed advances by certain banks to the Fenton Textile Association. The association went into liquidation and the liquidator lodged a proof against Mr. Fenton's estate in bankruptcy in respect of sums due from Mr. Fenton to the association. Mr. Fenton's trustee rejected the proof and claimed to set off the various sums which had been advanced by the banks to the association for which Mr. Fenton had given his personal guarantee. The banks had proved against Mr. Fenton's estate under the guarantee but had received nothing. It was held that inasmuch as none of these sums had in fact been paid by Mr. Fenton or his trustee to the banks, the trustee was not entitled, under the Bankruptcy Act, 1914, s. 31, to set off Mr. Fenton's contingent liability under the guarantees against the sums due by him to the association. Of course, in the present case Waite's trustee in bankruptcy has now paid off the guarantee. But the resemblance to *Re Fenton* (9) is in respect of the situation at the date of the receiving order. LAWRENCE, L.J., makes some observations on the position of a surety who has not paid anything (ibid., at p. 113):

> "The law as to the right of a surety to indemnity where the principal debtor is solvent is not in doubt. Until the surety is called upon to pay and does pay something under his guarantee, there is no debt or right at law at all; until then a surety's right is confined to a right to come into equity in order to get an indemnity against his liability to the principal creditor: see per PARKER, J., in *Re Mitchell* (10) ([1913] 1 Ch. 201 at p. 206). The form which the order takes in such case (as shown by *Wolmershausen* v. *Gullick* (11), [1893] 2 Ch. 514) is a declaration of liability, followed by an order upon the principal debtor to pay or secure the debt. Even a solvent surety is not entitled to an order for payment to himself of the amount of the debt, as such a payment would not discharge the principal debtor from his liability to the principal creditor; much less is the trustee of a bankrupt surety entitled to any such payment, as the money paid to him by the principal debtor would be distributable amongst the general creditors of the surety leaving the principal debtor liable to pay the debt due to the principal creditor."

If, as LAWRENCE, L.J., says, until the surety is called on to pay and does pay something under his guarantee, there is no debt or right at law at all, then at the date of the receiving order in Waite's bankruptcy (when payment in respect of the guarantee had not been made) there was no debt due to Mr. Waite which could be the subject of any set-off in respect of the moneys owed by Mr. Waite to the appellant for goods supplied. A debt due from the appellant did not arise until subsequently Waite's trustee made a payment to the bank. ROMER, L.J., puts a supposition which seems very pertinent to the present case ([1931] 1 Ch. at p. 116):

> "Let me now consider the case upon the supposition that Fenton became bankrupt, but the association remained solvent. The association would then have had to prove for the £436,000 in the bankruptcy. But could Fenton's trustee have set off his liability to the banks against such proof? In my opinion he could not. That there were mutual dealings between the association and Fenton resulting in the debt due to the association on the one hand and the liability of the association to indemnify Fenton against his liability to the banks on the other may be conceded. But there was nothing 'due' from the association to Fenton which could have been placed to Fenton's credit in the account that would have had to be taken under s. 31 of the Bankruptcy Act. A set off would have been equivalent to a payment by the association to Fenton's trustee for the general benefit of his creditors, leaving the association still liable to the banks. The

> A trustee's right against the association could have been no greater than Fenton's before his bankruptcy. He could only have obtained an order upon the association to discharge their indebtedness to the banks. That would have been the only way in which he could have compelled the association to discharge their contingent liability to Fenton's estate."

Now, if in this passage there is substituted for Fenton, Waite (the surety becoming B bankrupt) and, for the association, the appellant (the solvent principal debtor), the remarks of ROMER, L.J., exactly cover the present case. There was nothing due from the appellant to Mr. Waite at the date of the receiving order. It was only later, when the trustee in bankruptcy paid off the bank, that a debt became due from the appellant and that payment was made not by Mr. Waite but by the trustee, and out of assets which then were no longer vested in Mr. Waite but in C the trustee. It seems to us, therefore, that the decision in the action by Waite's trustee against the appellant was right in declining to admit the set-off. There was in fact no mutuality at the date of the receiving order in Waite's bankruptcy and the debt on which the action was founded was due not to Mr. Waite but to his trustee. It follows that the judgment was good and was a proper foundation for a bankruptcy notice which, therefore, could not have been set D aside: see *Re Bankruptcy Notice* (*No. 171 of 1934*) (12) ([1934] Ch. 431 at p. 438). The notice not having been complied with, the petition is, on the face of it, in order. That, however, is not an end of the matter. The Court of Bankruptcy is not bound to make a receiving order. Section 5 (2) provides that the court "may make a receiving order in pursuance of the petition". Under sub-s. (3):

> E "If the court . . . is satisfied . . . that for other sufficient cause no order ought to be made, the court may dismiss the petition."

It was argued that the petition ought to have been dismissed here owing to the following circumstance. It was said that in the appellant's bankruptcy Waite's trustee would have to prove for his debt, but that in that bankruptcy he could be met by the appellant's claim against him for the £101 due from Mr. Waite F and that if this were right the debt of the petitioning creditor would be reduced below £50 which would show that he ought never to have been allowed to proceed on his petition. There is certainly force in this submission, but we do not consider that we ought to refuse the order because of it. In the first place, the existence of the alleged debt of £101 has never yet been proved. The petitioner is a judgment creditor for £150 and, therefore, prima facie entitled to have an G order made on his petition. Even if the set-off be allowed in the appellant's bankruptcy, as to which we decide nothing today, there will remain a debt. The result may well be in the end that each party will be entitled to prove in the other's bankruptcy, a result we think more consonant with justice to the other creditors of each of them than any set-off. We therefore dismiss the appeal.

Appeal dismissed.

Solicitors: *Nye & Donne*, Brighton (for the appellant, the debtor); *Haslewood, Hare, Shirley Woolmer & Co.*, agents for *Bosley & Co.*, Brighton (for the respondent, the petitioning creditor).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

GILBERT (VALUATION OFFICER) *v.* S. HICKINBOTTOM & SONS, LTD.

[COURT OF APPEAL (Denning, Morris and Parker, L.JJ.), March 8, 9, 23, 1956.]

Rates—Rateable occupation—Rateable hereditament—Premises on opposite sides of highway—Bakery and repair depot—Whether one or two hereditaments.

The ratepayers carried on business as retail bakers at a retail bakery, which was fully equipped for making and packing bread and, working on the continuous belt system for sixteen hours in every day, produced over twelve million loaves per annum. It was essential that any breakdown in any part of the plant should be dealt with immediately to avoid interference with production and two bakery engineers and one bakery electrician were employed to carry out any necessary repairs, one being always present on the premises. The ratepayers also occupied a repair depot directly opposite across the adjoining highway of thirty-six feet, which was equipped with plant and used primarily for the repair and maintenance of their seventy-two commercial vehicles and four cars. The repair depot also contained the facilities for carrying out repairs to the bakery plant and machinery and its plant was used for the purpose. For rating purposes the valuation officer sought to assess the bakery and repair depot as two separate hereditaments, but the Lands Tribunal found on appeal that the use of the repair depot in connection with the bakery plant, although not forming the major portion of the work done there, was so essential to the efficient working of the bakery that they should be treated as one hereditament. On appeal,

Held: although two properties in the same occupation and used for one purpose but geographically separated should normally be treated as two separate hereditaments, yet the question whether they were so essentially one whole as to require to be treated as one hereditament where the separation was a public highway was a question of fact for the Lands Tribunal, and, as the tribunal had committed no error of law in arriving at its decision, that decision must be upheld.

North Eastern Ry. Co. v. *York Union* ([1900] 1 Q.B. 733) applied.

Glasgow University v. *Assessor for Glasgow* (1952 S.C. 504) distinguished.

Appeal dismissed.

[As to what constitutes a single rateable hereditament, see 27 HALSBURY'S LAWS (2nd Edn.) 361-363, paras. 791-793; and for cases on the subject, see 38 DIGEST 452-454, *191-202*.]

Cases referred to:

(1) *Spillers, Ltd.* v. *Cardiff Assessment Committee, etc.*, [1931] 2 K.B. 21; 100 L.J.K.B. 233; 144 L.T. 503; 95 J.P. 49; Digest Supp.

(2) *North Eastern Ry. Co.* v. *York Union*, [1900] 1 Q.B. 733; 69 L.J.Q.B. 376; 82 L.T. 201; 64 J.P. 437; 38 Digest 453, *193*.

(3) *Glasgow University* v. *Assessor for Glasgow*, 1952 S.C. 504; 45 R. & I.T. 375; 23 D.R.A. 332.

(4) *Re the Appeal of Bellamy, Hinckley Urban District Council, Respondents*, (1952), 45 R. & I.T. 691; 23 D.R.A. 192.

(5) *Spencer* v. *Thames Board Mills, Ltd.*, (1954), 47 R. & I.T. 809; 25 D.R.A. 261.

Case Stated.

The appellant valuation officer appealed to the Lands Tribunal against a decision of a local valuation court of the South Staffordshire Local Valuation Panel given on Nov. 19, 1953, rejecting appeals arising out of proposals made by the valuation officer to alter assessments in the valuation list for Wednesbury Borough as follows: (i) to delete an assessment of " Bakery, offices and premises ", Albert Street, Wednesbury, £620 net annual value; industrial purposes £561 net annual value, £140 rateable value; non-industrial purposes £59 net annual value, £59 rateable value, £199 total rateable value from Part II of the valuation list relating to industrial hereditaments; (ii) to insert an assessment of part of the premises as a separate hereditament described as " Bakery and premises ", at £470 net annual value, £117 rateable value in Part II of the valuation list; and (iii) to insert an assessment of the remainder of the premises as a separate hereditament described as " Repair depot " at £184 gross value, £150 rateable value in Part I of the valuation list relating to ordinary properties.

The respondent ratepayers were the owners and occupiers of the premises, at which they carried on business as retail bakers. The bakery and premises were on the south side, and the repair depot immediately opposite on the north side, of Albert Street. The ratepayers owned and occupied another building used as offices on the north side of Albert Street also immediately opposite the bakery, which was separately assessed and was not the subject of appeal. Albert Street was a highway, about thirty-six feet wide, repairable by the inhabitants at large, but no part of the land comprising it had been purchased by the local authority.

The bakery was fully equipped for making and packing the bread supplied by the ratepayers, who baked over twelve million loaves per annum. Production was on the continuous belt system and ran for sixteen hours in every twenty-four hours. It was essential that any breakdown in any part of the plant should be dealt with immediately if interference with production was to be avoided, since that would mean a shortage of bread for supply to customers. Two bakery engineers and one bakery electrician were therefore employed to carry out any necessary repairs to the machinery in the bakery, one being present on the premises throughout every twenty-four hours. It was essential that facilities should be available either on the bakery premises or very near to them indeed to enable repairs to the machinery to be carried out without delay.

The repair depot was primarily occupied in connection with the repair and maintenance of seventy-two commercial vehicles and four private cars owned by the ratepayers. It was equipped with the necessary plant for that purpose and a suitable staff was employed. In the repair depot were also provided the necessary facilities for carrying out repairs to the plant and machinery in the bakery and the plant in the repair depot was used by the bakery engineers and bakery electrician in the carrying out of the repairs. Some members of the repair depot staff were available for and were used in connection with their own class of work in the bakery. Sign painting and painting of notices in the bakery was done by painters employed in the repair depot. The fabrication of certain ironwork and machinery parts used in the bakery was carried out by workmen employed in the repair depot. If the repair depot was vacant and to let there would be no difficulty in letting it separately for one or other of several possible purposes.

The valuation officer contended: (i) that the bakery and repair depot were two separate hereditaments which ought to be assessed separately in the valuation list; (ii) that the bakery was an industrial hereditament and ought to be entered in Part II of the valuation list; (iii) that the repair depot was not an industrial hereditament in that it was a place used by the occupiers (the ratepayers) for the housing and maintenance of their road vehicles within the meaning of s. 3 (2) (b) of the Rating and Valuation (Apportionment) Act, 1928, and ought to be entered in Part I of the valuation list; and (iv) that the bakery and repair depot were not within the same curtilage or contiguous to one another within s. 3 (3) of the Act and that, as the repair depot was such a place as was referred to in s. 3 (2) (b) it could not be treated as part of a single factory or workshop comprising itself and the bakery under s. 3 (3). The ratepayers contended that the premises were in the same occupation and formed a single hereditament. Alternatively, they denied the valuation officer's contentions (iii) and (iv) and

A contended that the premises were either a single industrial hereditament or two separate industrial hereditaments.

The Lands Tribunal found that the first question to determine was whether the bakery and the repair depot were one or two separate hereditaments, which appeared to be a question of fact. Had the repair depot been used only for the repair and maintenance of road vehicles it would have held that they should be B treated as two hereditaments. But the tribunal was satisfied that the use of the repair depot in connection with the repairs of the bakery plant, although not forming the major portion of the work done in it, was so essential to the efficient working of the bakery that they should be treated as one hereditament despite the separation by a public highway. It therefore became unnecessary to consider the other contentions of the parties. The tribunal dismissed the appeal. C The valuation officer appealed to the Court of Appeal.

C. P. Harvey, Q.C., and *P. R. E. Browne* for the valuation officer.
Harold Williams, Q.C., and *J. F. Bourke* for the ratepayers.

Cur. adv. vult.

Mar. 23. **DENNING, L.J.:** The ratepayers are the owners and occupiers D of two properties in Wednesbury. These properties are separated by a public road called Albert Street, which is thirty-six feet wide. On one side of the road the ratepayers run a large bakery, which is fully equipped with machinery for making and packing bread. On the other side they have a repair depot which they use principally for the repair and maintenance of their seventy-two vehicles, but which they also use for repairing the plant and machinery in the bakery. In E this respect the repair depot is essential to the efficient working of the bakery itself.

The question for determination is whether the bakery and the repair depot are separate hereditaments for rating purposes or only one hereditament. The answer is very material, because, if they are one, the whole will be entitled to the benefit of industrial de-rating: whereas, if they are two, the bakery will be so F entitled but the repair depot may not.

The case therefore raises the important question: What is a separate hereditament for rating purposes ? The statutes contain no definition, but the practice which has prevailed for many years past warrants the following general rules :

(1) Where two or more properties are within the same curtilage or contiguous to one another, and are in the same occupation, they are as a general rule to be G treated for rating purposes as if they formed parts of a single hereditament. There are exceptional cases, however, where for some special reason they may be treated as two or more hereditaments. That may happen, for instance, when they are situate in different rating areas, or because they were valued at different times (see s. 3 (3) of the Rating and Valuation (Apportionment) Act, 1928); or because they were at one time in different occupations (see *Spillers, Ltd.* v. H *Cardiff Assessment Committee, etc.* (1), [1931] 2 K.B. 21, per AVORY, J., at p. 47); or because one part is used for an entirely different purpose (see *North Eastern Ry. Co.* v. *York Union* (2), [1900] 1 Q.B. 733).

(2) Where the two properties are in the same occupation but are not within the same curtilage nor contiguous to one another, each of them must as a general rule be treated as a separate hereditament for rating purposes: and this is the I case even though they are used by the occupier for the purposes of his one whole business. That was the position in the first four of the five rating cases considered in 1931 (determined together, see *Spillers, Ltd.* v. *Cardiff Assessment Committee, etc.* (1)). The two properties of the occupier were separated by the property of someone else, such as a dwelling-house, a canal or a railway. No one doubted that they should be treated as two separate hereditaments unless they could be said to be " contiguous " to one another, which the court held not to be the case.

(3) Where two properties are separated by a public highway, the surface of which is vested in the highway authority and the soil is vested in the occupier of the two properties, the position in general seems to me to be the same as if the two properties were separated by a canal, a railway or a dwelling-house occupied by somebody else. They are normally to be treated as two separate hereditaments for rating purposes. This was certainly assumed to be so in the fifth of the five rating cases (1) ([1931] 2 K.B. at p. 44). It was assumed that the properties on either side of the road should be separately rated unless they could be held to be " contiguous " within s. 3 (3) of the Act of 1928; and, on this point of " contiguous or not ", despite the admission made by counsel for the revenue officer, the court clearly indicated its view that in the ordinary way houses on opposite sides of the road were not contiguous. I agree with that view. The fact that the one occupier owns the subsoil of the road does not make them contiguous any more than if he owned the minerals underneath. It has nothing to do with the occupation.

Our present case comes within the third general rule. The two properties ought, therefore, prima facie, to be rated as two separate hereditaments. But this third rule is not inflexible. There are exceptional cases where two properties, separated by a road, may be treated as one single hereditament for rating purposes. That may happen when a nobleman's park, or a farm (when agricultural land was rated), or a golf course, is bisected by a public road. In such cases the two properties on either side of the road are so essentially one whole—by which I mean, so essential in use the one to another—that they should be regarded as one single hereditament.

Where does this case come ? Within the third general rule or the exception to it ? This is a question of degree and therefore of fact which is for the tribunal of fact, so long as it properly directs itself on the matter. Three cases were quoted to us where the tribunal of fact held that two properties on opposite sides of the road were two separate hereditaments although used as parts of one single undertaking. These cases are *Glasgow University* v. *Assessor for Glasgow* (3) (1952 S.C. 504), *Re the Appeal of Bellamy, Hinckley Urban District Council, Respondents* (4) ((1952) 45 R. & I. T. 691); *Spencer* v. *Thames Board Mills, Ltd.* (5) ((1954) 47 R. & I.T. 809). Those cases commend themselves to my mind, and I find it difficult to distinguish our present case from those on the facts. But there must be some distinction because the member of the Lands Tribunal had those cases well in mind, and he had the advantage of a view, which we have not. We can only reverse his decision if it was one to which he could not reasonably have come. I am not prepared to go so far and I would therefore dismiss the appeal.

MORRIS, L.J.: The bakery and the repair depot were entered in the valuation list as one hereditament. The local valuation court declined to delete the entry and declined to treat the bakery and the repair depot as separate hereditaments. On appeal to the Lands Tribunal, the first question for determination was whether the bakery and repair depot could properly be treated as one hereditament, or whether they ought to be entered as two. It was held that in the circumstances of the case they should be treated as one.

In *North Eastern Ry. Co.* v. *York Union* (2) the question for the court was whether the whole of the railway property in a parish other than a hotel and refreshment rooms should be rated in one sum. It had been agreed that a separate value could and would be put on the hotel and refreshment rooms as a separate item. CHANNELL, J., said ([1900] 1 Q.B. at p. 739):

> " I agree that it is almost entirely a question of fact. If the whole of these different portions of property were one hereditament, they ought to be rated in one lump sum, and whether they are one hereditament or more seems to me to be a question of fact. One thing I think is clear, that property must be rated according to what it is, and not according to what it might be. You may have a thing which, as it is, is one hereditament, but

> which is quite capable of being made into two. The owner of a field may sell half of it, and it may become two hereditaments in different occupations; but while it is undivided it is one hereditament. The fact that the different portions of the property here are capable of being made separate hereditaments is immaterial. The facts stated by the arbitrator show that at present they are one, though possibly with some slight alteration they might be made into separate hereditaments."

The decision in the present case fell to be made as a question of fact, but a question of law may nevertheless arise whether there was some erroneous approach or whether weight was given to any considerations which ought to have been disregarded. It was submitted that there was an erroneous approach in that attention was paid to the use to which the repair depot was put in connection with the repairs of the bakery plant. The tribunal held that the use of the repair depot in connection with the repairs of the bakery plant (although such use did not form the major portion of the work done therein) was so essential to the efficient working of the bakery itself that they should be treated as one hereditament despite the separation of the two buildings by a public highway. It was submitted, as set out in the notice of motion,

> "That the tribunal misdirected itself in holding that the functional connection for the purposes of the respondents' business between the use of the said 'repair depot' and the use of the said 'bakery' was a relevant and decisive consideration in arriving at the conclusion that the said premises should be treated as one hereditament."

If the consideration was a relevant and admissible one, however, the weight to be attached to it was a question for the tribunal. The problem which is raised, therefore, becomes one whether on the facts of this case regard could be had to the use to which premises are put.

It was submitted that, if premises are in the same occupation, and if they are contiguous or within the same curtilage, then prima facie they are to be regarded as one hereditament; but that in such circumstances a distinct and separate user of some part of such premises may justify regarding that part as a separate hereditament. The case of the hotel at York station in *North Eastern Ry. Co.* v. *York Union* (2) was given as an example. But it was submitted that, if premises which are in the same occupation are structurally and geographically separate, and if they are capable of being separately let, then the use to which the premises are put must be entirely excluded from consideration and the premises must be held to be separate hereditaments.

I do not feel able to accept this approach. I do not think that it is appropriate to lay down propositions of this nature as being inevitably or invariably applicable. If the decision whether premises form one hereditament is a question of fact, as I think it is, then I think it is undesirable to prescribe some formula in words, or to seek to define certain considerations as being relevant and to stipulate that others must be excluded. Parliament has not laid down a definition of a hereditament and difficulties might result if a rigid judicial definition were formulated. In the great majority of cases, after assessing all the considerations which apply according to the weight they command, there will be little difficulty in deciding whether premises comprise a hereditament. In the border-line cases, where difficulty arises, it is better to employ a common-sense assessment of the features of the case than to seek to have recourse to some standard formula.

Thus, to illustrate, there may be several buildings or structures in the same occupation which can properly be regarded as being one hereditament. It may be that they are within one enclosure. That may be one circumstance which points to the conclusion that they comprise one unit. That circumstance may supply a useful basis or test. So also, buildings which, though not actually enclosed together or contiguous, are very near together and are not separated by the presence of other buildings and are being put to one common use may be regarded as comprising one hereditament. There can be no doubt that ordinarily very great weight will be placed on what may be termed the geographical test. But the question is always one of fact and degree. On the other hand, where there are several buildings within one enclosure or curtilage, they may constitute separate hereditaments. This may be so because the buildings are separately let. It may also be so if the buildings, though not separately let, are capable of being separately let and are used for separate purposes (see *North Eastern Ry. Co.* v. *York Union* (2)). To illustrate further, a single building physically undivided and in the occupation of one occupier may be held to be one hereditament to be rated as a whole, even though some parts are capable of separate letting. On the other hand, a single building may have several separate occupiers whose premises may be separately rateable as being separate hereditaments.

If several buildings in one occupation are capable of being separately let and are not within a common enclosure or curtilage but are physically separated, being interspersed among other buildings in other occupations, it will hardly be possible to regard them as comprising one hereditament, even though they are all used for a common purpose. In view of the other circumstances (such as the structural or geographical separation of the buildings, their dispersion among other buildings, and their capability of being separately let) the mere fact of a community of use or purpose would almost certainly be held not to be sufficient to warrant the buildings being considered as one hereditament (see *Glasgow University* v. *Assessor for Glasgow* (3)).

I have merely cited a few examples and I have not attempted to refer to the varieties of situation which may arise or to refer exhaustively to the considerations which may have weight in deciding what a hereditament may comprise. The present case is rather exceptional and depends on its particular facts. But in my judgment there was no error of law in the approach of the Lands Tribunal. I would dismiss the appeal.

PARKER, L.J.: The question of law raised in this appeal by way of Case Stated is whether the Lands Tribunal misdirected itself in holding that the functional connection for the purposes of the ratepayers' business between the use of the repair depot and the use of the bakery was a relevant and decisive consideration in arriving at the conclusion that these premises should be treated as one hereditament. Unless it can be said that that functional connection was in law irrelevant, or if relevant could not be decisive, the tribunal's decision, I think, must stand.

Whether or not premises in one occupation fall to be entered in the valuation list as one or more hereditaments depends on several considerations. Without attempting an exhaustive list, the following can be mentioned:—

(1) Whether the premises are in more than one rating area. If so, they must be divided into at least the same number of hereditaments as the rating areas in which the premises are situated.

(2) Whether two or more parts of the premises are capable of being separately let. If not, then the premises must be entered as a single hereditament.

(3) Whether the premises form a single geographical unit.

(4) Whether, though forming a single geographical unit, the premises by their structure and lay-out consist of two or more separate parts.

(5) Whether the occupier finds it necessary or convenient to use the premises as a whole for one purpose or whether he uses different parts of the premises for different purposes.

Whereas a consideration of questions (1) and (2) will in certain events conclude the matter one way or the other, I think the same does not result from a consideration of any one of the other questions alone. The conclusion, where the

A considerations of (1) and (2) are not decisive, must depend on the weight to be attached on the facts of each case to the other considerations.

No doubt the most important of these other considerations is whether the premises form a geographical unit. Can they be ringed round on a map? As LORD KEITH said, in *Glasgow University* v. *Assessor for Glasgow* (3) (1952 S.C. at p. 509):

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> "In the ordinary case where de-rating issues are not involved the question whether separate buildings, or parts of buildings, should be entered in the roll as 'unum quid' falls to be decided primarily from the geographical standpoint."

This test is so often decisive that it is a convenient starting point to the inquiry, C but it is not decisive in all cases. Thus, though the premises may form a geographical unit, the manner in which different parts are used may justify the premises being treated as several hereditaments (cf. *North Eastern Ry. Co.* v. *York Union* (2) per CHANNELL, J., [1900] 1 Q.B. at p. 739).

The valuation officer's contention, however, is that, though the functional test may justify treating a geographical unit as two hereditaments, it is wholly D inapplicable where the premises occupied are geographically and structurally separate. There is no doubt, I think, that in the latter case little weight will ordinarily be given to any functional connection, but it is another thing to say that it is irrelevant. If, as is admitted, a functional connection is a relevant consideration when considering a geographical and structural unit, I fail to see why as a matter of law it cannot be considered at all when there are separate E geographical and structural units. Each case must be considered on its particular facts, due weight being given to the degree and nature of the separation on the one hand and the importance of the functional connection, on the other. Much reliance was placed by the valuation officer on *Glasgow University* v. *Assessor of Glasgow* (3) in which the Lands Valuation Appeal Court held that the reading room across the road from the main university buildings fell to be entered in the F valuation roll as a separate heritable subject, though the use of the reading room formed an integral part of the students' university work. While saying that the functional test played little part in the question, however, LORD KEITH did not suggest that it was not a relevant test. Further, the court in that case was upholding a determination of the valuation committee, and accordingly was holding that the committee had not gone wrong in law in giving decisive G weight to the geographical test. It does not follow that the decision would have been the same if the valuation committee had held that the reading room should be entered in the roll with the main university buildings as a single heritable subject.

In these circumstances I cannot hold that the Lands Tribunal erred in law. What weight was to be given to the different considerations was for the tribunal, H after hearing the evidence and viewing the premises.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue* (for the valuation officer); *Gregory, Rowcliffe & Co.,* agents for *Shakespeare & Vernon,* Birmingham (for the ratepayers).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

HAMMON *v.* FAIRBROTHER AND OTHERS.

[QUEEN'S BENCH DIVISION (Cassels, J.), March 23, 26, 1956.]

Agriculture—Agricultural holding—Notice to quit—Notice stating reasons—Ambiguity—Validity of notice—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 63), *s.* 24 (1) (2).

On Sept. 24, 1954, the landlords gave the tenant of an agricultural holding notice to quit on Sept. 29, 1955, stating therein (as an act of courtesy) that the reasons for giving the notice were: " (1) That rent due from Sept. 29, 1953, is in arrear and unpaid . . . notwithstanding written notices of the rent due having been given to you. (2) That you have not kept the said farm property and appurtenances in good tenantable repair as required by the . . . tenancy agreement . . . (3) That you have not complied with the terms of an agreement " to repay to the landlords money expended for repair on the tenant's behalf. The tenant delivered a counter-notice under s. 24 (1) of the Agricultural Holdings Act, 1948, and the landlords subsequently obtained the Minister's consent to the operation of the notice to quit. The tenant brought an action for a declaration that the notice to quit was invalid, contending that the notice to quit was not a simple notice without reasons which would be within s. 24 (1) and, if regarded as a notice given for the purposes of s. 24 (2)*, was ineffective since none of the reasons stated was a reason mentioned in a paragraph of s. 24 (2), and that, therefore, the notice to quit was wholly bad.

Held: the notice to quit was valid because it clearly told the tenant that he was to vacate the holding at a proper date, and the fact that the landlords had added as a matter of courtesy the reasons why the notice was given did not render it a notice which should be treated as having been given for the purposes of s. 24 (2) of the Agricultural Holdings Act, 1948.

Dictum of DENNING, L.J., in *Cowan* v. *Wrayford* ([1953] 2 All E.R. at p. 1142), and *Budge* v. *Hicks* ([1951] 2 All E.R. 245) considered.

[**Editorial Note.** In *Cowan* v. *Wrayford* ([1953] 2 All E.R. 1138) the notice to quit was described in its heading as a notice " stating reasons under s. 24 (2) of the Agricultural Holdings Act, 1948 " and there was therefore no doubt that the landlord intended to proceed within that sub-section. It seems that such a question as was decided in the present case would not arise if, where a notice to quit an agricultural holding is to be given and it is proposed to give reasons for the notice, the notice were to include a statement that the reasons were or were not given for the purposes of s. 24 (2). If they are given for the purposes of that sub-section, they should show under which paragraph thereof the landlord intends to proceed; see *Budge* v. *Hicks* ([1951] 2 All E.R. 245).

As to the operation of a notice to quit an agricultural holding, see 1 HALSBURY'S LAWS (3rd Edn.) 282-285, paras. 599-601.

For the Agricultural Holdings Act, 1948, s. 24 (1) (2), see 28 HALSBURY'S STATUTES (2nd Edn.) 46.]

Cases referred to:

(1) *Cowan* v. *Wrayford*, [1953] 2 All E.R. 1138; 3rd Digest Supp.
(2) *Budge* v. *Hicks*, [1951] 2 All E.R. 245; [1951] 2 K.B. 335; 2nd Digest Supp.
(3) *Jones* v. *Gates*, [1954] 1 All E.R. 158; 3rd Digest Supp.
(4) *Norfolk County Council* v. *Child*, [1918] 2 K.B. 351; *revsd.* C.A., [1918] 2 K.B. 805; 87 L.J.K.B. 1122; 119 L.T. 639; 31 Digest (Repl.) 494, *6200*.
(5) *Gardner* v. *Ingram*, (1889), 61 L.T. 729; 54 J.P. 311; 31 Digest (Repl.) 494, *6202*.

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* For the terms of this sub-section so far as relevant see p. 110, letters E and F, post.

Action.

Reginald Arthur Hammon, the tenant of an agricultural holding, claimed, among other things, a declaration that a notice to quit served on him by his landlords was invalid. The landlords counterclaimed for possession and mesne profits.

G. Dobry for the tenant.
C. F. Fletcher-Cooke for the landlords.

CASSELS, J.: The plaintiff was and still is the tenant of an agricultural holding of which the defendants, as trustees, are the freeholders. The agricultural holding, which is called East Dean, is about forty-seven acres in extent and situated in the parishes of Headcorn and Smarden in the county of Kent. The tenancy began on Nov. 27, 1944, with thirty-five acres, to which, in February, 1949, twelve acres were added. The rent is £110 a year. On Sept. 24, 1954, no rent having been paid since September, 1953, and the tenant not having kept the farm property in good tenantable repair as required by the tenancy agreement, and not having complied with an agreement to repay the landlords moneys expended on repairs as provided by the agreement, the landlords gave the tenant twelve months' notice to quit, which would expire on Sept. 29, 1955. The tenant brings this action for a declaration that the notice to quit is invalid, to which the landlords plead a denial of the invalidity and counterclaim for possession and mesne profits.

The parties have presented their respective cases without calling any evidence. The facts do not seem to be in dispute and the issue in the case really concerns the validity or otherwise of the notice to quit, which I now propose to read.

> "re tenancy—East Dean Farm, Headcorn. To: Reginald Arthur Hammon, Esq., East Dean Farm, Headcorn, Kent. As solicitors for Mrs. S. Fairbrother, H. C. Fairbrother, Esq., and R. K. Fairbrother, the trustees of the late Hugh Kingsley Fairbrother, your landlords, we hereby give you notice to quit and deliver up to them or to whom they may appoint on Sept. 29, 1955, that is, at the expiration of twelve months from the end of the now current year of your tenancy possession of the farm called East Dean in the parishes of Headcorn and Smarden in the county of Kent consisting of 47 acres, 1 rood and 38 poles or thereabouts together with the dwelling-house and farm buildings and held by you as tenant from year to year under an agreement dated Nov. 27, 1944, made between the said Hugh Kingsley Fairbrother of the one part and yourself of the other part. The reasons for giving this notice to quit are as follows: (1) That rent due from Sept. 29, 1953, is in arrear and unpaid in breach of the terms of the said tenancy agreement and notwithstanding written notices of the rent due having been given to you. (2) That you have not kept the said farm property and appurtenances in good tenantable repair as required by the said tenancy agreement of Nov. 27, 1944. (3) That you have not complied with the terms of an agreement dated Aug. 31, 1953, entered into by you with Messrs. E. J. Parker & Sons as agents for the landlords and in breach thereof have not repaid to the landlords the moneys expended by them on your behalf on repairs to the said farm property as provided by the terms of the said agreement and agreed to by you. Dated Sept. 24, 1954. Hirst & Co., 115, High Holborn, London, W.C.1. Solicitors for the said Mrs. S. Fairbrother, H. C. Fairbrother and R. K. Fairbrother."

It may well be observed from that notice to quit that the landlords were not risking writing the notice themselves, but that they consulted their solicitors and desired their solicitors to draw up the notice, and so, indeed, they did. On receiving this notice to quit the tenant served on the landlords on Oct. 5, 1954, a counter-notice (without prejudice to any question as to the validity of the notice to quit) requiring that the Agricultural Holdings Act, 1948, s. 24 (1), should apply to the notice to quit. That made necessary the Minister's consent to the operation of the notice to quit, and the landlords on Oct. 22, 1954, duly made application for the Minister's consent. That application was heard on June 6, 1955, by the Kent Agricultural Executive Committee acting on behalf of the Minister. It appears from the notices and correspondence that the committee had previously inspected the land, and on June 10, 1955, the committee issued the Minister's consent.

On June 18, 1955, the tenant gave notice of appeal to the Agricultural Land Tribunal, but, on Sept. 2, he withdrew it. On Nov. 7, 1955, the tenant issued a writ in this action. It is contended on behalf of the tenant that the notice to quit was not clear and unambiguous and that by giving reasons, one or more of which were characteristic of s. 24 (2) of the Agricultural Holdings Act, 1948, but were not reasons mentioned in that sub-section, the notice was rendered wholly bad. Section 24 (1) provides:

> " Where notice to quit an agricultural holding or part of an agricultural holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this sub-section shall apply to the notice to quit, then, subject to the provisions of the next following sub-section, the notice to quit shall not have effect unless the Minister consents to the operation thereof."

That provides the tenant with the right to serve a counter-notice, which means that the landlord must obtain the Minister's consent, and if the Minister does not give the consent then the notice is ineffective. Section 24 (2) provides, so far as is relevant:

> " The foregoing sub-section shall not apply where . . . (d) at the date of the giving of the notice to quit the tenant had failed to comply with a notice in writing served on him by the landlord requiring him within two months from the service of the notice to pay any rent due in respect of the agricultural holding to which the notice to quit relates, or within a reasonable time or within such reasonable period as was specified in the notice to remedy any breach by the tenant that was capable of being remedied of any term or condition of his tenancy which was not inconsistent with the fulfilment of his responsibilities to farm in accordance with the rules of good husbandry, and it is stated in the notice to quit that it is given by reason of the matter aforesaid."

The terms of that sub-section indicate that it may well be that when a landlord gives notice to a tenant, stating in the notice some reasons coming within this sub-section, the notice then becomes a notice purporting to operate under s. 24 (2).

I have been referred to *Cowan* v. *Wrayford* (1) ([1953] 2 All E.R. 1138). That was a case in the Court of Appeal in which the landlord had served a notice under s. 24 (2). The difference between a notice complying with s. 24 (2) and a general notice to quit was pointed out by Somervell, L.J., when he said ([1953] 2 All E.R. at p. 1140):

> " So there is not only a difference in procedure, but also a financial difference affecting both landlord and tenant according to whether the landlord is able to establish a right to proceed under [s. 24 (2) (d)] or has no case for bringing himself within those words, but serves an ordinary notice and does in fact get the Minister's consent if the counter-notice is served. In one case compensation for disturbance will be payable and in another case it will not."

I shall have to return to that case in a moment. My attention was also called to *Budge* v. *Hicks* (2) ([1951] 2 All E.R. 245). There DENNING, L.J., said ([1951] 2 K.B. at p. 341; [1951] 2 All E.R. at p. 249):

> " If the landlord of an agricultural holding wishes to give his tenant notice to quit, he should get some good advice on the matter, because there are now many legal requirements which he has to fulfil before his notice will be good. In particular, he must state in his notice the reason why he requires possession, and that reason must be one of the reasons prescribed in the Act of Parliament. I do not think that the notice need be in any particular form, but it must at least make it clear what his reason is. In particular, when he complains of a breach of covenant which may, or may not, be capable of remedy, he must make it clear which it is, so that the tenant may know whether the notice is given under sub-para. (d) or (e)."

Then he said that in that particular case of *Budge* v. *Hicks* (2) the relevant notice did not do that. He said (ibid.):

> " It does not make it clear under which sub-section it comes. It is therefore not a good notice."

DENNING, L.J., said in *Cowan* v. *Wrayford* (1) ([1953] 2 All E.R. at p. 1142):

> " But this case cannot be considered at common law apart from the Act. The ancient script of the common law has been over-written by the Act, and the two have to be integrated together. In order that a notice to quit an agricultural holding should be good, it must be clear and unambiguous, and for that purpose it must either be a simple notice without stating reasons at all, in which case it will operate under s. 24 (1), or it must be a notice stating reasons as prescribed by sub-s. (2), in which case it will operate under sub-s. (2)."

I venture to think, with great respect to the lord justice, that the words " without stating reasons at all " are really unnecessary for the decision of that case and I should be very sorry to have to hold that where a landlord, in giving notice to his tenant of an agricultural holding, stated reasons (which might of course be infinitely various, and might even be personal), he must therefore, whatever the reasons were (whether or not any of those reasons fell within any of the paragraphs of s. 24 (2)), be giving a notice under s. 24 (2) with all the consequences of that sub-section. On the receipt of the notice (assuming that the notice does not come under s. 24 (2)), the tenant has all the protection of sub-s. (1). He has the protection of the Minister whose consent the landlord must obtain before the notice to quit can have any effect. When one looks at s. 24 (2), one observes (as indeed BIRKETT, L.J., observed in *Budge* v. *Hicks* (2), [1951] 2 All E.R. at p. 249) that it is required that if the reason for giving notice comes under any of these paragraphs that reason must be stated in the notice.

Two months after *Cowan* v. *Wrayford* (1) was decided in the Court of Appeal, *Jones* v. *Gates* (3) ([1954] 1 All E.R. 158), came before the Court of Appeal and there the landlord had tried to exclude the tenant from exercising his rights under s. 24 (1) by stating that the land was " required for a use, other than for agriculture ", which is para. (b) of sub-s. (2). It turned out in that case that the landlord had an idea that the land might be useful and attractive to anybody who was going to promote a sports ground, but no definite arrangements had been reached between the landlord and anybody else that it would be taken over as a sports ground. The county court judge was not satisfied that the holding was required for such a purpose; the landlord appealed to the Court of Appeal which upheld the county court judge. If technicalities are to prevail, they are available, of course, for use not only by the tenant but also by the landlord. My attention has been drawn to the strict wording of s. 24 (2) (d) which in so far as the rent is concerned says that

> " at the date of the giving of the notice to quit the tenant had failed to

> comply with a notice in writing served on him by the landlord requiring him within two months from the service of the notice to pay any rent due in respect of the agricultural holding to which the notice to quit relates."

The wording of the first of the reasons in the notice to quit shows that the landlords had sent a demand that the rent should be paid and, of course, that is exactly what the tenant did not do. No two months' notice, as required by s. 24 (2) (d), had been served. The tenant served a counter-notice under s. 24 (1) and the procedure under that section came into operation by the landlords' applying for the Minister's consent on Oct. 15, 1954. That consent was duly given on June 10, 1955, the Minister having given due consideration to the circumstances of the case, because as I read his decision he referred first to the non-payment of the rent by the tenant in breach of the terms of tenancy, and, secondly, to the tenant's failure to keep the farm property and appurtenances in good tenantable repair.

I have to look at the reasons given in the notice to quit, and having given them careful consideration, I hold that this notice was not invalid and that the reasons given do not come within any of the paragraphs of sub-s. (2). The first reason which was given was the non-payment of rent by the tenant in breach of the terms of the tenancy. Secondly, the tenant had failed to keep the farm property and appurtenances in good tenantable repair. Thirdly, there had been the agreement to repay money spent by the landlords on the tenant's behalf. These reasons were the subject of an exchange of letters between the solicitors acting for both parties. The solicitors for the tenant asked the solicitors for the landlords why they gave reasons at all, and the solicitors for the landlords replied that they gave reasons because they thought it was only courtesy so to do, namely, to let the tenant know that he was being called on to give up possession of the farm by reason of non-payment of rent, non-payment of a sum of money due, and not keeping the farm in good tenantable repair. It is true that in the counter-notice of the tenant to the landlords the words " without prejudice " are contained and they are also in a letter which is dated Oct. 23, 1954, in which the solicitors to the tenant said that the counter-notice was given, and that the tenant's appearance before the agricultural committee would be, entirely without prejudice to the right to contend in another place that the notice to quit was invalid. The tenant has contended it here and contended it with considerable force and I am certainly not prepared to hold that he was estopped from putting that contention forward. When I look at the pleadings in this case I find that in the reply it is put forward that the Minister had no jurisdiction to entertain the case at all, but I have not heard that emphasised in this court.

My attention has been called to more than one case which dealt with the validity of notices. One such case is *Norfolk County Council* v. *Child* (4) ([1918] 2 K.B. 351), where AVORY, J., said, in giving the judgment of the court consisting of himself and LAWRENCE, J. (ibid., at p. 354):

> ". . . I think the decisions upon the point establish that the test to be applied in either case is whether it is so vague or uncertain that it is unsafe for the tenant or landlord, as the case may be, who receives the notice to act upon it ",

and they cited *Gardner* v. *Ingram* (5) ((1889) 61 L.T. 729), in which BOWEN, L.J., said (ibid., at p. 730) that " the tenant used language on which the landlord could not safely act." I have come to the conclusion that this notice is not in the least bit ambiguous. It is as plain as a pikestaff. The tenant is told, and he knows he is told, to vacate this agricultural holding by the end of the year following the giving of the notice. As a matter of courtesy the landlords' solicitors have added the reasons why the tenant has to leave. He has not paid his rent. He is told that he has not kept the property and appurtenances in good and tenantable repair, and he signed an agreement in which he said that he would. What is more, the landlords spent a considerable sum of money in putting the farm buildings into good repair, and the tenant entered into an agreement to repay the landlords the money they had spent, but he has not paid them.

I hold that this case does not come within s. 24 (2). In those circumstances, I give judgment for the landlords for possession and mesne profits.

Judgment for the defendants on the claim and on the counterclaim.

Solicitors: *Field, Roscoe & Co.*, agents for *Hallett & Co.*, Ashford, Kent (for the tenant); *Hirst & Co.* (for the landlords).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

MACLEAN (INSPECTOR OF TAXES) *v.* TREMBATH.

[CHANCERY DIVISION (Roxburgh, J.), March 15, 16, 1956.]

Income Tax—Deduction in computing profits—Expenses incurred "wholly, exclusively and necessarily in the performance of . . . duties"—Company directors—Man and wife sole shareholders and directors—Visit to Australia in connection with company's business—Company no trade with Australia—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2 *c.* 10), *s.* 161 (1), *s.* 162 (1), *Sch.* 9, *r.* 7.

The taxpayer and his wife were sole shareholders and directors (his fees being £5,000 and hers £480 per annum) of a company which was the sole authorised dealer in refrigeration products of manufacturers in an area comprising most of South London and Surrey, under an agreement which required the company to send representatives when reasonably requested by the manufacturers to a designated place for instruction in the sale, installation and servicing of the products. The taxpayer in his work required technical knowledge and experience and imagination for recommending types and arrangements of plant for customers. His wife had no technical qualifications and in 1953-54 did not attend the company's premises. In order to gain experience of refrigeration methods and distribution methods and to acquire new ideas and so to assist his company's business, the taxpayer with his wife in 1953 visited Australia where he had been born and had relatives. There, most often unaccompanied by his wife, he visited establishments of the manufacturers and other establishments and had useful discussions with the manufacturers' officials to the later benefit of his business. He and his wife also visited his relatives. He claimed to deduct the cost of the visit as an expense from his income for income tax purposes under r. 7 of the Rules Applicable to Sch. E in Sch. 9 to the Income Tax Act, 1952, and he (but not his wife) gave evidence before the Special Commissioners. The commissioners found that the expenses (other than those applicable to personal travel, etc.) were wholly, exclusively and necessarily incurred in the performance of the taxpayer's and his wife's duties as directors and allowed the deduction. On appeal,

Held: there being evidence on which the commissioners could arrive at their decision in respect of the taxpayer's expenses, the deduction of the expenses must be upheld; but, in the absence of any evidence as to the directions given by the company to the wife as to what functions she, a non-technical director, was to perform in Australia, and of evidence as to the functions she did perform there, there was no evidence on which the commissioners could have arrived at their decision, or could hold that her travelling expenses (which were emoluments under s. 161) were travelling expenses necessarily incurred in the performance of her duties, and deduction of the wife's expenses must be disallowed.

[**Editorial Note.** Distinction should be drawn between the deduction of travelling expenses which are deductible if the holder of an office is "necessarily" obliged to incur them, and other expenses which are deductible only if "wholly, exclusively and necessarily" incurred in the performance of duties (see p. 119, letter E, post).

As to deduction of expenses in computing income for income tax purposes under Sch. E to the Income Tax Act, 1952, see 17 HALSBURY'S LAWS (2nd Edn.) 221, 222, paras. 446, 448; and for cases on the subject, see 28 DIGEST 88-90, *519-535*.

For the Income Tax Act, 1952, s. 161 (1), s. 162 (1), and Sch. 9, para. 7 of Rules Applicable to Sch. E, see 31 HALSBURY'S STATUTES (2nd Edn.) 156, 157, 524.]

Case Stated.

The respondent taxpayer appealed to the Special Commissioners of Income Tax against an assessment to income tax made on him under Sch. E to the Income Tax Act, 1952, in the sum of £7,010 (corrected to £7,200) less £15 national insurance contributions and £347 expenses for 1953-54. The figure of £7,200 comprised £5,000 fees as director of Trembath & Co., Ltd., a private limited company of which the taxpayer and his wife held all the issued shares and were the only directors; £480 fees to the taxpayer's wife as director of the company; and £1,720 included in the taxpayer's emoluments as director of the company under s. 156 or alternatively s. 160 and s. 161 of the Act. The question for determination was whether a sum of £1,220 paid by the company to or on behalf of the taxpayer in connection with a visit by the taxpayer and his wife to Australia was allowable to the taxpayer as expenses under para. 7 of Sch. 9 to the Act. The taxpayer contended that, in so far as it fell to be treated as emoluments of the taxpayer as director of the company, the whole sum was expended by him wholly, exclusively and necessarily in the performance of his duties as director of the company, and should be allowed as a deduction in assessing his emoluments under para. 7 of Sch. 9 to the Act. The Crown contended that no part of the sum was so expended or should be allowed as a deduction from the assessment. The commissioners found that the expenditure on the taxpayer's and his wife's sea voyages, on their travel in Australia (excluding the voyage to and from Hobart on a private visit) and on their hotel accommodation was incurred wholly, exclusively and necessarily in the performance of their duties as directors of the company, but that the rest of the sums expended by the taxpayer in the course of the visit were not so expended. They accordingly held that the taxpayer was entitled to a deduction under para. 7 of Sch. 9 to the Income Tax Act, 1952, of £980 (£730 sea passage, £200 travel in Australia and £50 hotel accommodation) but disallowed £240 in respect of the remaining expenditure. The Crown appealed.

Heyworth Talbot, Q.C., and *M. Temple* for the Crown.
P. J. Brennan for the taxpayer.

ROXBURGH, J.: The question for determination concerns the amount allowable to the appellant taxpayer as expenses under para. 7 of Sch. 9 to the Income Tax Act, 1952. That paragraph provides:

> " If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment . . . or otherwise to expend money wholly, exclusively and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."

In the material period, Trembath & Co., Ltd. (which I will call " the company ") paid to or on behalf of the taxpayer certain sums totalling £1,220 in connection with a visit by the taxpayer and his wife to Australia. The taxpayer attended the hearing before the Special Commissioners, gave evidence before them and—this fact does not appear in the Case, but was stated by consent—was cross-examined before the commissioners, and they found the following facts.

The company was incorporated in November, 1946. Its principal objects were set out in its memorandum of association but no question of ultra vires arises. It is found that:

> " At all material times the [taxpayer] and his wife between them held all the issued shares in the company, and were its only directors."

I regard that as important for several reasons. I expect that the records of the company were not very carefully kept, though I do not know because none of them are in evidence. Again, if the taxpayer wanted to be accompanied by his wife on a visit to Australia, as creditors are not in this case at all likely to be affected, it would not make any difference in a practical sense whether the trip was paid for by the company or by one or other of the taxpayer and his wife except in so far as that might have some bearing on the tax position; in other words, there were no shareholders who would be affected other than the taxpayer and his wife.

> " The company has at all material times been an authorised dealer in the products of the Frigidaire Division of General Motors, Ltd. . . . a company associated with General Motors Corporation, a company incorporated in the U.S.A. . . . These products consist of various refrigeration products and equipment . . . In addition to selling the products, the company undertook the installation, repair and maintenance of commercial products which it had sold."

A distinction is drawn between " commercial products " and " domestic products " in the Case which is not really material for the purposes of the appeal.

> " The company's business in connection with Frigidaire commercial products was regulated by an agreement between the company and Frigidaire . . . whereby the company was appointed sole authorised dealer in the commercial products for a territory covering the major part of South London and Surrey."

The important thing about the territory is that it did not extend anywhere near Australia. Its exact boundaries are wholly immaterial.

Clause 13 of that agreement provided that:

> " The [company] shall maintain within the territory such one or more places of business and such sales staff, service staff and transport facilities as [Frigidaire] shall consider necessary to ensure adequate and efficient selling coverage and service facilities throughout the territory."

That is not important, but this is:

> " When reasonably requested to do so by [Frigidaire] the [company] shall at its own expense send representatives to Hendon or some other convenient place designated by [Frigidaire] for the purpose of instruction in the sale, application, installation and servicing of ' Frigidaire ' commercial products."

The following are findings by the commissioners:

> ". . . all of the company's staff had attended instructional courses at the Frigidaire instructional establishment at Hendon, at Frigidaire's request and at the company's expense. The company had also sent members of its staff to other dealers to gain experience, on its own initiative. Frigidaire had not formally requested any dealer to go abroad in pursuance of cl. 13, but some had gone on their own initiative, and their visits to Frigidaire establishments abroad had been planned for them by Frigidaire. The [taxpayer] had himself been to Holland and Paris to visit factories; he did so at the suggestion (but not on the formal request) of Frigidaire. He had not been requested by Frigidaire to visit Australia.
>
> " The [taxpayer] worked full time in the direction and management of the company's business. The company had two warehouses and a showroom, and about half of the [taxpayer's] time was spent on the company's premises and about half on outside jobs, discussing proposals for installations with customers and supervising installations. In order to make the company's business in connection with the commercial products successful, it was

> necessary for the [taxpayer] not only to have the technical knowledge required for the installation of the products, but also to have the experience and imagination which would enable him to recommend types and arrangements of plant most suitable for the requirements of the individual commercial customer, particularly in connection with the use of refrigeration in connection with goods on display. As regards the commercial products the company had been faced with (and had met successfully) considerable competition in its territory; part of its success was due to the taxpayer's ability to 'sell an idea'." A B

The commissioners further say in the Case Stated:

> "In 1952 the [taxpayer] made up his mind to visit Australia in order to gain experience of refrigeration methods and distribution methods there, and in particular of the use of refrigeration in connection with goods on display. C
>
> "Australia is a very progressive country as regards refrigeration, and the trading conditions there were similar to those in the United Kingdom, and he thought that by the visit he would gain knowledge and experience which would be of great assistance to the company's business. He had close family connections with Australia—two brothers and a sister lived there—and he himself was born there, and that had influenced him a little in his decision, but apart from that he considered that the company would profit from a visit by him to Australia, and would profit more by a visit to Australia than to any other country." D

I shall have to return to that passage, but I would stress that not only is it an expression of what the taxpayer thought and not, in terms at any rate, of what the company thought, but also there is no mention in that portion of the Case of the wife at all. E

> "By 1952 the company's business had become well established and the [taxpayer] wanted to get new ideas in order to maintain the company's progress."

Now comes the first mention of the wife: F

> "The [taxpayer] decided that his wife should accompany him to Australia. Mrs. Trembath did not attend and give evidence before us [the Special Commissioners]. She was a director and secretary of the company. She had no technical qualifications. She had been engaged (but not full time) in the company's office work, but during the year of assessment 1953-54 she did not attend the company's premises and any documents which needed her signature as secretary were dealt with by her at home. She was of assistance to the taxpayer in forming ideas as to ways in which commercial products could be used, and she was a good conversationalist, which the [taxpayer] was not." G

I cannot help thinking it very important that the taxpayer's wife did not attend the company's premises at all in the year of assessment 1953-54, the year in question. I do not appreciate the bearing of the last observation, seeing that on no view could this company sell any goods to Australian customers because it was outside its territory. H

> "The [taxpayer] discussed his projected visit to Australia with officials of Frigidaire, and (after being satisfied with the arrangements for the management of the company's business during his absence) they approved of it and made arrangements for him to visit General Motors installations and officials at Melbourne, Sydney and Brisbane. I
>
> "The [taxpayer] and his wife left England in September, 1953, and returned on Feb. 1, 1954. The journeys, by sea in both directions, occupied eight weeks, and eleven weeks were spent in Australia. The [taxpayer] kept no detailed diary of their eleven weeks in Australia, but the following is a summary of their movements.

"They disembarked at Sydney where they stayed five days with friends. Two of these days the [taxpayer] spent at the General Motors offices with the director in charge (his wife accompanying him on one day) and he spent about half a day with a distributor of General Motors products (unaccompanied by his wife).

"They then spent seven days at Rockhampton, where they stayed with friends. There the [taxpayer] visited an abattoir (said to be the largest in the world), accompanied (on one day) by his wife.

"They then spent six days at Brisbane, where they stayed with the [taxpayer's] brother. There the [taxpayer] spent three days at the General Motors distribution centre (accompanied by his wife on one day) and spent a further day with a dealer looking over installations and discussing distribution methods. General Motors placed a car at his disposal during his time at Brisbane.

"They then went via Sydney (where they spent two days with friends) to Albury, where they stayed five days with a cousin, and where the [taxpayer] visited an abattoir and another installation.

"They then spent four or five days at Melbourne, staying with another brother, where the [taxpayer] spent two days at a General Motors factory (accompanied on one day by his wife).

"They then spent three days with the [taxpayer's] niece at Hobart: this was a private visit.

"They then returned via Melbourne and Albury to Sydney where they stayed five days with friends, and where the [taxpayer] spent one day (unaccompanied by his wife) in final talks with General Motors officials. They then embarked for the United Kingdom.

"The journey from Brisbane to Sydney was by car, and took four days, the nights being spent at hotels. The journey from Albury to Melbourne was by a borrowed car. The final journey in Australia from Melbourne to Sydney was by car as far as Albury and then by train. The other journeys were by air.

"The cost of the sea passages to and from Australia for the [taxpayer] and his wife was £730, which sum was paid by the company.

"The [taxpayer] had kept no detailed records of his expenditure in Australia and on board ship. We found that he had expended £200 on air travel (excluding the cost of the return journey from Melbourne to Hobart) and £50 on hotel accommodation; he spent a further £240 during the whole period of four and a half months, which he was unable to account for in any detail.

"All these moneys (£490 in all) were provided by the company."

The journey from Melbourne to Hobart was a private journey.

"On his visits to General Motors installations at Sydney, Brisbane and Melbourne the [taxpayer] and his wife spent more time in discussions with General Motors staff than in inspecting plant. The discussions ranged over what they sold, how they sold it, and why. He learned that they sold things in Australia which had never been used in England. These discussions were very useful to the [taxpayer] as director of the company, as he learned a great deal which he could not have learned otherwise. The knowledge and experience he acquired had enabled him to do business better and in consequence the company had got business which it would not otherwise have got.

"We, the commissioners who heard the appeal, found on consideration of the whole of the evidence that the expenditure on the [taxpayer's] sea passages, on his travel in Australia (excluding the journey to and from Hobart on a private visit), and on his hotel accommodation, was incurred wholly, exclusively and necessarily in the performance of his duties as director of the company."

They found that one moiety of the £730, one moiety of the £200 and one moiety of the £50, had been wholly, exclusively and necessarily incurred in the performance of the taxpayer's duties as a director of the company.

> " As regards the expenditure on the sea passages, travel in Australia (excluding the journey to and from Hobart) and hotel accommodation of the [taxpayer's] wife, we had rather more doubt, but on the balance of the evidence we found that this also was expended wholly, exclusively and necessarily in the performance of the duties of her office. As regards the rest of the moneys expended by the [taxpayer] in the course of his visit to Australia, we found (in the absence of any firm evidence to the contrary) that it was not expended wholly, exclusively and necessarily in the performance of the duties of the [taxpayer's] office.
>
> " Accordingly we held that the [taxpayer] was entitled to a deduction under para. 7 of Sch. 9 to the Income Tax Act, 1952, of the cost of the sea passages (£730), the cost of the travel in Australia as aforesaid (£200) and the cost of hotel accommodation (£50) making £980 in all. We disallowed the remaining expenditure, i.e., £240."

There is no cross-appeal and, therefore, this appeal by the Crown against the taxpayer relates to the £980, one-half of which is to be regarded as expenditure of the taxpayer and one-half as expenditure on behalf of his wife.

If that finding of the commissioners stands, r. 7 has been complied with so far as the taxpayer's expenditure is concerned. It has not been contended before me that his visit was wholly or even partly for the purposes of visiting relations or having a holiday, I may well believe for good and sufficient reasons, though it would have been a possible finding. It might not have helped the Crown even if they had succeeded on that contention. It is said that the taxpayer went to improve his personal equipment. That might have been a possible finding, but I think it unlikely. My own feeling is that the real question is whether he did not go primarily for personal reasons.

However that may be, there was evidence before the commissioners pointing in more than one direction, and, having heard him examined and cross-examined (which I have not done), they made a finding of fact which was open to them on the evidence. I cannot interfere; their finding stands. But I cannot take the same view with regard to the wife. It is, in my view, a fallacy to suppose that, if the taxpayer's expenses are allowable, the wife's are necessarily allowable too. I am not saying that anybody really quite supposed that, but the case seems to have been conducted somewhat on that tacit assumption—I do not mean here, but before the Special Commissioners.

Let us consider some of the contrasts. The taxpayer's fees as director of the company were £5,000; the wife's fees as such director £480. She never attended the company's premises at all in the year in question. She had no technical qualifications. Unlike the taxpayer, she did not attend and submit herself for cross-examination and, therefore, the Special Commissioners and I stand in the same position in that regard: we have none of us seen her. I do attach great importance to that; I doubt if I should have done what I am going to do if she had given evidence and had been cross-examined and they had accepted her evidence, but she did not.

The only thing that is found about her that might be said to be an asset is that she was a good conversationalist. I find great difficulty in seeing the value of that in connection with a visit to Australia, a country in which the company was debarred from selling Frigidaire products, by a woman who did not attend the business premises during the year of assessment. Moreover, it was conceded by the taxpayer that he was to some extent influenced by the desire to see his family, though no doubt that was qualified by a " but " of importance which was apparently accepted as paramount by the Special Commissioners. But there is no such qualification in connection with the wife. Indeed, it is not said whether she wanted to see her relations by marriage or had any natural desire to accompany her husband on a pleasant trip to the country of his birth, where many of his relations were established. Nothing is said about that at all.

Even so, I might have hesitated to reverse this finding of the commissioners if any explanation had been given of what she was supposed to be doing in Australia on behalf of the company. But I cannot find a word about that. I am drawing a distinction, of course, between her and the taxpayer; there is plenty of evidence as to what he was doing in Australia, but I cannot find any evidence of what she was doing. The fact that she visited the three or four places and took part in some discussions seems to me to be altogether too vague to give me any assistance.

I am quite certain that the finding of the commissioners, that the expenditure on her behalf was incurred wholly and exclusively in the performance of the duties of her office, is wrong. I think that is quite an impossible finding on the evidence before me. But that does not mean—and here the case has caused me a little difficulty—that the expenditure may not have been necessarily incurred in the performance of the duties of her office. I am inclined to think that the Special Commissioners must have there misread the rule (as, indeed, I did until counsel for the Crown drew my attention to it) in relation to travelling expenses. I am not going to treat that £50 for hotel expenses as a separate item because it only looks like stopping a night or two in the course of a journey and, for practical purposes, I think it is fairly to be treated as travelling expenses and not something quite different, as it would be if it had been for a long period of time.

The rule in regard to travelling expenses* has nothing to say about " wholly " or " exclusively ". It says:

> " If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment . . ."

There is nothing about " wholly and exclusively " at all; that comes in the later part of the rule, which seems to be directed to things other than travelling expenses. I think the Special Commissioners must have omitted to notice that because of the form of their finding: they do not in terms deal with it at all.

The first contention in respect of the wife's expenses arises out of the complicated legislation which now affects the matter, and particularly s. 161 of the Income Tax Act, 1952. This ticket to Australia is a substantial and quite the largest item and was purchased and paid for by the company. It would not be treated as an emolument at all if it fell within s. 162 (1) of the Income Tax Act, 1952, because that sub-section says:

> " Any expense incurred by a body corporate in the acquisition or production of an asset which remains its own property shall be left out of account for the purposes of the last preceding section."

I am afraid I cannot regard the benefits or facilities conferred by that ticket as falling within the exception in s. 162 (1). It seems to me that it falls plainly within the ambit of s. 161, i.e., provision of benefits or facilities, and, therefore, is properly to be treated as an emolument. This point was not taken before the Special Commissioners, but was taken before me by leave and I reject it. It being an emolument, therefore, it would be allowable as a deduction if the wife was necessarily obliged to incur and defray out of the benefits or facilities the expense of travelling in the performance of the duties of her office or employment.

There is a grave danger in a lax construction of that part of that rule. As an example, if a public company, acting with all proper formalities, required a director to travel to Australia for the performance of one single duty occupying only one day, I feel no doubt that the whole cost of the passage would be allowable as a deduction, notwithstanding that he spent several further months in Australia A doing nothing but visiting his friends and relations. After a good deal of discussion, I think that counsel for the Crown was prepared to accept that as the right construction of this rule, but in my view it is the right construction, whether he accepted it or not. It shows how careful one must be to see that the person claiming the allowance was really performing the duties of the office, since otherwise the opportunities for swindling would be vast, especially in the case of B a " man-and-wife " company in which nobody was interested as a shareholder except the man and his wife.

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* See the Income Tax Act, 1952, Sch. 9, para 7.

Having satisfied myself that the commissioners were wrong in their finding that this item was wholly and exclusively expended on the purposes of the company's business, I do not feel unduly saddled by their finding that it was " necessarily expended ", because their finding must be treated as a whole and, C if two of its ingredients fall out, it is difficult to postulate that the remaining ingredient must necessarily stand; it may be right or it may not. Being satisfied that there was no evidence that the wife's expenditure was incurred wholly and exclusively in the performance of her duties as a director, I am not embarrassed by the circumstance that they also found that it was " necessarily " incurred, especially as I think they have adopted the wrong approach. D

Dealing with director's expenses under r. 7 of the Rules Applicable to Sch. E involves different problems, not because the words bear any different meaning, but because their application to directors introduces problems not arising with persons whose duties are clearly regulated by contract or by statute. To ascertain the wife's duties the company's articles of association should first be looked at. That apparently nobody did, but probably that does not matter, because almost E certainly they were more or less in common form, in which case the duties would not be in any way specifically defined; they would only be defined in quite broad and general language with perhaps certain things expressly prohibited. Therefore, absence of such examination causes me no embarrassment.

Secondly, directors' duties are seldom stereotyped and cannot be discovered without studying the resolutions of the directors which ought to be recorded in F the company's minute book. That is the proper foundation of the search for what they are. I have no information whether any resolutions were ever recorded in the present company's minute book. If a resolution of the board of directors in the minute book had been proved (for the taxpayer must bring himself within the rule giving allowances), requesting the wife to go to Australia for a purpose specified in the resolution, I should have been prepared to say that the G expenditure ought to have been allowed, unless the Crown could show that it was not passed in good faith. In the case of a " one-man " or " man-and-wife " company that can sometimes be shown, but prima facie the resolution would be treated as genuine and construed according to its tenor, though it might be displaced on the ground that it was not bona fide. Nothing of that sort is suggested here. There is no direct statement that the company ever requested H the wife to go to Australia, which is not without importance considering that she was the taxpayer's wife. It may be said that he made such request, but non constat that he did it on behalf of the company.

There is no suggestion in the Case as to the function the wife was to perform in Australia, which I should have thought was inevitable if a company bona fide sent somebody there, especially when, as here, it had no business connections I there. It must surely give some sort of directions as to what is to be done there, either before departure or by telegraph. There is no suggestion that any directions were ever given to her.

There is also no evidence as to what she in fact did for the company. I am prepared to concede that there was a business element in her visit, but it is ill defined, and in my judgment that falls far short of showing that this expenditure was in the performance of the duties of her office of director. Therefore, I feel that I must reverse the finding of the commissioners on the wife's expenditure and hold that there was no evidence that it was necessarily incurred in the performance of the duties of her office of director. I think the commissioners used the word " necessarily " partly because they were able to find—as I could not possibly do—that she was wholly and exclusively performing the duties of that office in Australia, and partly because they did not make the right approach to the question what were the duties of the office of a director.

Accordingly, I allow the appeal in part, i.e., in so far as it relates to one moiety of the sum in question, being the expenditure on behalf of the wife, and reject it qua the other.

Appeal dismissed as to the taxpayer's expenses, allowed as to the expenses of the taxpayer's wife.

Solicitors: *Solicitor of Inland Revenue; Tuck & Mann* (for the taxpayer).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

J. SPURLING, LTD. *v.* BRADSHAW.

[COURT OF APPEAL (Denning, Morris and Parker, L.JJ.), March 20, 23, 26, 1956.]

Contract—Exception clause—Bailment—Clause exempting bailees from liability for any loss or damage however caused—Negligence of bailees but no radical breach of contract—Whether bailees protected by exception clause.

Bailment—Storage—Condition excluding liability—Negligent storage—Whether bailees liable.

In June, 1953, the defendant bought eight barrels of orange juice and sent them to the plaintiffs, who carried on business as warehousemen, to be stored. A little later the plaintiffs sent the defendant a " landing account " acknowledging receipt of the goods and stating: "The company's conditions as printed on the back hereof cover the goods held in accordance with this notice. Goods will be insured if you instruct us accordingly; otherwise they are not insured ". On the back of the landing account there were " Contract conditions " and many lines of small print including the following: " We will not in any circumstances when acting either as warehousemen . . . or in any other capacity, be liable for any loss, damage or detention howsoever, whensoever, or wheresoever occasioned in respect of any goods entrusted to or carried or handled by us in the course of our business, even when such loss, damage or detention may have been occasioned by the negligence, wrongful act or default of ourselves or our servants or agents . . . " On the same date the plaintiffs sent the defendant an invoice for £4 storage fees on which there appeared the following note: " All goods are handled by us in accordance with the conditions as over and warehoused at owner's risk and not insured unless specially instructed ". There were no conditions " as over ". The defendant paid the £4 but subsequently fell into arrear on these and other goods. On Mar. 9, 1954, the plaintiffs sent him an account for the balance due and on Mar. 12, the defendant issued a delivery order directed to the plaintiffs in favour of one T. who duly collected the eight barrels, which were then in bad condition. The defendant made no written complaint at that time or for several months thereafter in respect of the condition of the barrels. The plaintiffs issued a writ claiming the storage moneys due to them and the defendant counterclaimed for damages alleging that the plaintiffs either were in breach of an implied term of the contract of bailment to take reasonable care of the barrels of orange juice or were guilty of negligence in the storage. The plaintiffs denied negligence and also relied on the exempting condition printed on the back of the landing account as exempting them from liability for any negligence. At the trial of the action, the counterclaim being the only matter in dispute, the defendant gave evidence to the effect that he had received many landing accounts from the plaintiffs in respect of other goods but that he had never read the conditions printed on the back of the accounts, and he contended that the exempting condition was not part of his contract with the plaintiffs.

Held: (i) having regard to the reference to the conditions contained in the landing account, to the mention on the invoice that the goods would be at owner's risk and to the course of business between and conduct of the parties, the defendant had sufficient notice of the conditions and they formed part of the contract of bailment.

Parker v. *South Eastern Ry. Co.* ((1877) 2 C.P.D. 416); and *Roe* v. *R. A. Naylor, Ltd.* ([1917] 1 K.B. 712) considered.

(ii) although an exempting clause, such as that contained in the conditions printed on the landing account, availed a party to a contract only when he was carrying out the contract and would not avail him if he were deviating from it or were in breach of a term which went to the root of the contract, yet, since the defendant's counterclaim against the plaintiffs was based on negligence but nothing more, the exempting clause protected them and the counterclaim failed.

Woolmer v. *Delmer Price, Ltd.* ([1955] 1 All E.R. 377) distinguished.

Observations on what constitutes a breach going to the root of a contract by a warehouseman (see p. 124, letter F, to p. 125, letter A, post).

Appeal dismissed.

[**Editorial Note.** The decision in the present case would not necessarily govern a case in which, for example, the goods bailed had not been redelivered, for in such a case it might be that the bailees had been in breach of a fundamental term of the contract of bailment which would preclude their relying on an exempting clause. The decision may also be distinguished from cases where a bailee is not exempted from liability for negligence because the exempting clause is not clear or because there is other liability to which it can apply and to which, by a strict construction, it should be confined (see *Alderslade* v. *Hendon Laundry, Ltd.*, [1945] 1 All E.R. at p. 245, letter E).

As to conditions exempting a bailee for reward from liability, see 2 HALSBURY'S LAWS (3rd Edn.) 115, 116, para. 225; and for cases on the subject, see 3 DIGEST 95-98, *251-268*, 99, 100, *275-280*.]

Cases referred to:

(1) *Parker* v. *South Eastern Ry. Co.*, *Gabell* v. *Same*, (1877), 2 C.P.D. 416; 46 L.J.Q.B. 768; 36 L.T. 540; 41 J.P. 644; 3 Digest 85, *197*.

(2) *Bontex Knitting Works, Ltd.* v. *St. John's Garage*, [1943] 2 All E.R. 690; *affd.* C.A., [1944] 1 All E.R. 381, n.; 2nd Digest Supp.

(3) *Woolmer* v. *Delmer Price, Ltd.*, [1955] 1 All E.R. 377; [1955] 1 Q.B. 291.

(4) *The Albion, France, Fenwick Tyne & Wear Co., Ltd.* v. *Swan, Hunter & Wigham Richardson, Ltd.*, [1953] 2 All E.R. 679; 3rd Digest Supp.

(5) *Mersey Steel & Iron Co.* v. *Naylor Benzon & Co.*, (1884), 9 App. Cas. 434; 53 L.J.Q.B. 497; 51 L.T. 637; 12 Digest (Repl.) 378, *2966*.

(6) *Cunard S.S. Co.* v. *Buerger*, [1927] A.C. 1; 96 L.J.K.B. 18; 135 L.T. 494; 41 Digest 489, *3192*.

(7) *Alderslade* v. *Hendon Laundry, Ltd.*, [1945] 1 All E.R. 244; [1945] K.B. 189; 114 L.J.K.B. 196; 172 L.T. 153; 2nd Digest Supp.

(8) *Roe* v. *Naylor (R. A.), Ltd.*, [1917] 1 K.B. 712; 86 L.J.K.B. 771; 116 L.T. 542; *affd.* C.A., (1918), 87 L.J.K.B. 958; 119 L.T. 359; 12 Digest (Repl.) 170, *1096*.

(9) *Crooks* v. *Allan*, (1879), 5 Q.B.D. 38; 49 L.J.Q.B. 201; 41 L.T. 800; 41 Digest 602, *4294*.

Appeal.

The defendant appealed from an order of His Honour JUDGE BLOCK at the Mayor's and City of London Court, dated Dec. 21, 1955, whereby he dismissed the defendant's counterclaim for damages for negligence.

The facts appear in the judgment of DENNING, L.J.

J. Sofer for the defendant.

J. Megaw, Q.C., and *C. F. Dehn* for the plaintiffs.

DENNING, L.J.: In the first part of June, 1953, the defendant bought eight wooden casks of orange juice, containing sixty gallons apiece. He bought them " to clear for £120 ", and he sent them to some warehousemen, the plaintiffs, J. Spurling, Ltd., who on June 10, 1953, sent a receipt for them, called a " landing account ", which said:

> " We have pleasure in advising you that these goods consigned to you arrived at our premises this day and are subject to either warehouse, wharfage, demurrage or other charges . . . The company's conditions as printed on the back hereof cover the goods held in accordance with this notice. Goods will be insured if you instruct us accordingly; otherwise they are not insured."

On the back there were " Contract conditions " and many lines of small print, which included, towards the end, these words:

> " We will not in any circumstances when acting either as warehousemen, wharfingers, contractors, stevedores, carriers by land, or agents, or in any other capacity, be liable for any loss, damage or detention howsoever, whensoever, or wheresoever occasioned in respect of any goods entrusted to or carried or handled by us in the course of our business, even when such loss, damage or detention may have been occasioned by the negligence, wrongful act or default of ourselves or our servants or agents or others for whose acts we would otherwise be responsible."

On the same date, June 10, 1953, the plaintiffs sent an invoice to the defendant: " To receiving, warehousing and redelivery, £4 ", and there was a note at the bottom of it:

> " All goods are handled by us in accordance with the conditions as over and warehoused at owner's risk and not insured unless specially instructed."

There were no conditions " as over ". The defendant paid the £4 due on the invoice and he also paid the warehouse rent on these goods for a time, but he afterwards fell into arrear on these and other goods. On Mar. 9, 1954, the plaintiffs sent to him an account for the balance owing by him which was, they said, rather old. Within three days the defendant issued a delivery order in favour of a Mr. Tuson directed to the plaintiffs, asking them to release to him the eight barrels of orange juice; and on Apr. 23, 1954, Mr. Tuson, who was a cartage contractor, collected these eight barrels. I will refer a little later to what Mr. Tuson said was their condition when he collected them; but so far as the correspondence is concerned, there was not a word of complaint about the barrels for a long time. The plaintiffs wrote letters asking the defendant to pay their account, but he failed to do so. Over £60 was due to them and they wrote time and again, and received no reply. They put it into the hands of a debt collecting agency who wrote twice demanding the money. At last on Dec. 17, 1954, there was a reply. The defendant by his solicitors then said that he had a counterclaim for damages in respect of the storage of these barrels. Thus it was eight months after the goods were collected before there was any written complaint. The plaintiffs issued a writ for their charges amounting to £61 12s. 6d. The defendant put in a defence admitting the charges, but he also set up a counterclaim for £180 which, as I read it, was a counterclaim for negligence in the storage of the goods. He said that, when collected, five barrels were empty and without lids, one barrel contained dirty water, and two barrels were leaking badly. The plaintiffs put in a defence to the counterclaim in which they denied the charge of negligence and further said it was an express term of the contract that they should not be liable for any loss or damage of or to in connection with the barrels, and they relied on the " landing account " for that purpose. In all the circumstances, it was not surprising that the plaintiffs relied on the exempting clause.

When the matter came before the judge of the Mayor's and City of London Court, the counterclaim was the only matter in dispute. The cartage contractor Mr. Tuson was called. He said that when he collected the barrels they were at the far end of an alley-way, with lorry wheels in front of them, girders on top, and some tarpaulin sheets. He said that he later discovered they were damaged and spoke to the crane-driver about it. When the defendant was called, he said he had received landing accounts from the plaintiffs many times before; and he said that as soon as he saw the condition of the barrels he saw the yardman in the office. He went on to say that when he received the letters and demands for payment of the overdue account, he went and saw someone at the plaintiff's office and raised the matter of the barrels. The judge intervened before the defendant was cross-examined, and asked his counsel "Why is not the exempting clause a complete answer to the case?" Having heard what he had to say, the judge there and then decided in favour of the plaintiffs on the ground that the exempting clause exempted them from all liability. The judge in his judgment found that the plaintiffs were negligent; that was a finding which was not open to him, seeing that the defendant had not been cross-examined and that the plaintiffs had not had an opportunity of giving their evidence. Nevertheless, assuming that they were negligent, the question for us is whether the clause excuses them from liability.

If the clause is taken literally, it is wide enough to exempt the plaintiffs from any obligation to redeliver the goods. It would mean that if the managing director sold the orange juice to somebody else, or used it up for the company's purposes, maybe by mistake or even dishonestly, the company would not be liable; or if some discontented storeman took the bung out of a barrel and let the orange juice escape, the company still would not be liable. If the clause went to those lengths, it would be very unreasonable and might for that reason be invalid on the lines which Bramwell, L.J., indicated in *Parker* v. *South Eastern Ry. Co.* (1) ((1877) 2 C.P.D. 416 at p. 428); but I do not think this clause is to be construed as widely as that. All these exempting clauses are held nowadays to be subject to the overriding proviso that they avail to exempt a party only when he is carrying out his contract, not when he is deviating from it or is guilty of a breach which goes to the root of it. Just as a party who is guilty of a radical breach is disentitled from insisting on the further performance by the other, so also he is disentitled from relying on an exempting clause. For instance, if a carrier by land agrees to collect goods and deliver them forthwith, and in breach of that contract he leaves them unattended for an hour instead of carrying them to their destination, with the result that they are stolen, he is disentitled from relying on the exempting clause. That was decided by this court in *Bontex Knitting Works, Ltd.* v. *St. John's Garage* (2) ([1944] 1 All E.R. 381, n.) approving the judgment of Lewis, J. ([1943] 2 All E.R. 690); or if a bailee by mistake sells the goods or stores them in the wrong place, he is not covered by the exempting clause: see the decision of McNair, J., in *Woolmer v. Delmer Price, Ltd.* (3) ([1955] 1 All E.R. 377). The essence of the contract by a warehouseman is that he will store the goods in the contractual place and deliver them on demand to the bailor or to his order. If he stores them in a different place, or if he consumes or destroys them instead of storing them, or if he sells them, or delivers them without excuse to somebody else, he is guilty of a breach which goes to the root of the contract and he cannot rely on the exempting clause. If, however, he should happen to damage them by some momentary piece of inadvertence, then he is able to rely on the exempting clause, because negligence by itself, without more, is not a breach which goes to the root of the contract (see *The Albion* (4) [1953] 2 All E.R. 679), any more than non-payment by itself is such a breach: see *Mersey Steel & Iron Co.* v. *Naylor Benzon & Co.* (5) ((1884) 9 App. Cas. 434 at p. 443). I would not like to say, however, that negligence can never go to the root of the contract. If a warehouseman were to handle the goods so roughly as to warrant the inference that he was reckless and indifferent to their safety, he would, I think, be guilty of a breach going to the root of the contract and could not rely on the exempting clause. He cannot be allowed to escape from his obligation by saying to himself: " I am not going to trouble about these goods because I am covered by an exempting clause ".

Another thing to remember about these exempting clauses is that in the ordinary way the burden is on the bailee to bring himself within the exception. A bailor, by pleading and presenting his case properly, can always put the burden of proof on the bailee. In the case of non-delivery, for instance, all he need plead is the contract and a failure to deliver on demand. That puts on the bailee the burden of proving either loss without his fault (which would be a complete answer at common law) or, if the loss was due to his fault, that it was a fault from which he is excluded by the exempting clause: see *Cunard S.S. Co.* v. *Buerger* (6) ([1927] A.C. 1); and *Woolmer* v. *Delmer Price, Ltd.* (3). I do not think that the Court of Appeal in *Alderslade* v. *Hendon Laundry, Ltd.* (7) ([1945] 1 All E.R. 244) had the burden of proof in mind at all. Likewise, with goods that are returned by the bailee in a damaged condition, the burden is on him to show that the damage was done without his fault: or that, if fault there was, it was excused by the exempting clause. Nothing else will suffice. Where, however, the only charge made in the pleadings—or the only reasonable inference on the facts—is that the damage was due to negligence and nothing more, then the bailee can rely on the exempting clause without more ado. That was, I think, the case here. As I read the pleadings, and the way in which the case was put to the judge, the defendant was complaining of negligence and nothing more. The clause therefore avails to exempt the plaintiffs provided always that it was part of the contract.

This brings me to the question whether this clause was part of the contract. Counsel for the defendant urged us to hold that the plaintiffs did not do what was reasonably sufficient to give notice of the conditions within *Parker* v. *South Eastern Ry. Co.* (1). I agree that the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient. The clause in this case, however, in my judgment, does not call for such exceptional treatment, especially when it is construed, as it should be, subject to the proviso that it only applies when the warehouseman is carrying out his contract and not when he is deviating from it or breaking it in a radical respect. So construed, the judge was, I think, entitled to find that sufficient notice was given. It is to be noticed that the landing account on its face told the defendant that the goods would be insured if he gave instructions; otherwise they were not insured. The invoice, on its face, told him they were warehoused " at owner's risk ". The printed conditions, when read subject to the proviso which I have mentioned, added little or nothing to those explicit statements taken together. Next it was said that the landing account and invoice were issued after the goods had been received and could not therefore be part of the contract of bailment: but the defendant admitted that he had received many landing accounts before. True he had not troubled to read them. On receiving this account, he took no objection to it, left the goods there, and went on paying the warehouse rent for months afterwards. It seems to me that by the course of business and conduct of the parties, these conditions were part of the contract.

In these circumstances, the plaintiffs were entitled to rely on this exempting condition. I think, therefore, that the counterclaim was properly dismissed, and this appeal also should be dismissed.

MORRIS, L.J.: I am of the same opinion. Although the range of the discussion in this case covered a number of important points of law, it does not seem to me that all of them in fact arise. The claim that the plaintiffs brought, when the action was an action in the High Court, was one for money due for rent and wharfage charges to an amount of over £60. Only a very small part of that amount relates to any of the matters now in issue. When, however, the defendant delivered his pleading while the action was in the High Court, he pleaded, in March, 1955, a defence and a counterclaim, and by his counterclaim he raised matters in connection with the storage of the eight barrels which have been in question. It seems to me that the pleading was perfectly clear and was a good pleading. I do not think that any criticism really has been made or is made of the pleading. It is quite explicit and states what was the issue raised. The defendant pleaded that the eight barrels had been stored by the plaintiffs. Then in para. 3 he said:

> " It was an implied term of the said contract of bailment that the plaintiffs would take reasonable care of the said barrels of orange juice while storing them as aforesaid."

Paragraph 4:

> " In breach of the said term and/or negligently [" the said term " I think means the implied term pleaded in the previous paragraph] the plaintiffs stored the goods in the open air and further damaged them while in their possession. By reason of the said matters when the plaintiffs delivered the said goods to a customer of the defendant they were in the following condition ",

and then the condition of the goods is set out. It seems to me that, as a pleading, that is quite unexceptionable, and what it is saying is, not " These goods were lost " or " These goods were never delivered when a demand was made "; what is said is: " The defendant asked that these goods should be delivered to a customer of his. They were delivered, but when delivered they were in defective condition because of the way in which they had been stored "; in other words, because they had been stored negligently and in breach of an implied term of the contract that the plaintiffs would take reasonable care of the barrels while storing them. So this case does not raise questions that might arise if there were simply a claim that goods had been asked for and had not been returned.

The learned judge heard the evidence of Mr. Tuson, the cartage contractor, as to the state of the goods when he first deposited them with the plaintiffs and their state when they were removed. The evidence of the defendant in chief was heard, but before he was cross-examined the judge intervened. The judge said in his judgment:

> " I have no doubt that the plaintiffs were negligent in looking after these barrels."

I think the plaintiffs are entitled to have it known that, although there is that finding against them, their evidence had not been heard, although the evidence of the carter had been heard. The learned judge, however, proceeded on the basis that there was negligence and negligence was the case that was raised. Then there was brought into consideration the question of the conditions on the contract, and one question is whether the conditions were a part of the contract. The learned judge said this:

> " But this was one of many transactions undertaken as between the plaintiffs and the defendant for the storage of goods. [The defendant] was most truthful and honest about the whole matter. He said he had had lots of these landing accounts, where, on the front, is clearly printed: ' The company's conditions as printed on the back hereof cover the goods held in accordance with this notice '. Although his eyesight is not as good as it might be, perhaps, he told me that he had never taken the trouble either to read or get somebody else to read those conditions, and that many of those landing notes had passed through his hands over the course of trading."

It is true, as counsel for the defendant said, that because the evidence of the plaintiffs was not heard, there is no positive evidence that the conditions on previous landing accounts were the same as the conditions in the present case. It is clearly established, however, that the defendant knew that there were conditions. There can be no question that it is abundantly plain on the face of the document that there are conditions. On the face of the document the following words are plainly legible:

> " The company's conditions as printed on the back hereof cover the goods held in accordance with this notice. Goods will be insured if you instruct us accordingly; otherwise they are not insured."

The learned judge went on to say that he himself, looking at the conditions on the back, could read them; accordingly he was finding as a matter of fact that the conditions on the back of that document were legible, and it follows, therefore, that he was finding as a matter of fact that the conditions were a part of the contract. In so doing, I cannot think that he was not following the line of approach to be found in a passage relied on by counsel for the defendant in the judgment of BAILHACHE, J., in *Roe* v. *R. A. Naylor, Ltd.* (8) ([1917] 1 K.B. 712 at p. 715):

> " Therefore the question in the present case is whether this printed clause is a clause which is so printed that from its position in the document and the size of the type an ordinary careful business man, reading the document with reasonable care, might miss it."

It seems to me implicit in the learned judge's judgment in the present case that he was saying " The words are quite clear on the face of the contract that there are conditions on the back, and those conditions on the back are in fact legible." Therefore, in finding that the conditions formed part of the contract, it does not seem to me that the learned judge was out of line with what BAILHACHE, J., said; nor that there is anything that controverts what was said by LUSH, J., in *Crooks* v. *Allan* (9) ((1879) 5 Q.B.D. 38 at p. 40), another passage relied on by counsel for the defendant. It seems to me, therefore, that these conditions were a part of the contract.

In this case then the question becomes whether, assuming that the goods were negligently kept by the plaintiffs, the conditions protect them. It seems to me that they plainly do. In *Alderslade* v. *Hendon Laundry, Ltd.* (7) LORD GREENE, M.R., said ([1945] 1 All E.R. at p. 245):

> " It must be remembered that a limitation clause of this kind only applies where the damage, in respect of which the limitation clause is operative, takes place within the four corners of the contract . . . But there is no room for the application of that principle in the present case because there is no material for finding that the loss of these handkerchiefs was due to some act by the laundry company outside what it had contracted to do."

In the present case, similarly, it seems to me that there is no material before us for finding that the claim results from some act of the plaintiffs outside what they contracted to do. In those circumstances, it seems to me that the conditions exempting the plaintiffs from negligence are conditions that availed, and, therefore, which excused the plaintiffs, even on the assumption that they had been guilty of negligence. I therefore agree that the appeal fails.

PARKER, L.J.: I have come to the same conclusion, and would only add a few words on the last submission of counsel for the defendant. He contends that even if the exemption clause is binding on the defendant, the circumstances of the loss were such that, wide as the clause is, it still may not cover the loss. That being so, it is said that the learned judge should not have stopped the case, but should have allowed the plaintiffs to call evidence to show, if they could, that the clause applied. I confess that I have seldom seen a wider clause, and it is I think impossible to think of any circumstances in which loss might occur which are not covered, provided, and provided always, as is conceded by the plaintiffs, that there has been no breach of a fundamental term akin to deviation. Thus, if, for instance, the contract had been to store indoors whereas these barrels were in fact stored in the open air, the clause would not apply. Indeed, at one time that was going to be the defendant's case, but it was abandoned. Counsel, however, goes on to contend that, even so, the onus is on the plaintiffs to show that the exemption clause has not been, as it were, displaced by any such breach of a fundamental term, and in this regard he relies strongly on the decision of McNair, J., in *Woolmer* v. *Delmer Price, Ltd.* (3). In that case a fur coat had been stored with the defendants under a contract which provided that " all goods are left at customer's risk ", a clause which it was held exempted the bailees from liability for negligence. They were, however, unable to show how the loss occurred, and McNair, J., said ([1955] 1 All E.R. at p. 379):

> " If, however, they fail to adduce satisfactory evidence of how the loss occurred, as is the case, and if the loss may have occurred in a way which would not be covered by the ' customer's risk ' clause, then the clause does not protect them."

McNair, J., went on to point to two sets of fact which might have occurred in that case, both amounting to breaches of fundamental terms, in which case the exempting clause would not apply. I think it is necessary to see the nature of the present proceedings and the way the pleadings are framed. I would observe that it is not a case of mere failure to redeliver; the goods were redelivered, and redelivered damaged. In those circumstances, the counterclaim properly alleged a breach of an implied contractual term to exercise reasonable care and alternatively negligence. It was said that by reason of that breach or that negligence the loss had occurred. I think that when I raised this matter, in the course of the argument, counsel took it as a criticism of his pleading. I would like to make it quite clear that I did not intend to criticise the pleading. It is a perfectly good pleading, and it pleaded the complaint made, and the only complaint that could be made. In those circumstances, it seems to me that the judge, having found that the negligence alleged was proved, was right in saying that the exemption clause applied. I am far from saying that the onus is not on defendants in a case where they have failed completely to redeliver or where the plaintiff has alleged a breach of a fundamental term. Thinking, as I do, that this is quite a different case from that which was before McNair, J., I find it unnecessary to go into the submission of counsel on behalf of the plaintiffs that that case, *Woolmer* v. *Delmer Price, Ltd.* (3), was wrongly decided.

While sympathising with the course that the judge took, I think it is a pity that the case was not heard out; but it is only right to say that, in my view, the only parties aggrieved thereby are the plaintiffs, against whom there is a finding of negligence, albeit they are exempted from liability therefor, when they had never had an opportunity of proving that they were not negligent. I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Shindler & Co.* (for the defendant); *Hyde, Mahon & Pascall* (for the plaintiffs).

[*Reported by* Philippa Price, *Barrister-at-Law.*]

A
BRITISH TRANSPORT COMMISSION *v.* WESTMORLAND COUNTY COUNCIL.
BRITISH TRANSPORT COMMISSION *v.* WORCESTERSHIRE COUNTY COUNCIL.

B [COURT OF APPEAL (Singleton, Jenkins and Hodson, L.JJ.), March 19, 20, 21, 22, 1956.]

Highway—Dedication—Footpaths over and under railway—Presumption of dedication—Whether dedication incompatible with objects of statutory corporation—Railways Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 20), *s.* 16.

C A bridge over a railway and a bridge under a railway were constructed by statutory railway undertakers at about the time of the construction of the railways. The bridges afforded accommodation crossings over and under the railways and were constructed under statutory obligation for the convenience of the owners whose lands were severed by the railways, but there were no public or private rights of way at the crossings when they
D were constructed. Subsequently, members of the public so used the crossings and paths leading thereto and therefrom as to justify the inference of dedication of public rights of way if the railway undertakers and their successors in title had capacity to dedicate. There was no evidence that the user by the public of the footpath over or under the bridges was incompatible with the working of the railway. It was, however, argued that the railway
E undertakers could not dedicate rights of way over or under the bridges because that would put them in a position of no longer being able to exercise the power expressly vested in them by the Railways Clauses Consolidation Act, 1845, s. 16*, to remove the bridges once the necessity for their maintenance had ceased.

Held: the test whether a statutory body, such as the railway under-
F takers, could validly dedicate to the public a right of way was whether user of the way by the public was compatible with the performance by the statutory body of the statutory purposes for which they held the land over which the way passed, and (per JENKINS and HODSON, L.JJ.) the question whether dedication of a particular way was compatible with those purposes was a question of fact; in the present cases dedication of the rights of way
G to the public was compatible with the statutory purposes for which the land was held and the appeals would be dismissed.

Per SINGLETON and HODSON, L.JJ.: the law as stated in *R.* v. *Inhabitants of Leake* ((1833) 5 B. & Ad. at p. 478) and subsequent cases has received statutory recognition in s. 1 (7) of the Rights of Way Act, 1932 (see p. 142, letters D to H, and p. 144, letter F, post).

H *South Eastern Ry. Co.* v. *Warr* ((1923) 21 L.G.R. 669) followed.

Dictum of PARKE, J., in *R.* v. *Inhabitants of Leake* ((1833) 5 B. & Ad. at p. 478) applied.

Ayr Harbour Trustees v. *Oswald* ((1883) 8 App. Cas. 623) considered.

Decision of the DIVISIONAL COURT ([1956] 1 All E.R. 321) affirmed.

[As to capacity of statutory corporations to dedicate the surface of land vested
I in them for use as a highway, see 16 HALSBURY'S STATUTES (2nd Edn.) 222, para. 268; and for cases on the subject, see 26 DIGEST 290-292, *225-243*.

For the Railways Clauses Consolidation Act, 1845, s. 16, see 19 HALSBURY'S STATUTES (2nd Edn.) 603.]

Cases referred to:

(1) *Midland Ry. Co.* v. *Gribble*, [1895] 2 Ch. 827; 64 L.J.Ch. 826; 73 L.T. 270; 19 Digest 81, *490*.

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* The terms of this section (so far as relevant) are printed at p. 131, letter G, post.

(2) *R.* v. *Leake* (*Inhabitants*), (1833), 5 B. & Ad. 469 (110 E.R. 863); 2 Nev. & M.K.B. 583; 26 Digest 290, *225*. A

(3) *Ayr Harbour Trustees* v. *Oswald*, (1883), 8 App. Cas. 623; 11 Digest (Repl.) 103, *5*.

(4) *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.*, [1926] A.C. 355; 95 L.J.Ch. 587; 134 L.T. 673; 90 J.P. 77; Digest Supp.

(5) *South Eastern Ry. Co.* v. *Cooper*, [1924] 1 Ch. 211; 93 L.J.Ch. 292; 130 L.T. 273; 88 J.P. 37; 19 Digest 108, *687*. B

(6) *Grand Junction Canal Co.* v. *Petty*, (1888), 21 Q.B.D. 273; 57 L.J.Q.B. 572; 59 L.T. 767; 52 J.P. 692; 26 Digest 290, *226*.

(7) *Re Heywood's Conveyance. Cheshire Lines Committee* v. *Liverpool Corpn.*, [1938] 2 All E.R. 230; Digest Supp. C

(8) *A.-G.* v. *London & South Western Ry. Co.*, (1905), 69 J.P. 110; 26 Digest 292, *239*.

(9) *South Eastern Ry. Co.* v. *Warr*, (1923), 21 L.G.R. 669; 26 Digest 291, *232*.

(10) *Great Central Ry. Co.* v. *Balby-with-Hexthorpe Urban Council, A.-G.* v. *Great Central Ry. Co.*, [1912] 2 Ch. 110; 81 L.J.Ch. 596; 106 L.T. 413; 76 J.P. 205; 26 Digest 292, *240*. D

(11) *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.*, [1896] 2 Q.B. 439; 65 L.J.Q.B. 625; 75 L.T. 239; 11 Digest (Repl.) 139, *210*.

(12) *Great Western Ry. Co.* v. *Solihull Rural District Council*, (1902), 86 L.T. 852; 66 J.P. 772; 26 Digest 290, *227*.

(13) *Lancashire & Yorkshire Ry. Co.* v. *Davenport*, (1906), 70 J.P. 129; 26 Digest 291, *229*. E

Appeals.

The appellants, the British Transport Commission (called in this report " the Commission"), appealed from two orders of the Divisional Court, dated Jan. 23, 1956, and reported [1956] 1 All E.R. 321. The Commission had made an application pursuant to the National Parks and Access to the Countryside Act, 1949, s. 31, for a declaration that on Aug. 1, 1952, no public right of way existed over a bridge spanning certain lines of railway owned and occupied by the Commission in the Borough of Kendal, Westmorland, and had also made a similar application for a declaration that on Nov. 1, 1954, no public right of way existed under certain lines of railway owned and occupied by the Commission in the Urban District of Malvern, Worcestershire, the railway lines in each case being crossed (either above or below them) by a footpath which had been dedicated to the public if the statutory railway undertakers, predecessors of the Commission, validly could dedicate such a public right of way. The Divisional Court held that railway undertakers had validly dedicated rights of way over and under their railways to the public. The relevant parts of the Case Stated in *British Transport Commission* v. *Westmorland County Council* are quoted in the judgment of SINGLETON, L.J. The full facts both in that case and in *British Transport Commission* v. *Worcestershire County Council* are set out in the report of the decision of the Divisional Court (see [1956] 1 All E.R. at pp. 322-324). F G H

Sir Frank Soskice, Q.C., and *J. P. Widgery* for the appellants (the Commission).

Harold Williams, Q.C., and *E. S. Temple* for the respondents (the County Councils). I

SINGLETON, L.J.: There are two appeals before the court, the first being an appeal by the British Transport Commission from a judgment of the Divisional Court in their claim against the Westmorland County Council, and the second being an appeal by the Commission in their claim against the Worcestershire County Council. I propose to deal generally with the case between the Commission and the Westmorland County Council (hereinafter called " the Council "). The same questions arise in the two appeals.

On June 30, 1845, the Kendal and Windermere Railway Act, 1845, was passed (which, by s. 41 is a public Act)

> " for making a railway from the Lancaster and Carlisle railway to Birthwaite in the parish of Windermere, to be called ' The Kendal and Windermere Railway '."

By s. 3 a number of named persons and others were to be

> " united into a company for the purpose of making and maintaining a railway to commence by a junction with the Lancaster and Carlisle railway at or near Oxenholme . . . to terminate at or near Birthwaite . . . with proper works and conveniences belonging thereto according to the provisions of the said recited Acts and of this Act, and for other purposes herein and in the said recited Acts contained; and for the purposes aforesaid such company shall be incorporated by the name of ' The Kendal and Windermere Railway Company ', and by that name shall have power to purchase and hold lands for the purposes of the undertaking within the restrictions herein and in the recited Acts contained."

The Commission are the successors in title of the company which was incorporated under the provisions of that Act. By s. 20 it is provided:

> " And whereas plans and sections of the railway showing the lines and levels thereof, and also books of reference containing the names of the owners, lessees, and occupiers, or reputed owners, lessees, and occupiers, of the lands through which the same is intended to pass, have been deposited with the clerk of the peace of the county of Westmoreland; be it enacted, that, subject to the provisions in this and the said recited Acts contained, it shall be lawful for the said company to make and maintain the said railway and works in the line and upon the lands delineated on the said plans, and described in the said books of reference, and to enter upon, take, and use such of the said lands as shall be necessary for such purpose."

The Act incorporated, among other Acts, the Railways Clauses Consolidation Act, 1845. We have been referred in particular to two sections of that Act. First, s. 16, " Works to be executed ", of which I read a part:

> " Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, herein-after mentioned, to execute any of the following works; (that is to say,) . . . Alterations and repairs.—They may from time to time alter, repair, or discontinue the before-mentioned works or any of them, and substitute others in their stead; and General power:—They may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway."

Secondly, s. 68:

> " The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway; (that is to say,) Such and so many convenient gates, bridges, arches, culverts, and passages, over, under, or by the sides of or leading to or from the railway, as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof."

I think it convenient at this stage to draw attention to *Midland Ry. Co.* v. *Gribble* (1) ([1895] 2 Ch. 827) which shows that, apart from s. 16 of the Act of 1845, and assuming that it applies, there is no obligation on the railway company to keep open a bridge made by way of accommodation works once the necessity for it has ended. In that case Lindley, L.J., said ([1895] 2 Ch. at p. 830):

> " The words ' shall at all times maintain ' do not mean that the company must maintain it at all times if he does not want it. Having asked for this accommodation and got it, he could if he chose release it; and if he chose to release it there would be an end of the statutory obligation to maintain it. The maintenance of it is not a public duty; it is a duty to him privately, and, of course, to those claiming under him."

Lopes, L.J., said (ibid., at p. 832):

> " An accommodation work like this passage-way is a work necessary for the purpose of making good any interruption caused by the railway to the use of the lands through which the railway is made, the lands on either side being in the occupation of the same owner. That accommodation work is made by the railway company for a special purpose, that special purpose being to maintain a communication between the lands of the same owner or occupier which have been intersected by the railway; and, in my judgment, as soon as that special purpose is at an end, and when, as Mr. Bridgeman has admitted, it is practically impossible now to use the work for that purpose, the accommodation being no longer required, the obligation to afford it also ceases."

The question which arises for determination is whether, on Aug. 1, 1952, a public right of way existed over a bridge spanning the lines of the railway between Kendal and Windermere and within the Borough of Kendal. The bridge was an " accommodation work " provided by the Kendal and Windermere Railway Co. and was necessary because the railway ran across the land of an owner on both sides of what became the line, so that the bridge was necessary for the use of his land.

Paragraph 2 of the Case Stated sets out certain facts which had to be considered by the Court of Quarter Sessions for the County of Westmorland in circumstances which I will detail in a moment. The Court of Quarter Sessions found these facts:

> " (a) The said lines of railway were constructed in or about the year 1847 by [the Commission's] predecessors in title under powers contained in the Kendal and Windermere Railway Act, 1845. (b) At the date of the construction of the said railway no public right of way existed on or near to the line of the said way numbered 29 [on the plan which was exhibited]. (c) The said bridge was constructed by the [Commission's] predecessors in title at or about the time of the construction of the said railway in order to facilitate access between the land on either side of the said railway which was severed by the construction of the same. (d) The said bridge was constructed solely as a private accommodation crossing for the benefit of the owners and occupiers of the lands so severed as aforesaid and no express dedication to the public of the way thereover has at any time been made. (e) Since the construction of the said railway members of the public have used the said way numbered 29 and the said bridge in such manner and for such period as to give rise to a presumption that the same had been dedicated as a highway if the owner of the soil were capable of such dedication. (f) The owners from time to time of the soil of the said way, other than the [Commission] and their predecessors in title as owners of the said railway have at no time been under such a disability as would render them incapable of dedicating

> A the said way as a highway and have made no application to quarter sessions for such a declaration* as was sought by the [Commission] in these proceedings nor has such an application been made by any lessee or occupier (other than the [Commission]) of the soil of the said way. (g) If and when the [Commission] cease to be bound to maintain the said bridge for the benefit and convenience of the owners or occupiers of the lands severed by B the said railway for whose benefit and convenience the same was originally constructed, by reason of the rights of the said owners and occupiers having been released by agreement or abandoned or having otherwise ceased to be exercisable, the [Commission] would demolish and discontinue the said bridge, it being their practice so to deal with accommodation works as opportunity arises. (h) There is no likelihood of the [Commission] wishing C to construct additional lines of rails under the said bridge or its approaches unless substantial new industrial development takes place in the area served by the said railway. There is no prospect of any such development. (i) The continued existence of the bridge will not cause any danger to the running of the [Commission's] trains and the operation of the railway."

D Sub-paragraph (j) of the Case Stated deals with the question of expense which would result if the bridge had to be kept in its present condition at a time when it might be discontinued otherwise; and the cost is (as shown in sub-para. (j)) comparatively small: indeed, sub-para. (k) contains this:

> " In so far as it is a matter of fact, the expenditure involved in the maintenance of the bridge is quite compatible with the present and future E execution of the purposes for which the land is vested in the [Commission]."

Let me add to those findings of fact that so far as I have heard and read there is no evidence to show that the user by the public of the footpath over the bridge has ever caused any inconvenience to the Commission or to their predecessors in title.

On Dec. 16, 1949, there was passed the National Parks and Access to the F Countryside Act, 1949, Part 4 of which places a formidable duty on county councils. Section 27 (1) provides:

> " Subject to the provisions of this Part of this Act, the council of every county in England or Wales shall, as soon as may be after the date of the commencement of this Act, carry out a survey of all lands in their area over G which a right of way to which this Part of this Act applies is alleged to subsist, and shall, not later than the expiration of three years after that date or of such extended period as the Minister may in any particular case allow, prepare a draft map of their area, showing thereon a footpath or a bridleway, as may appear to the council to be appropriate, wherever in their opinion such a right of way subsisted, or is reasonably alleged to have H subsisted, at the relevant date."

Section 27 (6) contains certain definitions, including,

> " ' footpath ' means a highway over which the public have a right of way on foot only, other than such a highway at the side of a public road."

Section 30 provides for the preparation of provisional maps and statements; I and s. 31 (1) provides:

> " At any time within twenty-eight days after the publication of a notice under sub-s. (1) of the last foregoing section, the owner, lessee or occupier of any land shown on the map to which the notice relates, being land on which the map shows a public path, or a road used as a public path, may apply to quarter sessions for a declaration—(a) that at the relevant date

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* I.e., a declaration that the footpath leading over the bridge was not a public highway, see p. 134, letter A, post.

> mentioned in the provisional statement there was no public right of way over the land."

It was under that provision that the Commission applied to quarter sessions for a declaration that the footpath numbered 29 shown on the plan and leading over the bridge, which I have already mentioned, was not a public footpath. The question which is raised is stated in para. 1 of the Case. Paragraph 3 sets out the contentions of the Commission:

> "It was contended by the [Commission] that the dedication of a public right of way over the said bridge would be incompatible with the purposes of the [Commission's] railway undertaking in that: (a) It would commit the [Commission] in perpetuity to all such expense in the maintenance of the said bridge as might from time to time be necessary which expense could be avoided if the same were demolished. (b) It would fetter the [Commission's] powers to expand their said railway undertaking by the construction of additional lines of rails if and when they might require to do so. (c) It would deprive the [Commission] of their statutory powers to discontinue the said bridge and crossing pursuant to s. 16 of the Railways Clauses Consolidation Act, 1845."

As I have pointed out, there might be the right to discontinue the bridge or to remove it, apart from s. 16.

On the present appeal, counsel for the Commission did not pursue the contention which was originally before the court which dealt with the cost which would be incurred by the Commission if they had to keep the bridge in existence for all time, but his submission was really that which is para. 3 (c) which I have read, namely, that

> "It would deprive the [Commission] of their statutory powers to discontinue the said bridge and crossing pursuant to s. 16 of the Railways Clauses Consolidation Act, 1845."

His submission became this: Those who built and made the railway lines, bridges and the like, acquired the land under powers given them by the statute; and they cannot divest themselves of any of the powers so given; one of their powers is to discontinue the said bridge in certain events; and if there can be said to be a public right of way over the bridge the result would be that they would have to keep open something which they otherwise might discontinue and abolish. He claimed that they would thus be parting in effect with some part of that which they had acquired for statutory purposes, and they have no right to do that: in other words, the company could not deprive itself of the benefit of any part of the Act under which it was constituted, and could not grant or dedicate a right of way over this part of their property or over any part: so to do would be to deprive itself of something given to it for a statutory purpose.

Paragraph 4 of the Case sets out the contentions of the Council, and it is right that I should read them.

> "(a) there having been user of the said way numbered 29, and the said bridge in such manner and for such period as to give rise to a presumption that the same had been dedicated as a highway, if the owner of the soil were capable of dedication, dedication ought to be presumed to have taken place. (b) the user of the bridge by the public as a public footpath was not inconsistent with the operation of the railway and the execution of the purposes for which the bridge and adjoining railway land is and was vested in the [Commission] and their predecessors. (c) the dedication of a public right of way over the bridge would only be incompatible with the execution of the functions of the [Commission] and their predecessors if it were to involve the [Commission] in a material increase in expenditure and on the facts the [Commission] would not be involved in any increase in expenditure

A whatever. (d) section 16 of the Railways Clauses Consolidation Act, 1845, does not have the effect contended for it by the [Commission]; otherwise its effect would be that railway undertakers as a matter of law could in no circumstances dedicate a right of way across any part of their railway; this proposition is not supported in any decided case."

B In para. 6 of the Case, quarter sessions expressed their opinion in this way:

> " We were of opinion that there had been dedication and accordingly refused to make the declaration sought by the [Commission]."

In para. 7 they state the question for the court:

> " The question for the opinion of the High Court is whether on the facts C aforesaid, a dedication of the alleged public right of way was incompatible with the statutory objects of the [Commission]."

As I have said, the question was put a little differently by counsel on behalf of the Commission.

The Commission appealed to the Divisional Court, and their appeal was dismissed. In the judgment of the Divisional Court (which was delivered by D LORD GODDARD, C.J.) there appears this passage ([1956] 1 All E.R. at p. 325):

> " The bridge in question was put up for the accommodation of the land owner through whose land the railway passed. Section 68 of the Railways Clauses Consolidation Act, 1845, requires the company to provide such gates, bridges, arches, culverts, and passages over, under, or by the side of or E leading to or from the railway, as may be necessary for the accommodation of the owners or occupiers. Section 16 sets out the various works which a railway company may execute, and the section applies both to works for the construction of the railway and to accommodation works. It contains a clause enacting that the company may from time to time alter, repair or discontinue the works and substitute others, and it is contended that, if this F passage over the bridge were dedicated, the effect would be to deprive the [Commission] of a statutory right to remove it should it no longer be required as an accommodation work. If this contention be right, it is indeed strange that it has never before been the subject of a decision or even mentioned in any of the judgments on the subject."

After referring to various authorities, LORD GODDARD, C.J., said (ibid., at G p. 326):

> " None of the cases suggest that dedication or the creation of an easement is ultra vires, so long as it is not inconsistent with the statutory purpose for which the company was incorporated. That is the test, and we think may be said to be the only test, which determines whether the dedication is intra or ultra vires."

H We have had cited to us a large number of authorities. I do not propose to discuss all of them. I take the view that the passage from the judgment of the Divisional Court correctly expresses the authorities (ibid.):

> " None of the cases suggest that dedication or the creation of an easement is ultra vires, so long as it is not inconsistent with the statutory purpose I for which the company was incorporated."

That is the test to be applied.

In order to determine the question, it is first necessary to consider what was the object of the statute incorporating the original company. The object was the making and the maintaining of a railway, and of railway lines. Counsel for the Commission said that his submission would be that the railway company to which statutory powers were given could not dedicate a right of way over the bridge because it would involve the abrogation by them of an express statutory

A power vested in them by s. 16 of the Railways Clauses Consolidation Act, 1845: they would be putting it out of their power to discontinue and to remove the bridge. Later, he put it in this way: they cannot, by a voluntary dedication of a right of way, put themselves in a position no longer to be able to exercise an express power which Parliament has vested in them to take down a bridge once the necessity for its maintenance has disappeared. The first case to which B I desire to refer is *R.* v. *Inhabitants of Leake* (2) ((1833) 5 B. & Ad. 469). It is on that which was said in that case (which has been approved in the House of Lords and which holds good today) that the determination of this matter seems largely to depend. The headnote to the report of that case is (ibid.):

> "The inhabitants of a parish are bound by law to repair all roads within C it dedicated to and used by the public, although there be no adoption of such roads by the parish. Where land is vested in fee in trustees for certain public purposes, they may dedicate the surface to the use of the public as a highway, provided such use be not inconsistent with the purposes for which the land is vested in them. By an Act for draining fen lands, commissioners were authorised to make drains and other works therein prescribed, and also D to make a new cut or main drain as therein mentioned, and to dispose of all earth and soil arising from the drains directed to be made, in forming banks, at certain distances, on each side thereof; and the banks, drains, etc., were to remain under their control, for the purposes of the Act. The commissioners, under the powers of the Act, made a drain according to the Act, and with the earth taken from it made a bank on one side of it, of the average breadth of E forty feet: this drain and bank were never part of the fen, but were old inclosed land, and bounded by old inclosures on both sides; and the land upon which they were respectively made, was purchased by the commissioners for the purposes of the Act. The bank had been used for about twenty-five years as a public highway, and was a convenient and useful road for the public. Upon a special case, stating these facts, it was held by F DENMAN, C.J., and PARKE, J., LITTLEDALE, J., dissentiente, that the dedication of this part of the bank as a road to the use of the public was not inconsistent with the purposes to which the commissioners were bound by the Act to apply it; it not appearing by the case, (which, however, ought to have been more express on these points; per PARKE, J.) that the cleansing of the drains or any other purpose of the Act had been or was likely to be interfered with by such user of the soil." G

I propose to refer first to the judgment of LITTLEDALE, J. (ibid., at p. 483):

> "It is true that the bank has not, for a great number of years, been practically used to give any further protection or support of the works than it did when first made, and very probably it never may be wanted in any H other state than that in which it now is. But I cannot take judicial notice of that, and I cannot say but at some future time it may be wanted for the works of the drainage, in such a manner as that it could not be used beneficially for these purposes if there was a common highway over it. And I think the commissioners had no power to dedicate to the use of the public as a highway, land which they were entrusted with the ownership of, for a I special purpose, and for which special purpose this land may at some future period be required; and as all the King's subjects are presumed to know Acts of Parliament, they, when they used the roads, must be presumed to have known that in point of law it could not be so dedicated, and that it could only be used as a way of permission and sufferance; and they cannot be considered as having acquired a right by adverse enjoyment, but only by usurpation on rights which were designated by Parliament, and which, therefore, could not be infringed upon."

The words of importance are:

> " And I think the commissioners had no power to dedicate to the use of the public as a highway, land which they were entrusted with the ownership of, for a special purpose, and for which special purpose this land may at some future period be required . . . "

I do not disguise from myself the great force of those words. It may appear odd, if a statutory body is entrusted with certain power and is given the right to acquire, compulsorily or otherwise, land on which it can exercise those powers, that it should be able to dedicate or to grant, rights of way over the land which it has acquired under those powers. On the other hand, a different view was taken by PARKE, J., and by DENMAN, C.J. The opinion of PARKE, J., is stated in these words (ibid., at p. 478):

> " If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power. The mere circumstance of their not being beneficial owners, cannot preclude them from giving the public this right."

That opinion was shared by DENMAN, C.J. It has been accepted as good law ever since, and we have to treat this case on that basis.

Counsel for the Commission referred us to *Ayr Harbour Trustees* v. *Oswald* (3) ((1883) 8 App. Cas. 623). The Ayr Harbour Trustees were empowered by statute to acquire compulsorily an area of land for the purposes of their undertaking, on payment of compensation to the owners of the land acquired. They sought to reduce the amount of compensation by offering to enter into a covenant with the dispossessed owner restricting themselves from building on or using a considerable portion of the land which the Act permitted them to take. To this the owner objected, and claimed that he was entitled to be compensated for what he had lost and that the company had no power to sterilise the land which they had acquired and to covenant not to use it for the purpose for which the statute gave them power to acquire it. LORD BLACKBURN said (8 App. Cas. at p. 634):

> " I think that where the legislature confer powers on any body to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily are intrusted to them, and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently for the public good to justify it in intrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void ";

from which counsel submitted that the railway company had no power to do something which was equivalent to dedication, for it would be divesting themselves of a power which they had—in this case, the power to remove the bridge if and when its retention became unnecessary. LORD WATSON in the same case said (ibid., at p. 639):

> " To give effect to the terms of the minute would, in my opinion, be to affirm that the appellants have power to repeal the provisions of the Act, in so far as these apply to the land taken from the respondent; and as I can find no indication of an intention on the part of the legislature to vest any such power in the appellants, I think the minute is altogether invalid."

Undoubtedly there is much to be said for the argument that a railway company so constituted had not the power to do that which it is said they did; there is, however, a line of authority following on those to which I have referred which shows conclusively that the courts have adopted the view expressed by Parke, J., in *R.* v. *Inhabitants of Leake* (2) (5 B. & Ad. at p. 478).

I refer now to *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* (4) ([1926] A.C. 355). I do not propose to go into the facts of that case, as they are not relevant for consideration here. I would refer however to the speech of Lord Sumner (ibid., at p. 370) where he refers to the judgment of Warrington, L.J., in *South Eastern Ry. Co.* v. *Cooper* (5) ([1924] 1 Ch. 211 at p. 229):

> " Warrington, L.J., in *Cooper's* case (5), where a private level crossing was claimed, sums up the rule by saying, that a statutory company has no power to grant any easement, unless expressly or impliedly authorised, but that its inability in this respect is confined to the granting of easements, the enjoyment of which is incompatible or inconsistent with the employment of the land for the statutory purposes for which it was acquired. In *Grand Junction Canal Co.* v. *Petty* (6) ((1888) 21 Q.B.D. 273), Lindley, L.J., says, that such incompatibility is a matter of evidence, and, in practice, evidence has regularly been given and considered for the purpose of testing the question."

Lord Sumner refers to *Ayr Harbour Trustees* v. *Oswald* (3) in this way ([1926] A.C. at p. 371):

> " My Lords, I do not think that there is a true analogy between these cases. On examining the facts in the *Ayr Harbour* case (3) it is plain that, in effect, the trustees did not merely propose to covenant in a manner that committed the business of the harbour to restricted lines in the future; they were to forbear, once and for all, to acquire all that the statute intended them to acquire, for, though technically they acquired the whole of the land, they were to sterilize part of their acquisition, so far as the statutory purpose of their undertaking was concerned. This is some distance from a mere contract entered into with regard to trading profits. The land itself was affected in favour of the former owner in the *Ayr* case (3) just as a towpath is affected in favour of the owner of a dominant tenement, if he is given a personal right of walking along it. If the Ayr trustees had reduced the acquisition price by covenanting with the respondent for a perpetual right to moor his barges, free of tolls, at any wharf they might construct on the water front of the land acquired, the decision might, and I think would, have been different. There is, however, another aspect of the *Ayr Harbour* case (3) which ought to be loyally recognised. It is certainly some ground for saying that there may be cases where the question of competence to contract does not depend on a proved incompatibility between the statutory purposes and the user, which is granted or renounced, but is established by the very nature of the grants or the contract itself. It was not proved in the *Ayr* case (3) that there was any actual incompatibility between the general purposes of the undertaking and the arrangement by which the particular proprietor was to be spared a particular interference with the amenities or the advantages of his back land. I think the case was supposed to speak for itself and that, in effect, the trustees were held to have renounced a part of their statutory birthright. The appellants, however, contend, and Russell, J., appears to have thought, that your Lordships' House extended other principles, namely, those applicable to servitudes over land acquired, to mere contracts restricting the undertakers' future freedom of action in respect to the business management of their undertaking. This point of view ought therefore to be examined."

It is from that part of the speech of LORD SUMNER that there arises an expression which has been used often in this and other cases—

> "held to have renounced a part of their statutory birthright."

LORD SUMNER pointed out that in *Ayr Harbour Trustees* v. *Oswald* (3) the facts spoke for themselves. The trustees of the harbour had acquired certain land for uses for the purposes of the dock which they were about to construct and at the same time they sought to dispose of their right to do, on a part of the land they so acquired, that which was their statutory purpose. Those facts were sufficient to cause one to say that there was no question but that the thing spoke for itself. There was no need to go into any evidence. Counsel for the Commission submitted that likewise when it is found that statutory undertakers, a railway company, are said to have dedicated a right of way over a bridge in circumstances in which, if it were so, they would be prevented from removing the bridge, an accommodation way, they had renounced a part of their statutory birthright, namely, the right to remove it, possibly at some time in the indefinite future. I do not regard it in that light. In considering the case I feel that one must bear in mind the general principles stated in the authorities, coupled with the fact that the bridge has existed for over one hundred years now and that, so far as we know, for all that time members of the public have used it as they have passed along the footpath and over the railway bridge. That has taken place without any inconvenience to the railway company or to their works or workers. I do not regard the possible loss of the right to terminate something at some time, which might never come, as a parting with the railway company's statutory birthright.

Counsel referred the court to a decision of SIMONDS, J., in *Re Heywood's Conveyance* (7) ([1938] 2 All E.R. 230), where there had been a covenant with regard to land and the decision of the learned judge was that there was no enforceable covenant in any event because the covenant originally entered into was void under the rule in *Ayr Harbour Trustees* v. *Oswald* (3). The argument of Mr. Cyril Radcliffe, K.C. (who appeared for the plaintiffs), on that part of the case was (ibid., at p. 231):

> "Also, if a statutory corporation acquires land for the purpose of its undertaking, it cannot fetter itself with a covenant which impedes the best development of that land for the purpose of the undertaking."

SIMONDS, J., said (ibid., at p. 232):

> "It is said, in the second place, that there is no enforceable covenant in any event, because the covenant originally entered into was void and of no effect, under the doctrine of the well-known case of *Ayr Harbour Trustees* v. *Oswald* (3). In my view, both those contentions are well-founded."

He cited the words of LORD SUMNER in *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* (4) ([1926] A.C. at p. 371), and added ([1938] 2 All E.R. at p. 233):

> "If one can imagine those words of restriction inserted into the Act, it would clearly amount to a substantial restriction of the statutory purposes for which the legislature was authorising the acquisition of these lands. That is something which clearly cannot be done, in view of the case to which I have referred, *Ayr Harbour Trustees* v. *Oswald* (3), a case too often cited for it to be necessary for me to refer to it."

In certain authorities cited to us, counsel for the Commission, while pointing out differences on the facts that I recognise, submitted that they were not binding on this court by reason of the fact that his point, based on the words of LORD BLACKBURN and of LORD WATSON in *Ayr Harbour Trustees* v. *Oswald* (3), had not been cited or considered by the court. The first of those cases was *A.-G.* v. *London & South Western Ry. Co.* (8) ((1905) 69 J.P. 110). I do not propose to deal with it, because I think there is a difference on the facts. I would not, however, like it to be thought that those who constituted the court or counsel who argued in *A.-G.* v. *London & South Western Ry. Co.* (8) were not well acquainted with the principles of law stated in *Ayr Harbour Trustees* v. *Oswald* (3).

The second case is *South Eastern Ry. Co.* v. *Warr* (9) ((1923) 21 L.G.R. 669). It is desirable that I should refer to this case. The headnote to the report of that case is (ibid.):

> " A railway company brought an action for trespass for the climbing over a locked wicket gate at a level crossing. The defence was that a public footway ran through the crossing, and that such footway had been dedicated to the public by permitting long user. The company contended that for the last thirty years the gate had been locked from time to time, and, further, that by the decision in *Great Central Ry. Co.* v. *Balby-with-Hexthorpe Urban Council* (10) ([1912] 2 Ch. 110) a railway company could not dedicate a public highway across its lines, and that even if there had been presumed dedication over land granted to the company for statutory purposes, such dedication was ultra vires the company, and void. Held, that although there might have been interruption of the footway at intervals during the last thirty years, yet evidence of long user prior to that period established the dedication. Held further, that though a statutory company cannot dedicate any part of its land so as to interfere with the objects for which the company came into being, yet there is nothing to prevent it dedicating a right of way to the public where the user of that right of way is not inconsistent with the objects and obligations of the company."

That was an appeal from a decision of Russell, J. (21 L.G.R. 65). The point which is of interest in this case was not raised in the court of first instance before Russell, J., but it was raised in the Court of Appeal. The Court of Appeal consisted of Lord Sterndale, M.R., Warrington and Younger, L.JJ. Lord Sterndale said (21 L.G.R. at p. 670):

> " Although this appeal from Russell, J., has taken a long time to argue, I hope I may be able to compress my judgment into very little space. There is no doubt about the principle, as far as I can make out, to be applied. We had a great number of cases cited to us, some of which, in my opinion, have very little relation indeed to the point we have to decide. They establish this proposition, and I do not think it has ever been doubted, that a statutory body like a railway company cannot alienate its land and cannot grant rights, whether public or private, over its land which interfere with the statutory purposes for which it has been established. I do not think that has ever been doubted, and that is the only principle, in my opinion, which is established by the very numerous cases to which we have been referred on that point."

Counsel has pointed out that *Ayr Harbour Trustees* v. *Oswald* (3), so far as the report shows, was not cited, but the passage which I have read shows that the principle was recognised by the court and was followed. Lord Sterndale, M.R., continued (ibid., at pp. 670, 674):

> " I think this is also undoubted; I do not think it has ever been questioned in this case, that in order to establish a right of public highway there must be proved not only user, but a dedication by the owner of the land . . . But, at the expiration of a very long argument, another point was raised, which is the only point that has given me any difficulty at all, and that is this: There is a decision in *Great Central Ry. Co.* v. *Balby-with-Hexthorpe Urban Council* (10) . . . and I think it must be taken to be the opinion of the learned judge who gave that decision, that a railway company has not got the power to dedicate a public highway across its lines [that is the point taken here]. I doubt if the learned judge meant more than this: that if all you know is

> A that the railway company is proposing to dedicate, or is said to have dedicated, a public highway across its lines of metals, and the conclusion is obvious that it must interfere with the working of the railway, then it is beyond the powers of the company to make such a dedication, because, as I have said, nobody disputes that a railway company cannot grant a public or private right in such a way as to interfere with the carrying out of its B statutory powers "

—again recognising the force of the decision in *Ayr Harbour Trustees* v. *Oswald* (3). LORD STERNDALE said further (ibid., at p. 674):

> "If it could be shown that the result of the dedication which gives access to the footpath across the line to a large number of persons would be C such as to interfere with the statutory powers of the company, then the company could not give that access. That does not seem to me to be doubted. It seems to me that must be shown in some way. I do not care to discuss now upon whom the onus is, because when you have got evidence on both sides the matter of the question of onus does not become as a rule very important. There must be disclosed by the evidence, such as it is, D something which shows that the company cannot dedicate because to do so would be to interfere with its statutory powers. There is here no such evidence given on either side, and I decline entirely to say that, apart from evidence, the giving of access to an unknown number of persons, who may be few or may be many, to cross an existing highway is prima facie doing something that will interfere with the statutory working of the railway. E The evidence discloses nothing of the kind. The evidence discloses as a matter of fact that this has been used as a highway for something like fifty years, and no interference with the statutory working of the railway has ever occurred at all. Therefore, it seems to me that there is no reason for interfering with the learned judge's judgment, and that the appeal must be dismissed with costs."

F No question of onus arises here. There is no evidence whatever that the user by the public of the footpath over the bridge is incompatible with the working of the railway, and no evidence to show that there has ever been any inconvenience caused to anyone. Therefore, on the judgment of LORD STERNDALE, M.R., it appears to me that this appeal should fail. WARRINGTON, L.J., said (21 L.G.R. at pp. 675, 676, 677):

G

> "Now this, I think, is really indisputable and established by a long line of authorities, that in the case of a statutory body such as a railway company which has acquired land for the purposes of its undertaking, it is not competent for a company to deal with its land by way of partial alienation in such a way that the result may be incompatible with the use by the H company of the land which was so acquired for the purposes for which it was acquired . . . in my opinion, that proposition in its wide terms is not capable of being supported if it be alleged that it is a presumption of law, quite irrespective of the facts of the present case, that a railway company cannot create a public footpath across its rails. If that is put forward as a proposition of law, I venture, with all respect, to disagree with it . . . In my opinion, I therefore, the plaintiffs could only succeed in the present case in showing that the supposed dedication would be ultra vires if there were evidence from which the court could properly infer that the existence of a footway would be incompatible with the use of the land of the railway company for the purposes for which it was acquired. Now, in the present case there is not a scrap of evidence on that point, nor do I see anything in the evidence which was given to lead me to suppose that the use of this footway will ever be the slightest inconvenience to the railway company in the use of their rails, and not only that, but I do not believe the company think so themselves."

A YOUNGER, L.J., at the end of his judgment said (ibid., at p. 678):

> " I have nothing to add to the question of law which has been discussed by my Lord and the lord justice. If I may be allowed to say so, I entirely agree with what they have said on that part of the case, and I agree that this appeal must be dismissed."

B Perhaps that case is the nearest to this case that we have seen. The decision is binding on us, and we are compelled to follow it. Over and above that, I regard it as in accordance with the line of authorities since the judgment of PARKE, J., in *R.* v. *Inhabitants of Leake* (2). It appears to me that the law as so stated is recognised in the Rights of Way Act, 1932. Section 1 (1) provides:

> C " Where a way, not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication, upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way . . . "

D The remaining words in the sub-section have been repealed. Section 1 (7) provides:

> " Nothing in this section contained shall affect any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate any such way where such way would be incompatible with such public or statutory purposes." E

It appears to me that sub-s. (7) is placed in the section in order to preserve the position of a statutory undertaker. He is not to be deemed to have dedicated a way under sub-s. (1) unless the conditions set out in sub-s. (7) apply. Nothing in the sub-section is to affect any incapacity of a statutory body to dedicate any such way where such way would be incompatible with such public or statutory F purposes. Sub-section (7) does no more than recognise and keep in existence the position which was there before the Act was passed. Counsel for the Commission argued that the words in the first two lines of sub-s. (1) provide a difficulty for the Council. The words

> " not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication ", G

are inserted, it is suggested, in order to prevent there being any dedication by a public authority, a statutory body. I do not think that that argument is sound, having regard to the concluding words of sub-s. (1), and, in particular, to the introduction of sub-s. (7), which deals with the position of statutory bodies.

H No position arises in which it can be said (to use LORD SUMNER'S words in *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* (4) ([1926] A.C. at p. 371)) that the railway company were depriving themselves of their statutory birthright. They could, if they had so desired, have prevented people crossing over the bridge one hundred years ago, but they allowed people to pass over the bridge and to use the footpath over it, generation after generation. I The question for determination is whether or not the user by the public of the way across the bridge is incompatible with the performance by the statutory body of its public duties as set out in the Act which gave it power to acquire land. I believe that that is the test. It is the test stated in *South Eastern Ry. Co.* v. *Warr* (9). The decision in that case binds this court, and it is in accordance with the decisions over the years. There is nothing which enables us to say that any different test ought to be applied in this appeal.

I agree with the decision of the Divisional Court, and I would dismiss this appeal.

JENKINS, L.J.: I agree. I appreciate the force of counsel's argument based on *Ayr Harbour Trustees* v. *Oswald* (3), and I am also sensible of the attractions of the similar view expressed on this very question of dedication by LITTLEDALE, J., in his dissenting judgment in *R.* v. *Inhabitants of Leake* (2). It seems to me, however, that this court is bound by the authorities to uphold the decision at which the Divisional Court arrived. I will not repeat the citations already made from the authorities, which begin with the judgment of the majority of the court in *R.* v. *Inhabitants of Leake* (2), and include *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.* (11) ([1896] 2 Q.B. 439), *South Eastern Ry. Co.* v. *Cooper* (5), and *Grand Junction Canal Co.* v. *Petty* (6). This line of cases was referred to, by no means with disapproval, by LORD SUMNER in *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* (4). Finally, I should mention *South Eastern Ry. Co.* v. *Warr* (9) (to which my Lord has referred). According to these authorities, companies, such as the predecessors in title of the Commission in the present case, in possession of land for the purpose of operating a railway on them under statutory powers, are not totally incapacitated from dedicating ways over their land to the public, but are incapacitated from so doing only if the effect of the dedication will be incompatible with the public or statutory purposes for which they hold the land. The question whether in any given case the dedication of a particular way would be incompatible with the public or statutory purposes of the company or body concerned, is, according to the authorities by which we are bound, a question of fact, and, as I understand it, the question of fact is whether the existence of the way as a public footpath or highway would prevent or impede the efficient operation of the railway. That, in my view, is the question, and it is not open to us to hold that the question is not one of fact but one of law, so that one must look at the powers of the company or body concerned and see whether there are any of those powers, however unimportant, which might, in some event, be in any way obstructed or impaired by reason of the dedication, however improbable that event might be.

Looking at the facts of these two cases, it seems to me abundantly plain that there is here in fact no incompatibility in the sense which that expression should bear in a case such as this. The physical existence of the bridge (over the railway in the *Westmorland* case and under the railway in the *Worcestershire* case) quite obviously did not in any way impede the operation of the railway. The use of these ways by members of the public in addition to the adjacent owners on the severance of whose land they were provided could not affect the position one way or the other.

The Commission do not before us rely on any question of the expense of maintenance, but it appears from the two Cases Stated that any extra expense in that way would be a relatively trifling matter. The sole impediment that can be made out is that if and when, at some unpredictable time, the Commission became entitled to do away with these bridges owing to the land on either side of the line being no longer in common ownership, they might be prevented from doing so by the existence of a public right of way. It is to be observed that, irrespective of the existence of any public way, the bridges must be maintained for some future period of wholly unpredictable length by reason of the rights of the owners of the land on either side of the line for whose benefit these bridges were constructed. I cannot think that the possibility that, at some unpredictable future time, the Commission may be deprived of the opportunity they would otherwise have had of discontinuing these accommodation bridges suffices to make the dedication of public rights of way over them incompatible with the efficient operation of the railway within the meaning of that expression as used in the authorities by which we are bound. Accordingly, I agree with my Lord that this appeal fails and should be dismissed.

HODSON, L.J.: I agree. I also feel that there is great force in the argument of the Commission, which finds a clear and convincing expression in the dissenting judgment of LITTLEDALE, J., in *R.* v. *Inhabitants of Leake* (2) and also derives A support from the authoritative statement of the law in *Ayr Harbour Trustees* v. *Oswald* (3).

To put the point in its shortest possible form, it is this: The Commission cannot repeal the Act of Parliament and they cannot voluntarily divest themselves of express powers conferred by that Act. It is said that they have done this very thing if they have dedicated to the public a right of way which they could otherwise discontinue. B I think that the answer to this argument is that the authorities are too strong for the Commission. The dedication of rights of way has not been considered to be an abrogation of powers so long as it is not incompatible with the purposes of the company (see the majority judgments in *R.* v. *Inhabitants of Leake* (2) and in particular the passage from the judgment of PARKE, J. (5 B. & Ad. at p. 478)). The authorities which follow *R.* v. *Inhabitants of* C *Leake* (2) have been recognised by the House of Lords as containing sound law. It seems to me that they have considered the question of compatibility to be a question of fact, and when considering ultra vires, the courts have in these cases applied their minds not so much to the specific powers of the corporation (e.g., to those specific powers which are contained in s. 16 of the Railways Clauses Consolidation Act, 1845) but rather to the general purposes of the corporation, D looking at those purposes in their broadest sense. A number of passages have been cited to us from the judgments of members of this court which seem to me to support that view. I have in mind the language used by WARRINGTON, L.J., in *South Eastern Ry. Co.* v. *Cooper* (5) in referring to the statutory duty of the railway company. He considered the question to be whether the exercise of a general right of way such as was granted by the railway company would be E inconsistent with the performance of its statutory duty of running trains with safety along the section of their line crossed by the defendants' level crossing. Similarly, in *Great Western Ry. Co.* v. *Solihull Rural District Council* (12) ((1902) 86 L.T. at p. 852) COLLINS, M.R., referred to "the main purpose"; and in *Lancashire & Yorkshire Ry. Co.* v. *Davenport* (13) ((1906) 70 J.P. 129), STIRLING, L.J., in an appeal from WALTON, J., quoted without adverse comment the F question which had been put to the jury in the court below dealing with the "fundamental purpose" of the railway company in question. Finally, I think that, apart from the reference by LORD SUMNER in *Birkdale District Electric Supply Co. Ltd.* v. *Southport Corpn.* (4) ([1926] A.C. at p. 371) to *R.* v. *Inhabitants of Leake* (2) and other cases, this line of authority has received statutory recognition in the Rights of Way Act, 1932, s. 1 (7). G The court in dealing with this problem has, I think, not taken the narrow view which is contended for by the Commission but has looked at the matter from a broad point of view and has always regarded the question of compatibility as a question of fact to be decided on the facts of the particular case.

In those circumstances, I agree that this appeal must be dismissed.

Appeals dismissed. Leave to appeal to the House of Lords granted. H

Solicitors: *M. H. B. Gilmour* (for the appellants, the Commission); *Sharpe, Pritchard & Co.*, agents for *K. S. Himsworth*, Kendal, and *W. R. Scurfield*, Worcester (for the respondents, the County Councils).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

DAVIS CONTRACTORS, LTD. *v.* FAREHAM URBAN DISTRICT COUNCIL.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Radcliffe and Lord Somervell of Harrow), March 5, 6, 7, 8, April 19, 1956.]

Building Contract—Delay not due to fault of either party—Scarcity of labour—Buildings ultimately completed—Whether contractors entitled to sum in excess of contract price on quantum meruit.

Contract—Frustration—Change of circumstances—Scarcity of labour to fulfil building contract.

In March, 1946, the appellants tendered for a contract with the respondents to build seventy-eight houses within a period of eight months. The tender was accompanied by a letter which stated that the tender was "subject to adequate supplies of material and labour being available as and when required to carry out the work within the time specified". In July, 1946, after further negotiations, a formal contract was entered into between the parties and this incorporated a number of preliminary documents; these were listed in a clause of the contract and, although the tender was specified to be one of them, the letter was not so specified. The contract was to build the houses at a fixed price subject to certain adjustments. For various reasons, the chief of which was the lack of skilled labour, the work took twenty-two months to complete instead of eight months. The appellants were paid the contract price together with stipulated increases and adjustments but they claimed that they were entitled to a greater sum on the basis of a quantum meruit. They contended that the contract price was not binding because either (a) the contract had been subject to an express overriding condition (contained in the letter of March, 1946) that there should be adequate supplies of material and labour, or (b) that owing to the long delay due to the scarcity of labour the contract had been frustrated.

Held: the appellants were not entitled to be paid on the basis of a quantum meruit because

(i) the appellants' letter of March, 1946, and the condition stated therein were not incorporated into the final contract of July, 1946 (see particularly p. 157, letter H, to p. 158, letter I, post, per LORD RADCLIFFE with whose opinion VISCOUNT SIMONDS and LORD MORTON OF HENRYTON agreed).

(ii) the fact that both parties to the contract expected that it would be possible to complete the work within eight months did not result in the contract being frustrated when, as events happened, these expectations were not realised with the consequence that the contract became more onerous than the parties had contemplated (*Bush* v. *Whitehaven Port & Town Trustees* (1888), 2 Hudson's B.C., 4th Edn., 122, criticised).

Basis of the doctrine of frustration considered; see per LORD REID (LORD SOMERVELL OF HARROW concurring) at pp. 152 et seq., post, and per LORD RADCLIFFE at pp. 159 et seq., post, particularly at p. 160, letter D.

Decision of the COURT OF APPEAL ([1955] 1 All E. R. 275) affirmed on the second point but overruled on the first point.

[As to variation of building price where circumstances have changed, see 3 HALSBURY'S LAWS (3rd Edn.) 435, para. 819; as to the implication of conditions in building contracts where the owner prevents completion, see ibid., 450, para. 854; and for cases on the subject, see 7 DIGEST 370, *153* et seq.

As to the basis of the doctrine of frustration of contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 187, para. 320; and for cases on the subject, see 12 DIGEST (Repl.) 414, *3219* et seq.]

Cases referred to:

(1) *Bush* v. *Whitehaven Port & Town Trustees*, (1888), 52 J.P. 392; 2 Hudson's B.C., 4th Edn., 122; *affd.* C.A., 2 Hudson's B.C., 4th Edn., 130; 7 Digest 392, *232*.

(2) *Bank Line, Ltd.* v. *Capel (A.) & Co.*, [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 12 Digest (Repl.) 443, *3365*.

(3) *British Movietonews, Ltd.* v. *London & District Cinemas, Ltd.*, [1951] 2 All E.R. 617; [1952] A.C. 166; 2nd Digest Supp.

(4) *Denny, Mott & Dickson, Ltd. v. Fraser (James B.) & Co., Ltd.*, [1944] 1 All E.R. 678; [1944] A.C. 265; 113 L.J.P.C. 37; 171 L.T. 345; 12 Digest (Repl.) 450, *3394*.

(5) *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 85 L.J.K.B. 1389; 115 L.T. 315; 12 Digest (Repl.) 687, *5284*.

(6) *Horlock* v. *Beal*, [1916] 1 A.C. 486; 85 L.J.K.B. 602; 114 L.T. 193; 12 Digest (Repl.) 433, *3322*.

(7) *Scott & Sons* v. *Del Sel*, 1922 S.C. 592; *affd.* H.L. 1923 S.C. (H.L.) 37; Digest Supp.

(8) *Sir Lindsay Parkinson & Co., Ltd.* v. *Works & Public Buildings Comrs.*, [1950] 1 All E.R. 208; [1949] 2 K.B. 632; 2nd Digest Supp.

(9) *Thorn* v. *London Corpn.*, (1876), 1 App. Cas. 120; 45 L.J.Q.B. 487; 34 L.T. 545; 40 J.P. 468; 12 Digest (Repl.) 416, *3231*.

(10) *Hirji Mulji* v. *Cheong Yue S.S. Co.*, [1926] A.C. 497; 95 L.J.P.C. 121; 134 L.T. 737; 12 Digest (Repl.) 436, *3332*.

(11) *Dahl* v. *Nelson, Donkin & Co.*, (1881), 6 App. Cas. 38; 50 L.J.Ch. 411; 44 L.T. 381; 41 Digest 517, *3471*.

(12) *Larrinaga & Co., Ltd.* v. *Société Franco-Americaine des Phosphates de Medulla, Paris* (1923), 92 L.J.K.B. 455; 129 L.T. 65; 29 Com. Cas. 1.

Appeal.

Appeal by contractors from an order of the Court of Appeal, dated Dec. 20, 1954, and reported [1955] 1 All E.R. 275, reversing an order of LORD GODDARD, C.J., dated May 18, 1954, whereby he upheld an arbitrator's award in favour of the appellants. The facts appear in the opinion of VISCOUNT SIMONDS.

Charles Russell, Q.C., and *J. S. Daniel* for the appellants.

H. J. Phillimore, Q.C., *Stephen Chapman, Q.C.*, and *M. Stuart-Smith* for the respondents.

The House took time for consideration.

Apr. 19. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal arises out of arbitration proceedings to which the parties were the appellants, Davis Contractors, Ltd., a firm of building contractors, and the respondents, the Fareham Urban District Council. On July 9, 1946, the parties had entered into a building contract, whereby the appellants agreed to build for the respondents seventy-eight houses at Gudgeheath Lane, Fareham, in the county of Southampton within a period of eight months for a sum of £85,836. For various reasons, the chief of them the lack of skilled labour, the work took not eight but twenty-two months. The appellants were in due course paid the contract price which, together with stipulated increases and adjustments, amounted to £94,425. They contended, however, that, owing to the long delay, the contract price had ceased to be applicable, and that they were entitled to a payment on a quantum meruit basis.

The appellants put their claims on alternative grounds, (a) that the contract price was subject to an express overriding condition contained in a letter of Mar. 18, 1946, that there should be adequate supplies of labour and material, and (b) that the contract had been entered into on the footing that adequate supplies of labour and material would be available to complete the work within

A eight months, but, contrary to the expectation of both parties, there was not sufficient skilled labour and the work took twenty-two months, and that this delay amounted to frustration of the contract. It was conceded by the respondents that, if the contract was frustrated as alleged, the appellants were entitled to a further sum on the basis of a quantum meruit. With this aspect of the case which might have presented some difficulty, your Lordships will not be B troubled. These two grounds of claim have persisted through the long course of these proceedings which have included a prolonged hearing before an arbitrator, an award in the form of a special case, a hearing of the case by the Lord Chief Justice (LORD GODDARD), an appeal to the Court of Appeal, a reference back to the arbitrator, a supplemental award by him, a further hearing by the Court of Appeal, and an order of that court rejecting the appellants' claim.

C My Lords, with the first ground of claim I will deal very briefly. I am in full agreement with the opinion of PARKER, L.J., on this part of the case, which will be elaborated by my noble and learned friend, LORD RADCLIFFE. The appellants' letter of Mar. 18, 1946, to which I have referred was a covering letter in which, while enclosing their tender prepared in accordance with the respondents' bills of quantities and specifications, they made a number of D statements about the basis of that tender. The material statement was as follows:

> " Our tender is subject to adequate supplies of material and labour being available as and when required to carry out the work within the time specified."

E It is possible that, if this letter had been followed by an immediate acceptance, the parties must have been deemed to enter into a contract which contained some such term, though its precise content and effect would have been extremely difficult to define; but that is not what took place, nor what might be expected to take place. On the contrary, there were negotiations following the tender, and these resulted in the formal agreement of July 9, which did not incorporate F the letter of Mar. 18. It would, as it appears to me, be contrary to all practice and precedent to hark back to a single term of preceding negotiations after a formal and final agreement omitting that term has been signed. The reference to the letter in an appendix to the tender is clearly confined to the matter with which that appendix dealt, namely, the so-called " escalator " clause of the conditions of contract.

G The second ground of claim demands more serious consideration, not because it has any intrinsic merit but because it has acquired from the course of the proceedings a certain specious validity.

I cannot avoid reciting to your Lordships some of the findings of the arbitrator. After stating that the site was handed to the appellants and work was begun on June 20, 1946, and completed on May 14, 1948, the arbitrator proceeded thus:

> H " (6) At the time of entering into the said agreement the [appellants] and the respondents anticipated that there would be available in the building industry a sufficient labour force and a sufficient supply of materials to enable the work specified in the agreement to be carried out substantially within the time stipulated in the agreement.
>
> " (7) The conditions in which the work had to be carried out were different I from those anticipated by the [appellants] and the respondents in that: (a) At all times there was a serious shortage of skilled labour in the industry and the [appellants] were unable to obtain an adequate supply of such skilled labour; (b) There was difficulty in obtaining adequate supplies of bricks, timber and plumbers' goods; (c) There was an adequate supply of unskilled labour in the industry but not at all times within the locality of Fareham where the [appellants] were required under the General Conditions of Contract to recruit such labour unless the importation of labour from elsewhere were specially sanctioned by the respondents.

> "(8) As a result of the said shortage of labour and materials the [appellants] were unable to complete the work within the time specified in the agreement and the respondents accepted the position and allowed the work to continue until finally completed on May 14, 1948, without serious objections by the respondents.
>
> "(9) As a result of the longer time taken to complete the work the [appellants] incurred additional expense and the actual cost to them of carrying out the contract was £115,233 14s. The [appellants] have been paid by the respondents the sum of £94,424 17s. 9d."

He then referred to the appellants' claim for further payment in respect of their additional cost and expense, which he found to have been partly due to the circumstances set out above, over which they had no control, and to exceptional weather conditions and partly due to matters for which they were themselves to blame, and came to the conclusion that the sum of £17,651 13s. 1d. (which was afterwards slightly reduced) represented the amount of additional cost properly and unavoidably incurred by them. He then stated the submission of the appellants on this point, viz.: that the contract was entered into on the "basis" that adequate supplies of labour and materials would be available at the times required and that, because they were not so available, the "footing" of the contract was removed and that they were entitled to be paid on the basis of a quantum meruit. The question of law stated by him which was intended to cover this point was put baldly thus: "Whether the [appellants] are entitled to be paid any sum in excess of £94,424 17s. 9d. already paid them ?"

On the matter coming before the court, the Lord Chief Justice was of the opinion which your Lordships have rejected that the letter of Mar. 18, 1946, was incorporated in the contract, and on that basis was further of opinion that there was an implied promise by the respondents to pay a further reasonable sum if the conditions of the letter were not satisfied. The learned judge referred to *Bush* v. *Whitehaven Port & Town Trustees* (1) ((1888) 2 Hudson's B.C., 4th Edn., 122), which must be discussed later, but observed

> "I do not think that it is necessary to go as far as that because I do not think that it is a destruction of the whole foundation of the contract."

An appeal was taken to the Court of Appeal. On the question of the letter of Mar. 18 being incorporated in the contract, the court, though no order to that effect was drawn up, expressed a view adverse to the appellants, but on the alternative ground of claim, with which I am now concerned, thinking that the findings of the arbitrator were inadequate, referred the case back to him with this direction

> "that the said arbitrator may make further findings of fact for the information of this court relevant to the application of the principle in the case of *Bush* v. *Whitehaven Port & Town Trustees* (1) and the contentions of the parties on this issue. The arbitrator to state his own conclusions on the contentions of the parties if he intends his award to be a final award."

My Lords, I do not find it easy to interpret this direction. *Bush* v. *Whitehaven Port & Town Trustees* (1), which is reported only in HUDSON ON BUILDING CONTRACTS, if it can be said to embody any principle, illustrates an early stage in the development of the doctrine of frustration which has since been the subject of many decisions in this House. And it was, I think, to this issue that the contentions of the parties and the further findings of the arbitrator were directed. Thus, while the appellants repeated their former contention that, because adequate supplies of labour and material were not available, the footing of the contract was removed, the respondents contended that

> "in any event the footing on which the contract was agreed was not so

changed that the contract could be declared or treated as void or the [appellants] be entitled to payment on a quantum meruit"

and

> "that any claim on a quantum meruit basis was precluded by reason of the conduct of the parties after a claim for additional payment was first intimated by the [appellants]"

and

> "That the respondents so far from allowing the [appellants] to continue work on a different basis consistently maintained that the contract was still applicable".

The arbitrator then stated (inter alia) the following question of law:

> "Whether the [appellants] are entitled to be paid any sum in excess of the £94,424 17s. 9d. already paid to them, namely on a quantum meruit, by reason of:—(a) the footing upon which the contract was made having been so changed in the course of its execution that its provisions no longer applied or (b) an implied term in the contract that it ceases to bind in the circumstances as found."

Having been asked to state his own conclusions, he further found that both parties entered into the contract on the basis that adequate supplies of labour and materials would be available at the times required, that such supplies were not so available and that, as the duration of the work was unavoidably extended from a period of eight months to one of twenty-two months, the footing of the contract was removed. I do not think it necessary to state all his conclusions, but it is proper to add that, for reasons which are set out, he found that

> "the footing of the contract was so changed that it became void and the [appellants] are entitled to a fair and reasonable price for the work they have done."

I do not refer to his findings about the conduct of the parties, except to say that at an early stage they were at issue, the appellants making and pressing a claim for additional payment which the respondents steadfastly resisted. Giving effect to his own conclusions, the arbitrator found that the appellants were entitled to be paid a further sum of £17,258 13s. 1d.

Now the matter came back to the Court of Appeal, which was not constituted as on the former occasion. The alternative grounds of claim were again fully argued. The first ground, that of the incorporation of the letter of Mar. 18 in the contract, was rejected, either because it was held not to be incorporated or because, even if incorporated, it had not the effect for which the appellants contended. On this I will say no more.

The second ground of claim remains, and on this the learned judges of the Court of Appeal were unanimously against the appellants and they were, in my opinion, clearly right. If the matter had, in the first instance, come before a court of law which, after finding the facts as found by the arbitrator had then to consider the law applicable to those facts, there could only have been one answer. The Lord Chief Justice was, in my opinion, stating the obvious when he said in the passage that I have cited "I do not think it is the destruction of the whole foundation of the contract". The doctrine of frustration of a contract (for it is that doctrine and nothing else which must be invoked) has never been applied or, so far as I am aware, been sought to be applied to such a case unless, indeed, *Bush* v. *Whitehaven Port & Town Trustees* (1) was one. The contract was for completion of certain work in eight months; the contractors made their tender in the expectation that they would be able to do the work in the time and made a price accordingly. It may then be said that they made the contract on the "basis", or on the "footing", that their expectations would be fulfilled. Nor, presumably, were the expectations, or at least the hopes, of the respondents in any way different. Let it be said, then, of them, too, that they contracted on the same basis or footing. But it by no means follows that disappointed expectations lead to frustrated contracts. I do not propose to revive the controversy about the juridical basis of the doctrine of frustration. If it rests on an implied term of the contract to the effect that the parties will not be bound if a certain event happens, or does not happen, I can see no ground for saying that such a term must be implied in this contract. If it is permissible to judge by the event, it is clear that the parties would not have agreed on any such term. I pause to observe that it is not enough to say that, in the event of something unexpected happening, some term must be implied; it must be clear also what that term should be. In such a case as this, I can see no reason for supposing that the parties would have agreed either at what moment the frustrating event was to be deemed to happen or what was to be the position when it, in fact, happened. Equally, if, as is held by some, the true doctrine rests not on an implied term of the contract between the parties but on the impact of the law on a situation in which an unexpected event would make it unjust to hold parties to their bargain, I would emphasise that, in this aspect, the doctrine has been, and must be, kept within very narrow limits. No case has been cited in which it has been applied to circumstances in any way comparable to those of the present case. It is sufficient to ask when, in the course of this twenty-two month contract, that unexpected disruptive event happened which put an end to it. Lord Sumner in *Bank Line, Ltd.* v. *A. Capel & Co.* (2) ([1919] A.C. 435 at p. 454), said:

> " Rights ought not to be left in suspense or to hang on the chances of subsequent events."

It is wholly inconsistent with this, as I think, fundamental condition that a building contractor should, without intermission, work on his contract over a period which by much or little exceeds the contract time and, at the end of it, say, as the appellants say here, " A twenty-two month project is not an eight month project " or, less formidably,

> " An expenditure of £111,000 is not an expenditure of £94,000, therefore the original contract must be regarded as frustrated and for all the work that has been done we must be paid not the contract price but upon the basis of a quantum meruit."

My Lords, I say it with all respect to the arguments of learned counsel, but it appears to me that that is to make nonsense of a doctrine which, used within its proper limits, serves a valuable purpose.

It was urged, however, that this case cannot be regarded in the manner that I postulated. There are the findings of the arbitrator, a man experienced in the matter of building contracts, and they should not be set aside. I will say at once that the arbitrator has clearly done his work with great care and skill; but his findings involve a blend of law and fact and, deliberately using the words that he has chosen, " basis " and " footing ", I can see no justification for a conclusion of law that the contract was frustrated.

It remains to say something about *Bush* v. *Whitehaven Port & Town Trustees* (1), which has loomed so large in the earlier stages of this case and in the argument before this House. I must say for myself that I find it an extremely puzzling case and, if it had been a decision of this House and, therefore, binding on us, I should have felt grave difficulty about it. But two things may be said: first, it is not binding on us; secondly, in so far as it is an authority on the law of frustration for which purpose alone I conceive it to have been cited, it must be read in the light of the numerous decisions of higher authority which have since been given. I am not satisfied that it can be supported on the ground suggested by Denning, L.J., nor, on the other hand, do I say that the decision is a wrong one. But I do emphatically say that it cannot, in the light

A of later authority, be used to support the proposition that where, without the default of either party, there has been an unexpected turn of events which renders the contract more onerous than the parties had contemplated that is by itself a ground for relieving a party of the obligation he has undertaken. I agree with the learned lord justice that that is the import of the decision of this House in *British Movietonews, Ltd.* v. *London & District Cinemas, Ltd.* (3) B ([1951] 2 All E.R. 617), and that it precisely covers this case.

I would dismiss this appeal with costs.

LORD MORTON OF HENRYTON: My Lords, two questions of law arise on this appeal: (i) Was the letter of Mar. 18, 1946, from the appellants to the respondents, incorporated in the contract under seal which was entered C into by the parties on July 9, 1946 ? (ii) Was that contract frustrated, with the result that the appellants, who have erected seventy-eight houses for the respondents, are not bound to accept the contract price, but are entitled to a further sum of over £17,000, which the arbitrator has awarded to them ?

My Lords, in my opinion, the letter of Mar. 18, 1946, merely formed part of the negotiations between the parties which led up to the contract of July 9, D and its terms were not incorporated into that contract. This matter is dealt with fully in the opinion which will be delivered by my noble and learned friend, LORD RADCLIFFE, and I am content to say that I agree with his reasoning and his conclusion.

I can state quite briefly my views on the second question, since I understand your Lordships are all of opinion, as I am, that the Court of Appeal reached E the right conclusion. The appellants contracted to complete forty houses within six months, seventy within seven months, and all the seventy-eight houses within eight months. It is agreed that the work started on June 20, 1946, and should, therefore, have been completed in February, 1947. In fact, the progress of the work was delayed, because, as the arbitrator held, " adequate supplies of labour and materials were not available at the times required ". F Nevertheless, the appellants went on with the work, without any actual interruption, and completed it in a period of twenty-two months. They now contend that the contract was frustrated, and they rely on certain findings by the arbitrator, which have already been read, and on the decision of the Court of Appeal in *Bush* v. *Whitehaven Port & Town Trustees* (1) ((1888) 2 Hudson's B.C., 4th Edn., 122).

G My Lords, it is clear that the appellants are entitled to no more than the contract price, unless they can satisfy your Lordships that, at some time, the contract of July 9, 1946, came to an end, so that, in continuing to erect houses, they were no longer working under that contract. I am not so satisfied. I agree with the observation of MORRIS, L.J. ([1955] 1 All E.R. at p. 282) that:

> H " Although the basis or footing of the contract was removed in the limited sense that the expectations of the parties were not realised, the facts found do not require an implication in the contract that it was to come to an end if those expectations were not realised."

It is, I think, impossible to hold that a contract has been frustrated unless it can be said " as and from such and such a date, at latest, the contract ceased I to bind the parties ". In the course of the hearing counsel for the appellants were asked: " When do you say that the contract came to an end ? ", and they replied that they were unable to specify any time. I think that this answer was correct and inevitable, but it reveals the inherent weakness of the appellants' case.

The facts in *Bush* v. *Whitehaven Port & Town Trustees* (1) are very briefly stated in the report, but I think it is clear that the judgments of the Court of Appeal in that case were based on the findings of the jury, and, in particular, the fifth finding. The question put to the jury was:

> " Were the conditions of the contract so completely changed, in consequence of the defendants' inability to hand over the sites of the work as required, as to make the special provisions of the contract inapplicable ? ",

and the jury replied: " Yes ". This question was, I think, a question of law, or, at least, of mixed fact and law, but the Court of Appeal accepted the jury's answer and, on that footing, held that, by Oct. 8, 1886, when the contractors got possession of the required sites, the contract had ceased to exist. In my opinion, *Bush* v. *Whitehaven Port & Town Trustees* (1) was a decision on very special facts, which enabled the court to find that, although the contractors finished the work specified in the contract, they were not working under the contract from Oct. 8, 1886, onwards. For this reason, the case does not, in my opinion, assist the appellants. I would add that, since the decision in the case just cited, the doctrine of frustration has frequently been considered in your Lordships' House, and for an authoritative exposition of the doctrine one should turn to the speeches in this House rather than to the judgments of the Court of Appeal in *Bush* v. *Whitehaven Port & Town Trustees* (1).

I would dismiss the appeal.

LORD REID: My Lords, the arbitrator has found in his supplementary award that " the footing of the contract was removed ", and his reason for so finding is that

> " both parties entered into the contract on the basis that adequate supplies of labour and materials would be available at the times required "

but that adequate supplies were not available with the result that the duration of the work was unavoidably extended from eight months to twenty-two months. It seems clear that he has used the words " footing " and " basis " because the special Case was referred back to him for further findings of fact relevant to the application of the principle in *Bush* v. *Whitehaven Port & Town Trustees* (1) ((1888) 2 Hudson's B.C., 4th Edn., 122), and the contentions of the parties on this issue, and the parties used these words in their contentions. The appellants' submissions, as stated in the award, are almost identical with the arbitrator's findings, and the respondents' submission is that the footing on which the contract was agreed was not so changed that the contract could be treated as void. This form of award gives rise to considerable difficulty. But I have some sympathy with the arbitrator. He may have found as much difficulty as I have in discovering " the principle in the case of *Bush* v. *Whitehaven Port & Town Trustees* (1)."

In order to determine how far the arbitrator's findings are findings of law and, therefore, subject to review, I think it is necessary to consider what is the true basis of the law of frustration. Generally, this has not been necessary; for example, LORD PORTER said in *Denny, Mott & Dickson, Ltd.* v. *James B. Fraser & Co., Ltd.* (4) ([1944] 1 All E.R. 678 at p. 687):

> " Whether this result follows from a true construction of the contract or whether it is necessary to imply a term or whether again it is more accurate to say that the result follows because the basis of the contract is overthrown, it is not necessary to decide . . . "

These are the three grounds of frustration which have been suggested from time to time, and I think that it may make a difference in two respects which is chosen. Construction of a contract and the implication of a term are questions of law, whereas the question whether the basis of a contract is overthrown, if not dependent on the construction of the contract, might seem to be largely a matter for the judgment of a skilled man comparing what was contemplated with what has happened. And, if the question is truly one of construction, I find it difficult to see why we should not apply the ordinary rules regarding the admissibility of extrinsic evidence whereas, if it is only a matter of comparing the contemplated with the actual position, evidence might be admissible on a wider basis. Further, I am not satisfied that the result is necessarily the same whether frustration is regarded as depending on the addition to the contract of an implied term or as depending on the construction of the contract as it stands.

Frustration has often been said to depend on adding a term to the contract by implication: for example, EARL LOREBURN in *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (5) ([1916] 2 A.C. 397 at p. 404), after quoting language of LORD BLACKBURN, said:

> " That seems to me another way of saying that from the nature of the contract it cannot be supposed the parties, as reasonable men, intended it to be binding on them under such altered conditions. Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said ' if that happens, of course, it is all over between us ' ? What, in fact, was the true meaning of the contract ? Since the parties have not provided for the contingency, ought a court to say it is obvious they would have treated the thing as at an end ? ".

I find great difficulty in accepting this as the correct approach, because it seems to me hard to account for certain decisions of this House in this way. I cannot think that a reasonable man in the position of the seaman in *Horlock* v. *Beal* (6) ([1916] 1 A.C. 486) would readily have agreed that the wages payable to his wife should stop if his ship was caught in Germany at the outbreak of war, and I doubt whether the charterers in *Bank Line, Ltd.* v. *A. Capel & Co.* (2) ([1919] A.C. 435) could have been said to be unreasonable if they had refused to agree to a term that the contract was to come to an end in the circumstances which occurred. These are not the only cases where I think it would be difficult to say that a reasonable man in the position of the party who opposes unsuccessfully a finding of frustration would certainly have agreed to an implied term bringing it about.

I may be allowed to note an example of the artificiality of the theory of an implied term given by LORD SANDS in *Scott & Sons* v. *Del Sel* (7) (1922 S.C. 592 at p. 597):

> " A tiger has escaped from a travelling menagerie. The milkgirl fails to deliver the milk. Possibly the milkman may be exonerated from any breach of contract; but, even so, it would seem hardly reasonable to base that exoneration on the ground that ' tiger days excepted ' must be held as if written into the milk contract."

I think that there is much force in LORD WRIGHT's criticism in *Denny, Mott & Dickson, Ltd.* v. *James B. Fraser & Co., Ltd.* (4) ([1944] 1 All E.R. at p. 683):

> " The parties did not anticipate fully and completely, if at all, or provide for what actually happened. It is not possible to my mind to say that, if they had thought of it, they would have said, ' Well, if that happens, all is over between us '. On the contrary, they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations."

It appears to me that frustration depends, at least in most cases, not on adding any implied term but on the true construction of the terms which are, in the contract, read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made. There is much authority for this view. In *British Movietonews, Ltd.* v. *London & District Cinemas, Ltd.* (3) ([1951] 2 All E.R. 617), VISCOUNT SIMON said (ibid., at p. 625):

> " If, on the other hand, a consideration of the terms of the contract, in the

> light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point—not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation."

In *Sir Lindsay Parkinson & Co., Ltd.* v. *Works & Public Buildings Comrs.* (8) ([1950] 1 All E.R. 208), Asquith, L.J., said (ibid., at p. 229):

> "In each case a delay or interruption was fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply, although there was nothing in the express language of either contract to limit its operation in this way."

I need not multiply citations, but I might note a reference by Lord Cairns, L.C., so long ago as 1876 to

> ". . . additional or varied work, so peculiar, so unexpected, and so different from what any person reckoned or calculated upon . . ."

(*Thorn* v. *London Corpn.* (9) ((1876) 1 App. Cas. 120 at p. 127)). On this view, there is no need to consider what the parties thought, or how they or reasonable men in their shoes would have dealt with the new situation if they had foreseen it. The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end.

In my view, the proper approach to this case is to take from the arbitrator's award all facts which throw light on the nature of the contract or which can properly be held to be extrinsic evidence relevant to assist in its construction and then, as a matter of law, to construe the contract and to determine whether the ultimate situation as disclosed by the award is, or is not, within the scope of the contract so construed.

The appellants, on Mar. 18, 1946, sent to the respondents with their tender a covering letter. I agree with your Lordships that this letter was not incorporated in the contract of July 9, 1946, and I do not think that it can be used in construing this contract. It was simply part of the preliminary negotiations, and we do not know, and cannot inquire, why it was not incorporated in the contract.

The arbitrator has found that both parties

> "anticipated that there would be available in the building industry a sufficient labour force and a sufficient supply of materials to enable the work specified in the agreement to be carried out substantially within the time stipulated in the agreement."

The nature of the contract is such that they must have expected this. The contract required the appellants to complete the work within eight months, and provided for payment of liquidated damages if the appellants failed to do so, subject to the surveyor being required, in certain events, to allow such additional time as he might deem fair and reasonable; and it was clearly of great importance to the appellants that there should be no substantial delay, because any such delay was bound to add considerably to their costs. It appears from the arbitrator's findings that the parties did not make their expectations known to each other, and I do not think that a finding that the parties, in fact, expected that there would be no substantial delay adds anything material or alters the legal position. The arbitrator then found that the conditions in which the work had to be carried out were different from those anticipated in that, at all times, there was a serious shortage of labour and difficulty in obtaining adequate supplies of bricks and other material. He found that, as a result of this shortage and the consequent delay in completing the work, the actual cost to the appellants of carrying out the contract was £115,233, whereas the sum paid to them under the contract was £94,425. The arbitrator has not awarded the whole of the difference between these sums. He held that, to some extent, the appellants were themselves to blame, and awarded £17,651 as the additional cost and expense properly and unavoidably incurred by them.

If the contract continued to apply, then the appellants are not entitled to more than they have already received; but, if it was brought to an end, then the respondents admit that the appellants are entitled to the sum awarded subject to a very small adjustment. The arbitrator found that

> " the respondents accepted the position and allowed the work to continue until finally completed on May 14, 1948, without serious objections by the respondents."

I do not think that that means, or was intended by the arbitrator to mean, that, at some time while the work was in progress, the parties agreed, or must be held to have agreed, that their contract should no longer apply and that the work should proceed on some other basis. There is no finding as to when any such agreement must be held to have been made, or what were its terms, and there are no facts found from which such an agreement could be inferred. The respondents, no doubt, recognised that the delays were not due to the fault of the appellants; they made no claim for liquidated damages, and they made no attempt to take the work out of the hands of the appellants, as they could have done if the appellants had been at fault. But that is no ground for inferring an agreement to terminate the contract and proceed on some different basis.

The appellants' case must rest on frustration, the termination of the contract by operation of law on the emergence of a fundamentally different situation. Using the language of ASQUITH, L.J., which I have already quoted, the question is whether the causes of delay or the delays were

> " fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply . . . "

In most cases, the time when the new situation emerges is clear, there has been some particular event which makes all the difference. It may be that frustration can occur as a result of gradual change, but, if so, the first question I would be inclined to ask would be when the frustration occurred and when the contract came to an end. It has been assumed in this case that it does not matter at what point during the progress of the work the contract came to an end, and that, whatever the time may have been, if the contract came to an end at some time the whole of the work must be paid for on a quantum meruit basis. I do not pursue this matter, because the respondents have admitted that, if there was frustration at any time, the appellants are entitled to the sum awarded. But, even so, I think that one must see whether there was any time at which the appellants could have said to the respondents that the contract was at an end, and that, if the work was to proceed, there must be a new contract, and I cannot find any time from first to last at which they would have been entitled to say that the job had become a job of a different kind which the contract did not contemplate. There is a difficulty about a party being entitled to go on and finish the work without raising the question that a new agreement is necessary, and then maintain that frustration occurred at some time while the work was in progress, but, again, I do not pursue that matter because it does not arise in view of the course this case has taken.

In a contract of this kind, the contractor undertakes to do the work for a definite sum, and he takes the risk of the cost being greater or less than he expected. If delays occur through no one's fault, that may be in the contemplation of the contract and there may be provision for extra time being given.

To that extent, the other party takes the risk of delay. But he does not take the risk of the cost being increased by such delay. It may be that delay could be of a character so different from anything contemplated that the contract was at an end, but in this case, in my opinion, the most that could be said is that the delay was greater in degree than was to be expected. It was not caused by any new and unforeseeable factor or event; the job proved to be more onerous but it never became a job of a different kind from that contemplated in the contract.

Bush v. *Whitehaven Port & Town Trustees* (1) appears to me to be a very special case and it must be read in light of the development of the law in later cases. I agree with your Lordships' comments on it, and I can get little assistance from it for the decision of the present case. I agree that this appeal should be dismissed.

LORD RADCLIFFE: My Lords, I agree that this appeal fails. Of the two main grounds on which the appellants rely, the shorter is that which concerns the question whether their building contract was made subject to a condition as to the availability of adequate supplies of labour and material by incorporating in its terms the relevant part of a letter from the appellants to the respondents dated Mar. 18, 1946. I will deal with that point first. But at the outset I must remark that if I thought, as I do not, that the appellants were right in their argument that such a condition was incorporated, I should not necessarily conclude from that that they were entitled to succeed in their appeal. For their success would depend on a further question: What significance should be attached to the words of the condition as part of the whole contract and what legal consequences should flow from them? As I believe that your Lordships are at one in thinking that the incorporation claimed never took place, I do not think that I need say anything more with regard to this further question except that it is itself a difficult one on which some difference of view has already shown itself in the courts.

The building contract is contained in a written agreement under seal dated July 9, 1946. The agreement itself is quite short, and its main purpose is to identify a number of separate documents which, it states, are to " form and be read and construed as part of this agreement." These other documents had come into existence for the purpose, or during the course, of the negotiations which had preceded the making of the formal agreement. Thus, early in the year 1946, the respondents had drawn up bills of quantities and a form of tender which indicated the nature of their requirements, and had invited inspection of their drawings, specifications and conditions of contract. Contractors wishing to tender for all or part of the projected work were to deliver their tenders on the form prescribed by Mar. 19, 1946. On Mar. 18, the appellants sent in a signed tender on the appropriate form undertaking the erection of (inter alia) seventy-eight houses at Gudgeheath Lane, Fareham, at a price of £92,425 and within the time limits specified. With it went a covering letter of the same date. As this is the letter which contains the alleged contractual terms it is desirable to set it out in full.

" DAVIS CONTRACTORS LIMITED
325, Kilburn High Road,
London, N.W.6
Mar. 18, 1946.

RL/JEM
Clerk of the Council,
Fareham Urban District Council,
Westbury Manor,
Fareham, Hants.

DEAR SIR,

Re Gudgeheath Lane, Fareham.

We have pleasure in enclosing herewith our tender prepared in accordance with your bills of quantities, and specifications submitted by your engineer and surveyor for one hundred and fifty two houses on four sites.

> Our tender is subject to adequate supplies of material and labour being available as and when required to carry out the work within the time specified.
>
> It is also based on the present published market prices of materials delivered to site and existing established rates of wages in the various trades for the district.
>
> Purchase tax has not been allowed for in our tender and payment of such will form a nett addition to the contract's sum. Also any variation in price of labour or materials will form nett additions or omissions to or from the contract's sum, as may be determined by calculation.
>
> We have based our price for facings on a p.c. amount of 20s. on the present quoted price for Fletton bricks delivered Fareham station. This has been necessary as we have been unable to get firm quotations for facings delivered to site.
>
> Thank you for this opportunity of serving you, and we assure you always of our best attention.
>
> Yours faithfully,
> For and on behalf of
> Davis Contractors Ltd.,
> (sd) W. B. W. C. Curd.
> Director.
> Contracts Manager."

The form of tender which the respondents prescribed had an appendix attached to it, bearing the heading:

> " Materials and goods to be purchased directly by the contractor, in respect of which variation of the contract sum is desired in accordance with cl. 68B of the conditions of contract."

There was then a blank space left under two column headings " Materials or Goods " and " Basic Price ". In this blank space the appellants had written the words " As terms of letter attached dated Mar. 18, 1946, reference RL/JEM." There was nothing else in the appendix except a clause limiting to some extent the contractor's right to vary the contract sum in respect of price variations of materials and goods. As the arbitrator found in his original award, the purpose of the appendix was

> " to enable contractors tendering for work to make a list in that appendix of all materials or goods which might be subject to a rise or fall in price so that both parties to the contract would be protected from the effect of fluctuation of prices . . ."

Between Mar. 18 and the date when the formal agreement was entered into, the appellants in fact supplied the respondents with a detailed schedule of prices, which was intended to constitute the list of materials and goods called for by appendix I and was accepted. No further reference appears to have been made to the letter of Mar. 18.

These are the circumstances in which it has to be decided whether the second paragraph of this letter formed a qualifying condition incorporated into the building contract. As the formal agreement of July 9 was evidently intended to sum up everything that had emerged from the preceding negotiations, it is necessary for the appellants to show that that agreement somehow carried into its terms the stipulation contained in that second paragraph. Nor did their argument before your Lordships proceed on any other basis. It is put in two ways. I do not agree with either of them. On the contrary, I agree with the way that this question was disposed of by Parker, L.J., in the Court of Appeal; but, since the appellants' argument on this point commended itself both to the Lord Chief Justice in the Queen's Bench Division and to a majority of the Court of Appeal on the occasion of each hearing, it is only right that I should notice it with some particularity.

The formal agreement, as I have said, referred to and incorporated a number of the preliminary documents. These were listed in cl. (2) as follows:

> " (a) The said tender.
> (b) The drawings.
> (c) The general conditions of contract.
> (d) The specification.
> (e) The bill of quantitities.
> (f) The schedule of rates and prices (if any)."

Now what was the " said tender " ? The actual form of the words is due to the only recital of the agreement, in which it is stated that the employer " has accepted a tender by the contractor for the sum of £92,425, etc." The first way that the appellants put their case is that the tender referred to is the whole offer made on Mar. 18, and that this offer included the second paragraph of the covering letter which was intended as a qualification of the terms of the form of tender.

My Lords, I think that this argument is a misreading of what the appellants and respondents intended by the formal agreement. Certainly all the other documents incorporated by cl. (2) are separate named documents which the parties were at some pains to identify by their respective signatures. Everything points to the " said tender " being, similarly, the document called form of tender, which the appellants had signed on Mar. 18 and forwarded by their letter. Nothing else, in fact, could properly be referred to as a " tender "; for there is a contradiction in terms in speaking of a letter which states that " our tender " is enclosed as if it were itself part of that very tender. As I see it, the truth of the matter is that, in forwarding their tender, the appellants proposed a qualification of the expected contract which the respondents did not accept, and to which the appellants did not themselves return. I do not think it unfair to add the point that, if they had, their stipulation could hardly have been left in its existing form which is at once sweeping and inconclusive.

The alternative argument rests on the fact that the appendix to the form of tender had had written in it by the appellants a reference to the letter of Mar. 18. But I do not see how this can avail them with regard to the second paragraph of that letter. For the whole purpose of the appendix was to provide a list of materials and goods that were to rank in allowing variations of the contract sum. In so far as parts of the letter did refer to prices of materials and goods, as, indeed, some did, I think that it would be correct to say that those passages formed part of the form of tender and, as such, might have been incorporated in the formal agreement. I say " might have been ", because I think that the arbitrator's finding that the later schedule of prices supplied on May 20 was intended to constitute appendix I of the tender must mean that the original reference to the letter of Mar. 18 ceased to have any contractual significance by the time that the formal agreement was made. But, however that may be, I think it plain that the reference in the appendix could only bear on matters relating to the prices of materials and goods, and could not possibly have been understood by the parties as bearing on the general question of the availability of supplies of labour and material. The context of the appendix makes it impossible to suppose that the reference was intended to introduce the letter of Mar. 18 as a whole.

If the second paragraph of that letter did not form part of the contractual arrangements, the appellants' right to claim any payment beyond the original contract sum rests on the argument that, at some date before completion, the original contract became frustrated by the continued shortage of the necessary supplies of labour and material and that, as from that date, the building work was carried on under a new working arrangement which admitted of further payment. The supplemental award of the arbitrator was drawn up on the basis that this argument succeeded. Despite his findings, I think that the law is against the appellants on this point, and that the award in their favour cannot be sustained.

Before I refer to the facts, I must say briefly what I understand to be the legal principle of frustration. It is not always expressed in the same way, but I think that the points which are relevant to the decision of this case are really beyond dispute. The theory of frustration belongs to the law of contract and it is represented by a rule which the courts will apply in certain limited circumstances for the purpose of deciding that contractual obligations, ex facie binding, are no longer enforceable against the parties. The description of the circumstances that justify the application of the rule and, consequently, the decision whether, in a particular case, those circumstances exist are, I think, necessarily questions of law. It has often been pointed out that the descriptions vary from one case of high authority to another. Even as long ago as 1918, Lord Sumner was able to offer an anthology of different tests directed to the factor of delay alone, and delay, though itself a frequent cause of the principle of frustration being invoked, is only one instance of the kind of circumstance to which the law attends (see *Bank Line, Ltd.* v. *A. Capel & Co.* (2) ([1919] A.C. 435 at pp. 457, 460)). A full current anthology would need to be longer yet. But the variety of description is not of any importance, so long as it is recognised that each is only a description and that all are intended to express the same general idea. I do not think that there has been a better expression of that idea than the one offered by Earl Loreburn in *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (5) ([1916] 2 A.C. 397 at pp. 403, 404). It is shorter to quote than to try to paraphrase it:

> ". . . a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract . . . no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted."

So expressed, the principle of frustration, the origin of which seems to lie in the development of commercial law, is seen to be a branch of a wider principle which forms part of the English law of contract as a whole. But, in my opinion, full weight ought to be given to the requirement that the parties " must have made " their bargain on the particular footing. Frustration is not to be lightly invoked as the dissolvent of a contract.

Lord Loreburn ascribes the dissolution to an implied term of the contract that was actually made. This approach is in line with the tendency of English courts to refer all the consequences of a contract to the will of those who made it. But there is something of a logical difficulty in seeing how the parties could even impliedly have provided for something which, ex hypothesi, they neither expected nor foresaw; and the ascription of frustration to an implied term of the contract has been criticised as obscuring the true action of the court which consists in applying an objective rule of the law of contract to the contractual obligations that the parties have imposed on themselves. So long as each theory produces the same result as the other, as normally it does, it matters little which theory is avowed (see *British Movietonews, Ltd.* v. *London & District Cinemas, Ltd.* (3) ([1951] 2 All E.R. 617 at p. 624 per Viscount Simon)). But it may still be of some importance to recall that, if the matter is to be approached by way of implied term, the solution of any particular case is not to be found by inquiring what the parties themselves would have agreed on had they been, as they were not, forewarned. It is not merely that no one can answer that hypothetical question;

it is also that the decision must be given " irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances " (*Hirji Mulji* v. *Cheong Yue S.S. Co.* (10) ([1926] A.C. 497 at p. 510)). The legal effect of frustration " does not depend on their intention or their opinions, or even knowledge, as to the event " (ibid., at p. 509). On the contrary, it seems that, when the event occurs, the

> " meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence "

(*Dahl* v. *Nelson, Donkin & Co.* (11) ((1881) 6 App. Cas. 38 at p. 59, per LORD WATSON)).

By this time, it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is, and must be, the court itself. So, perhaps, it would be simpler to say at the outset that frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do. There is, however, no uncertainty as to the materials on which the court must proceed.

> " The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the surrounding circumstances, and, on the other hand, the events which have occurred "

(*Denny, Mott & Dickson, Ltd.* v. *James B. Fraser & Co., Ltd.* (4) ([1944] 1 All E.R. 678 at p. 683, per LORD WRIGHT)).

In the nature of things there is often no room for any elaborate inquiry. The court must act on a general impression of what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

I am bound to say that, if this is the law, the appellants' case seems to me a long way from a case of frustration. Here is a building contract entered into by a housing authority and a big firm of contractors in all the uncertainties of the post-war world. Work was begun shortly before the formal contract was executed, and continued, with impediments and minor stoppages but without actual interruption, until the seventy-eight houses contracted for had all been built. After the work had been in progress for a time, the appellants raised the claim, which they repeated more than once, that they ought to be paid a larger sum for their work than the contract allowed; but the respondents refused to admit the claim and, so far as appears, no conclusive action was taken by either side which would make the conduct of one or the other a determining element in the case. That is not, in any obvious sense, a frustrated contract. But the appellants' argument, which certainly found favour with the arbitrator, is that, at some stage before completion, the original contract was dissolved because it became incapable of being performed according to its true significance, and its place was taken by a new arrangement under which they were entitled to be paid not the contract sum but a fair price on quantum meruit for the work that they carried out during the twenty-two months that elapsed between commencement and completion. The contract, it is said, was an eight months' contract, as indeed it was. Through no fault of the parties it turned out that it took twenty-two months to do the work contracted for. The main reason for this was that, whereas both parties had expected that adequate supplies of labour and material would be available to allow for completion in eight months, the supplies that were, in fact, available were much less than adequate for the purpose. Hence, it is said, the basis or the footing of the contract was removed before the work was completed; or, slightly altering the metaphor, the footing of the contract was so changed by the circumstance that the expected supplies were not available that the contract built on that footing became void. These are the findings which the arbitrator has recorded in his supplemental award.

In my view, these are, in substance, conclusions of law; and I do not think that they are good law. All that anyone, arbitrator or court, can do is to study the contract in the light of the circumstances that prevailed at the time when it was made and, having done so, to relate it to the circumstances that are said to have brought about its frustration. It may be a finding of fact that, at the time of making the contract, both parties anticipated that adequate supplies of labour and material would be available to enable the contract to be completed in the stipulated time. I doubt whether it is; but, even if it is, it is no more than to say that, when one party stipulated for completion in eight months and the other party undertook it, each assumed that what was promised could be satisfactorily performed. That is a statement of the obvious that could be made with regard to most contracts. I think that a good deal more than that is needed to form a " basis " for the principle of frustration. The justice of the arbitrator's conclusion depends on the weight to be given to the fact that this was a contract for specified work to be completed in a fixed time at a price determined by those conditions. I think that his view was that, if, without default on either side, the contract period was substantially extended, that circumstance itself rendered the fixed price so unfair to the contractor that he ought not to be held to his original price. I have much sympathy with the contractor; but, in my opinion, if that sort of consideration were to be sufficient to establish a case of frustration, there would be an untold range of contractual obligations rendered uncertain and, possibly, unenforceable.

Two things seem to me to prevent the application of the principle of frustration to this case. One is that the cause of the delay was not any new state of things which the parties could not reasonably be thought to have foreseen. On the contrary, the possibility of enough labour and materials not being available was before their eyes and could have been the subject of special contractual stipulation. It was not made so. The other thing is that, though timely completion was, no doubt, important to both sides, it is not right to treat the possibility of delay as having the same significance for each. The owner draws up his conditions in detail, specifies the time within which he requires completion, protects himself both by a penalty clause for time exceeded and by calling for the deposit of a guarantee bond, and offers a certain measure of security to a contractor by his escalator clause with regard to wages and prices. In the light of these conditions the contractor makes his tender, and the tender must necessarily take into account the margin of profit that he hopes to obtain on his adventure, and in that any appropriate allowance for the obvious risks of delay. To my mind, it is useless to pretend that the contractor is not at risk if delay does occur, even serious delay. And I think it a misuse of legal terms to call in frustration to get him out of his unfortunate predicament.

The arbitrator had put on him the duty of making further findings of fact " relevant to the application of the principle in the case of *Bush* v. *Whitehaven Port & Town Trustees* (1) ((1888) 2 HUDSON'S B.C., 4th Edn., 122) ". This may have been hard on him, for it implies that that decision can be ascribed to

one ascertainable principle. In my opinion, it cannot. The judgment of the A
Court of Appeal applied a different principle of law from that on which the trial judge's questions to the jury (and their answers) were based; and the judgment of the Divisional Court was more or less evenly balanced between the two. According to the findings of the jury taken together the case was one in which all the work done by Bush had been done under the original contract; the
contract was such that it carried an implied term that the Whitehaven Trustees B
should give possession of the whole site without delay; the delay which had taken place changed the conditions of the contract to such an extent that the "special provisions" precluding Bush from making any complaint of delay could no longer be applied; and Bush was entitled to damages for breach of contract arising from the trustees' failure to keep the implied term, the damages
being represented by the additional cost of the work to him over and above the C
contract price. It may be difficult to say by what principle of law the "special provisions" of the contract became inapplicable while the contract itself remained enforceable. But I suppose that judge and jury had in mind that the parties, by their conduct, had waived the enforcement of the particular clause. There is nothing out of order in such a finding, so long as the facts proved are clear enough
to warrant it, though, normally, one would expect them to include some discus- D
sion, oral or written, between the parties. I daresay that everyone felt that rough justice had been done.

The Court of Appeal, however, decided the case on a basis which had only a slight resemblance to the findings of the jury. By ignoring all the findings except that which related to the change in the "conditions of the contract",
and by treating that as if it applied to the contract as a whole and not merely E
to whatever was to be understood by the words "special provisions", they arrived at a new view of the facts on which they thought that a case of frustration could be made out. At some time, apparently unknown to and unmarked by the parties concerned, the original contract had disappeared with all its incidents and obligations, and in its place had been set up the legal relationship expressed
in Bush's claim (though he had not made it) to be paid on the basis of a "quantum F
meruit". I should have thought that it would have been much simpler to say, had the findings of the jury warranted it, that the parties had abandoned the original contract by mutual consent and substituted for it a new contract containing the substance of the old terms, but a reasonable price clause instead of the former fixed price. But that is not frustration; it is fulfilment with variations.

My Lords, I think that *Bush* v. *Whitehaven Port & Town Trustees* (1) may be G
worth remembering as an instance of what can happen to a case during its passage through successive courts, but I do not think it worth recording as an exposition of any principle of law. In that regard, the editors of the Law Reports, who ignored it, showed a sounder judgment than Mr. HUDSON, who enshrined it. In so far as it applied the principle of frustration to the facts of the case, the
principle was, in my view, misapplied. In so far as the judgments of the Court of H
Appeal contain general statements as to the law of frustration, I think that the subject has been so fully explored in later cases of higher authority that the particular exposition is of no real value. I am sincerely sorry if our decision embarrasses builders, who may, in some cases, have found in Vol. 2 of HUDSON ON BUILDING CONTRACTS a way of mitigating the risks of tenders to which the
law did not truly entitle them. But, in my view, their safety lies in the insertion I
of explicit conditions in any fixed price contracts they may undertake; it does not lie in an appeal to the principle of frustration.

LORD SOMERVELL OF HARROW: My Lords, I agree that the words on which the appellants seek to rely in the letter of Mar. 18 were not incorporated in the contract. I have had the advantage of reading the opinion which has just been read by my noble and learned friend, LORD REID. I agree with him that it is desirable to decide what is the proper basis of "frustration". I also agree with his conclusion on that matter, and I should add nothing except the possibility of confusion if I sought to restate it in my own words.

I, therefore, turn to its application to the issues in the present appeal. As the senior member of the Court of Appeal which remitted the case to the arbitrator, I would like to express my regret that we did not give more assistance to enable him to distinguish the "facts" from his conclusion on them. Fortunately, one or two questions put to counsel in the course of the argument showed that there was now no conflict as to relevant facts.

Contracts to be performed in futuro are based on expectations. If each party is equally well informed as to the data on which expectations must be based, it may be said that these expectations are the "basis" or "footing" on which the contract is made. It would, of course, be absurd to suggest that, if such expectations are not realised, the "basis" has gone and the contract is frustrated. As LORD SUMNER said in *Larrinaga & Co., Ltd.* v. *Société Franco-Americaine des Phosphates de Medulla, Paris* (12) ((1923) 129 L.T. 65 at p. 72):

> "In effect most forward contracts can be regarded as a form of commercial insurance, in which every event is intended to be at the risk of one party or another."

Later he says (ibid.):

> "No one can tell how long a spell of commercial depression may last; no suspense can be more harrying than the vagaries of foreign exchanges, but contracts are made for the purpose of fixing the incidence of such risks in advance, and their occurrence only makes it the more necessary to uphold a contract and not to make them the ground for discharging it."

Under the present contract, was the risk of shortage of skilled labour fixed on the appellants ? A builder who undertakes to finish a building by a certain day is, on the face of it, plainly taking such a risk. There are provisions in the present contract which re-enforce this construction, were it necessary to do so. With regard to prices of certain materials and rates of wages, there are what are called escalator clauses. The appellants were not prepared to take the risk of increases in these matters. The parties also directed their minds to the possibility of the work not being completed in the specified time. The appellants were to pay so much per week in damages. Extra time could, however, be allowed if there was delay by strikes, or if the work was stopped by order of the surveyor. This is, to me, a somewhat obscure clause, but it is sufficient that there was an exception clause for delay which did not cover shortage of labour, and provided only for relief from penalties and not for any extra cost that the delay might cause the appellants. The shortage of skilled labour, as is shown by the admitted figures set out in the points of claim, was very substantial. Evidence was called, which may not have been admissible, to show that the expectations were based on statements on behalf of the government as to the probable availability of skilled labour. A party contracting in the light of expectations based on data of that or any other kind must make up his mind whether he is prepared to take the risk of those expectations being disappointed. If not, then he will refuse to contract unless protected by some specific provision. There is no such provision here. The appellants took the risk under the contract and it seems to me quite impossible to maintain that the contract did not apply in the situation as it remained, the expectations on which the estimate was based not having been realised.

But for the decision in *Bush* v. *Whitehaven Port & Town Trustees* (1) (2 HUDSON'S B.C., 4th Edn., 122), I doubt if the issue of frustration would ever have been raised. I will give my reasons as shortly as I can for thinking that that case should not hereafter be citable as a decision relevant to the law of frustration. The case was fully examined by COHEN, L.J., in *Sir Lindsay Parkinson & Co., Ltd.* v. *Works & Public Buildings Comrs.* (8) ([1950] 1 All E.R. 208). The plaintiffs'

A claim was for extra expenses incurred on work and labour, in that the defendants had not made the site on which the plaintiffs were to do the work available as required. The delay was substantial, and turned a summer contract into a winter contract. The defendants relied on an exception clause providing that a failure to make the site available when required should not "vitiate or affect the contract". I think that the jury took the view, whether sound B in law or not, that the delay was so great that it ought not to be covered by the exception, and that the defendants should be treated as in breach. It is the form of two of the questions left to the jury that led the courts to deal with the case as one of frustration. The first two questions and answers were as follows ([1950] 1 All E.R. at p. 220):

> "(i) Was it the duty of the defendants under the contract to be in a C position at the commencement of and at all times during the contract to give the contractor the use of so much of the site of the works as might, in the opinion of the engineer, be required to enable the contractor to commence and continue the execution of the works in accordance with the contract? A.—Yes.
>
> "(ii) Was the contract made on the basis that the defendants would D be in a position to act as aforesaid? A.—Yes."

I doubt if this second question was a proper question to put. It was, in any event, liable to mislead. "Basis" may mean no more than "expectation". If it means more it is difficult to reconcile questions (i) and (ii) with giving any effect to the exception clause. The fifth question is also difficult:

> "Were the conditions of the contract so completely changed, in con- E sequence of the defendants' inability to hand over the sites of the work as required, as to make the special provisions of the contract inapplicable? A.—Yes."

This does not suggest that the contract is gone altogether, but only that the special provisions are inapplicable. The jury, in my view, took these words as referring to the exception. Question (viii) was as to the "damage suffered", F and the jury awarded £600 over and above the contract price. It appears that Lord Esher had some doubt whether the answer to the fifth question should be taken as a binding finding. Findings by juries on mixed questions of law and fact are not precedents. That is, no doubt, why the case was not reported in any law report. I doubt, myself, with respect, whether, on the findings of the jury taken with the terms of the contract, it was possible to treat it as a frustration G case. I am clear that it cannot be regarded as a precedent in the law of frustration as applied to building or any other contracts.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Blakeney & Marsden Popple* (for the appellants); *Kingsford, Dorman & Co.*, agents for *Blake, Lapthorn, Roberts & Rea*, Portsmouth (for the respondents).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

RAMSEY *v.* RAMSEY.

[Probate, Divorce and Admiralty Division (Davies, J.), January 25, 1956.]

Divorce—Discovery—Interrogatories—Documents lost or destroyed—Interrogatories as to contents—Facts to be elicited not necessary to prove interrogator's case—Whether interrogatories allowable—R.S.C., Ord. 31, r. 2.

The wife petitioned for divorce on the ground of the husband's desertion, alleging that he had left the matrimonial home one evening and had never returned. The husband denied desertion, and did not cross-pray for relief. The parties agreed to supply lists of documents and the husband, in his list, stated that he had had, but had not then, in his possession or power letters from the wife to himself, of dates unknown, and that these letters had been burned by him shortly after their receipt. The wife sought leave to administer the following interrogatories: "(1) When did you receive from the [wife] the letters . . . stating to the best of your ability the approximate date of each such letter? (2) How many such letters did you receive? (3) To the best of your recollection, what were the contents of each such letter?"

Held: (i) the court had power to allow interrogatories as to the contents of documents which had been lost or destroyed if there was evidence of their loss or destruction and if secondary evidence would be admissible from the party interrogated were the case being tried, and accordingly there was power to allow these interrogatories (*Wolverhampton New Waterworks Co.* v. *Hawksford* ((1859) 5 C.B.N.S. 703) applied), but

(ii) the interrogatories would not be allowed because (a) the legitimate use of interrogatories was to elicit admissions of facts essential to a party's case and on the pleadings the facts sought to be elicited by these interrogatories were not necessary for the wife to establish her case (observations of A. L. Smith, L.J., in *Kennedy* v. *Dodson*, [1895] 1 Ch. at p. 341, applied), and (b) neither were the interrogatories necessary for disposing fairly of the cause or matter or for saving costs within R.S.C., Ord. 31, r. 2.

Per Curiam: when a summons is adjourned into open court it is always open to counsel on either side to make any further submission which he may wish (see p. 167, letter C, post).

[As to interrogatories as to the contents of lost documents, see 12 Halsbury's Laws (3rd Edn.) 73, para. 100, note (b); and for cases on the subject, see 18 Digest 210, *1573*, *1574*.]

Cases referred to:

(1) *Herschfeld* v. *Clarke*, (1856), 11 Exch. 712; 25 L.J.Ex. 113; 26 L.T.O.S. 247; 18 Digest 210, *1573*.

(2) *Wolverhampton New Waterworks Co.* v. *Hawksford*, (1859), 5 C.B.N.S. 703; 28 L.J.C.P. 198; 32 L.T.O.S. 296; 141 E.R. 283; 18 Digest 210, *1574*.

(3) *Kennedy* v. *Dodson*, [1895] 1 Ch. 334; 64 L.J.Ch. 257; 72 L.T. 172; 18 Digest 197, *1444*.

Summons.

The wife petitioned for divorce on the ground of the husband's desertion, alleging:

> "That in January, 1947, when the parties were living together at . . . the [husband] in the evening told [the wife] that he was going to live with his sister . . . he took his coat and overalls and left the house and has since never returned to live with [the wife] but had lived separate and apart from her."

By his answer the husband denied the alleged desertion and pleaded that the wife had deserted him, alternatively that he had good cause for living separate and apart. The husband did not cross-pray for relief. The parties delivered lists of documents. The husband, in his list, stated:

> "3. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto. 4. The last mentioned documents were last in my possession or power, as to (a) the letters sent by me, on the date of posting of the same, and as to (b) the letters received by me, shortly after the date of receipt of the same when I burned them."

The second schedule read:

> "Letters [wife] to [husband]. Dates unknown. Letters [husband] to [wife]. Dates unknown."

On Nov. 22, 1955, Mr. Registrar KINSLEY made an order giving leave to the wife to administer the following interrogatories:

> "(1) When did you receive from the [wife] the letters set forth in the second schedule of your list of documents, stating to the best of your ability the approximate date of each such letter ? (2) How many such letters did you receive ? (3) To the best of your recollection, what were the contents of each such letter ? "

The husband appealed and on Dec. 20, 1955, DAVIES, J., having heard argument in chambers, adjourned the summons into court for judgment.

B. R. O. Carter (*J. R. B. Fox-Andrews* with him) for the husband.
D. Tolstoy for the wife.

DAVIES, J.: The wife by her petition alleges that the husband deserted her in January, 1947, the parties having been married in June, 1946. There is one child of the marriage, a daughter, Janet, born on June 25, 1947; and on June 15, 1952, the wife gave birth to a child of which the husband is not the father. The wife in the petition asks for the exercise of the court's discretion in her favour and has filed a discretion statement. There have been various proceedings between the parties in the magistrates' court. On Jan. 8, 1947, she obtained an order on the ground of the husband's desertion, and, after certain variations as to amount, on Aug. 6, 1952, no doubt consequent on the birth of the second child to which I have already referred, on the husband's application, the order was revoked on the ground that the wife had committed adultery. On that same day, apparently, the wife obtained an order for the custody of the child of the marriage, whether under the section empowering justices to make a separate order for custody when an order is revoked*, or whether under the Guardianship of Infants Acts, 1886 and 1925, I do not know. Finally, on Sept. 3, 1953, the order with regard to the custody of the child was varied and the husband was given the custody of the child. The issue in the suit is one of simple desertion. The wife says that the husband left her in 1947 without cause. The husband says that she drove him out, and, alternatively, that he had just cause for leaving her. He says in his answer that the justices' order was discharged on the ground of the wife's adultery; but he merely asks that the prayer in the petition be rejected. There is, therefore, no issue of adultery in the suit. The sole issue is desertion.

[DAVIES, J., referred to the husband's list of documents and continued:] I emphasise the words " relating to " in para. 3 of the husband's list†, as counsel for the wife placed great weight on them. It is on the statement that he has had and no longer has in his possession or power letters from the wife to him, which letters he burned shortly after the receipt, that this application and consequent order for interrogatories have been made. The interrogatories, as initialled by the learned registrar, are as follows:

> "(1) When did you receive from the [wife] the letters set forth in the second schedule of your list of documents, stating to the best of your

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* See the proviso to s. 7 of the Summary Jurisdiction (Married Women) Act, 1895: 11 HALSBURY'S STATUTES (2nd Edn.) 852.

† See supra letter A, ante.

> ability the approximate date of each such letter? (2) How many such letters did you receive ? (3) To the best of your recollection, what were the contents of each such letter ? ''

Counsel for the husband does not object very strongly to interrogatories Nos. 1 and 2, but he does object to interrogatory No. 3, that is to say he objects to having to answer what were the contents of these various letters. Speaking for myself, I take the view that really they stand or fall together. If interrogatory No. 3 should not be answered, then I cannot see any reason for allowing Nos. 1 and 2; if, on the other hand, interrogatory No. 3 is proper, then I can see no objection to interrogatories Nos. 1 and 2. The present appeal came before me first in chambers on Dec. 20, 1955, when, at the request of both learned counsel, having had the benefit of a very full argument, I adjourned the summons into open court with a view to giving judgment. Later, a message was conveyed to me that before I gave judgment counsel for the wife wanted to mention one further point. Rightly or wrongly, even without any such message, I take the view that when a summons is adjourned into open court it is always open to counsel on either side to make any further submission which he may wish.

The two points made on behalf of the husband are these. First, counsel says that it is not proper to interrogate as to the contents of written documents, and, secondly, he says that, even assuming that in a proper case the court can make an order for such interrogatories, in the circumstances of the present case it would be wrong to allow these interrogatories, particularly No. 3. He says that for two reasons, if I understand aright. He says, first, that despite the fact that they are included in his client's list of documents as being relevant documents, there is no issue in the present suit as to the correspondence; secondly, he says, referring to the words of R.S.C., Ord. 31, r. 2, that the interrogatories in general, and No. 3 in particular, are not

> " necessary either for disposing fairly of the cause or matter or for saving costs."

On the first point I am satisfied on an authority that has been cited to me that there is power in the court in a proper case to allow interrogatories as to the contents of a non-existent document. When I say " non-existent " I mean in the sense of lost or destroyed.

Two cases were cited to me on this branch of the matter. The first one, *Herschfeld* v. *Clarke* (1) ((1856) 11 Exch. 712), does not, I think, advance the matter much further; but the second one, *Wolverhampton New Waterworks Co.* v. *Hawksford* (2) ((1859) 5 C.B.N.S. 703), is obviously of great importance. It is not necessary, I think, for me to consider that case in detail. Suffice it to say that I am satisfied that the court was there saying that you may only administer an interrogatory as to the contents of a written document if secondary evidence of that document would be admissible at the trial or hearing. In that particular case, documents had never reached the possession of the party seeking to administer interrogatories, so that that party would not have any personal knowledge of their contents. Therefore, if it is shown that a document is lost or destroyed, a party who has knowledge of its contents may be interrogated about its contents if he could have been asked the same question in court. If, on the other hand, there is no evidence that the document is lost or destroyed, then, just as secondary evidence of its contents would not be admissible in court, interrogatories are not permissible. As a corollary to that, the proper way to obtain evidence of the contents would be (i) if the document is in the possession of the other party, by discovery in the ordinary way on affidavit of documents and notice to inspect, and (ii) if it is in the possession of a third party, by taking the ordinary steps to obtain production by subpoena duces tecum or otherwise. In *Wolverhampton New Waterworks Co.* v. *Hawksford* (2) it was made perfectly plain with regard to the documents which were no longer in existence that interrogatories should be allowed. I need quote only one sentence from the judgment of WILLIAMS, J. (5 C.B.N.S. at p. 707): A

> "With respect to the sixth and seventh [interrogatories], I do not see why the benefit of the Act* should not be extended to a case of this sort, when satisfactory evidence is given of the loss of the instrument the contents of which are sought to be proved by secondary evidence."

I am satisfied, therefore, that in a proper case such an order can be made. B The question, however, is whether it ought to be made in the present case. There is on the pleadings no issue as to correspondence at all. Obviously, as was pointed out by counsel for the wife, in any case between a husband and wife where desertion is alleged on one side or the other, correspondence leading up to, or, as in the present case, correspondence subsequent to, the separation may be most material or most relevant as a part of the whole story. C There are many cases in which there is in the pleadings a reference to letters: for example where the petitioner alleging desertion pleads that after the respondent left the petitioner wrote a number of letters asking for a resumption of cohabitation and that those letters, or those parts of those letters, were ignored by the respondent or the offers made in them were rejected. This is not one of such cases and although the letters may be relevant in a general sense, D I cannot say that any issue arises with regard to this correspondence at all. My attention was called to the well-known passage in the judgment of A. L. SMITH, L.J., in *Kennedy* v. *Dodson* (3) ([1895] 1 Ch. 334). As was emphasised by counsel for the wife this morning, the facts of that case were far removed from those of the present case. The passage relied on for the husband was at the opening part of the judgment (ibid., at p. 341): E

> "In my opinion, the legitimate use, and the only legitimate use, of interrogatories is to obtain from the party interrogated admissions of facts which it is necessary for the party interrogating to prove in order to establish his case; and if the party interrogating goes further, and seeks by his interrogatories to get from the other party matters which it is not incumbent on him to prove, F although such matters may indirectly assist his case, the interrogatories ought not to be admitted."

On the pleadings as they are before me in the present suit, are these interrogatories as to how many letters the wife wrote to the husband, when he got them, and what was in them, and the matters that might there be elicited, necessary for her to establish her case? In my opinion they are not. G The case is one of simple desertion, and I cannot say that it is necessary for her to prove these letters in establishing her case.

There is another point, which is in fact part of the second point under R.S.C., Ord. 31, r. 2. Are these interrogatories necessary either for disposing fairly of the case or for saving costs? If the wife wrote a number of letters to the husband, as no doubt she did, she knows what she wrote in them; if she wants to prove H the contents of those letters she can say in the witness-box what was in them. It is perfectly true that it would be very handy for her by means of these interrogatories to force the husband, who is not asking for cross-relief, to set out affirmatively what he says was in the letters. But supposing the husband is minded to give inaccurate answers about the contents of the letters, I use the word "inaccurate" advisedly, is he less likely to give inaccurate answers to this I interrogatory than he would on oath in the witness-box? What sort of benefit is the wife likely to derive from these interrogatories and what saving of costs is likely to ensue if I allow them? I put the question in that way and the answer seems to be plain, none. In those circumstances, though there is, in my judgment, plainly the power to allow these interrogatories, I fail to see that they are necessary within the meaning of R.S.C., Ord. 31, r. 2. In my judgment, therefore, this appeal succeeds. The appeal will be allowed and the order of the registrar discharged.

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* Common Law Procedure Act, 1854, s. 51: see 18 HALSBURY'S STATUTES (2nd Edn.) 443.

Appeal allowed.

Solicitors: *Walter A. Jennings* (for the husband); *L. H. Whitlamsmith* (for the wife). [*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

W. F. HARRISON & CO., LTD. *v.* BURKE AND ANOTHER.

[COURT OF APPEAL (Denning, Morris and Parker, L.JJ.), March 15, 1956.]

Chose in Action—Assignment—Debt—Legal assignment—Notice—Validity—Date of assignment wrongly stated in notice—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 136 (1).

By deed dated Dec. 7, 1954, a hire-purchase company purported to assign to the plaintiffs sums "legally due and owing" to the company under, among other agreements, a hire-purchase agreement entered into by the defendant. On Dec. 9, 1954, the plaintiffs gave the defendant notice in writing that the debt due, which was stated in the assignment and the letter to be £203 8s., had been assigned to the plaintiffs "by an indenture dated Dec. 6, 1954." The hire-purchase price not yet paid was £203 8s. but of that only four instalments amounting to £33 18s. were presently due at that date. These instalments were in arrear. In an action by the plaintiffs for the recovery of a total sum specified in the agreement as due on breach of its terms, or for return of the goods sold and damages,

Held: the notice of assignment was bad because the date of the assignment was wrongly stated therein and, therefore, the legal right to the debt under the hire-purchase agreement had not been assigned effectually at law within s. 136 (1)* of the Law of Property Act, 1925.

Stanley v. *English Fibres Industries, Ltd.* ((1899) 68 L.J.Q.B. 839) approved.

Per DENNING, L.J.: ". . . as at present advised, I should have thought that a notice of assignment ought to state the amount of the debt correctly . . ." (see p. 171, letter D, post).

Appeal dismissed.

[As to notice of assignment of a chose in action, see 4 HALSBURY'S LAWS (3rd Edn.) 488, para. 1010; and for cases on the subject, see 8 DIGEST (Repl.) 597, 598, *414-428*.

For the Law of Property Act, 1925, s. 136 (1), see 20 HALSBURY'S STATUTES (2nd Edn.) 715.]

Case referred to:

(1) *Stanley* v. *English Fibres Industries, Ltd.*, (1899), 68 L.J.Q.B. 839; 8 Digest (Repl.) 598, *425*.

Appeal.

The plaintiffs, W. F. Harrison & Co., Ltd., appealed from that part of a judgment of His Honour JUDGE BROWN, given at St. Helens and Widnes County Court on Dec. 8, 1955, whereby judgment was given for the first defendant, Mrs. Anne Veronica Burke.

In August, 1954, Woodcock Hire-Purchase Co. entered into an agreement with the first defendant for the hire-purchase of a refrigerated counter for £233 8s. and the second defendant, Charles Leo Burke (the first defendant's husband), guaranteed the payments under the agreement. The agreement provided that if the owners should recover possession of the counter (which they were to be entitled to do for breach of any term of the agreement) the first defendant should pay all arrears of hire and such further sum as should bring the total to £116 14s. An initial payment of £30 was made under the agreement

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* The relevant terms of the sub-section are set out at p. 171, post, in the footnote.

A but no payments in respect of the balance of £203 8s. payable in twenty-four monthly instalments of £8 9s. 6d. By a deed dated Dec. 7, 1954, Woodcock Hire-Purchase Co. purported to assign to the plaintiffs a debt of £203 8s. due by the defendants to the company. By a letter, dated Dec. 6, 1954, but sent on Dec. 8, 1954, and received by the first defendant on Dec. 9, 1954, the plaintiffs gave the first defendant notice that their debt under the agreement B had been assigned to the plaintiffs, but wrongly stated the date of assignment as Dec. 6, 1954. They brought an action in the county court against both defendants claiming the sum of £116 14s. less the deposit of £30, or £86 14s. alleged to be due under the hire-purchase agreement or alternatively return of the refrigerated counter and damages for the detention thereof. The county court judge held (a) that, in any event, the assignment could not pass any claim to C payments accruing due after the date thereof; (b) that no notice in writing had been given to the second defendant, as required by s. 136 (1) of the Law of Property Act, 1925, and, therefore, the second defendant was entitled to judgment against the plaintiffs; and (c) that, as the notice of assignment wrongly stated the date of the assignment, he was bound by the decision in *Stanley* v. *English Fibres Industries, Ltd.* (1) ((1899) 68 L.J.Q.B. 839) to hold that the D notice was bad and that, therefore, the legal right to the debt had not passed to the plaintiffs under s. 136 (1) of the Act of 1925, and, accordingly, that the first defendant was also entitled to judgment. He held further that, if he had not felt bound to follow *Stanley* v. *English Fibres Industries, Ltd.* (1), he would have entered judgment for the plaintiffs against the first defendant for £33 18s.

W. G. O. Morgan for the plaintiffs. E
The first defendant did not appear.

DENNING, L.J.: Mrs. Burke, the first defendant, who carries on a confectioner's business in Wigan, arranged with the plaintiffs, W. F. Harrison & Co., Ltd., who are dealers, to supply her with a refrigerated counter. She could not pay the money down, so it was arranged on hire-purchase terms, the hire-purchase company being Woodcock Hire-Purchase Co. In the result, Woodcock F Hire-Purchase Co. let to her a refrigerated counter on a payment of £30 down and twenty-four instalments of £8 9s. 6d. a month until a total of £233 8s. should be paid, and her husband, the second defendant, guaranteed the payments. The first £30 was paid, but no more, because there was a dispute as to the quality of the article. Nothing now turns on that. The hire-purchase agreement was dated Aug. 19, 1954. By an assignment of Dec. 7, 1954, Woodcock G Hire-Purchase Co. purported to assign to the plaintiffs:

> "all those the several debts or sums of money now legally due and owing to 'the vendor' [Woodcock Hire-Purchase Co.] by the persons whose names and addresses and amounts of their respective debts are set forth in the schedule hereunder written."

H In the schedule were put the names of the defendants, and the amount £203 8s. As appears from the document, the date when it was executed was Dec. 7, 1954, but on Dec. 6, 1954, the day before that, a letter, purporting to be a notice of assignment, was drawn up by the plaintiffs, dated Dec. 6, 1954, and addressed to "Mrs. A. V. Burke." The letter was in these terms:

> "Dear Madam, We hereby give you notice that by an indenture dated I Dec. 6, 1954, the debt amounting to £203 8s. owing by you to Woodcock Hire-Purchase Co. of Woodcock Street, Wigan, has been assigned to us absolutely and the debt is now due and owing to us. Also take notice that if you pay the amount, or any part thereof, to any person other than ourselves or our authorised agent after receipt of this notice, you will still be liable to us for the amount. Yours faithfully, for W. F. Harrison & Co., Ltd."

That letter was not dispatched to the first defendant on Dec. 6. It was sent by

A the plaintiffs to their solicitors, who sent it off to the first defendant on Dec. 8, and it reached her on Dec. 9.

The question is whether that is a valid notice of assignment such as to transfer to the plaintiffs the legal right to sue for the debt. The sum owing at Dec. 7, 1954, was not £203 8s., as stated in the assignment, but only the instalments which had then accrued due—£33 18s., and, therefore, the notice of assignment B did not give the right figure for the debt. Further, it gave the wrong date of the assignment; it said that the indenture was dated Dec. 6, 1954, whereas the only assignment produced to the court is one dated Dec. 7, 1954. The question is whether that error in giving the date of the assignment makes the notice bad.

In *Stanley* v. *English Fibres Industries, Ltd.* (1) ((1899) 68 L.J.Q.B. 839), it was held by RIDLEY, J., that, if the date given for the assignment was bad, the C notice did not comply with the requirements of the Supreme Court of Judicature Act, 1873, s. 25 (6)*. I find myself in agreement with that decision. Section 136 (1) of the Law of Property Act, 1925*, shows that the written notice of the assignment is an essential part of the transfer of title to the debt, and the requirements of the sub-section must be strictly complied with. I think that the notice itself must be strictly accurate, in particular, in regard to the date which is given D for the assignment. Even though it is only one day out, as in this case, the notice of assignment is bad.

I need not say anything about the amount of the debt, which in this case was put at £203 8s., when it was, in fact, only £33 18s.; but, as at present advised, I should have thought that a notice of assignment ought to state the amount of the debt correctly, because it concerns a transfer of title and the statutory E requirements must be strictly complied with. I find myself in agreement with the judgment of the county court judge that the plaintiffs did not prove a right or title in themselves to this debt in accordance with s. 136 (1) of the Act of 1925, and I think that the appeal must fail.

MORRIS, L.J.: I agree. A question might be raised in regard to the assignment itself, which is an assignment of the debts or sums of money referred F to in the schedule. The schedule refers to a debt of £203 8s. owing by the first defendant. At the date of the assignment there was not a debt of £203 8s. But we have not had argument in regard to the validity of the assignment itself, and, therefore, I express no opinion in regard to it. We have been concerned with the question whether there has been a valid notice in writing of the assignment. Section 136 (1) of the Law of Property Act, 1925, requires express notice G in writing and provides that if that is given the assignment

> "is effectual in law . . . to pass and transfer from the date of such notice—(a) the legal right to such debt or thing in action . . ."

The notice in writing in this case refers to a debt amounting to £203 8s. If this were a good notice, it would seem to be a notice that, as from the date thereof, H the plaintiffs had a "legal right to such debt", namely, a debt of £203 8s. There was no debt of £203 8s., but I do not think it necessary to decide this case on that point. I think that the case can be decided on the question of the date. The notice is dated Dec. 6. Whether the purported assignment was good or not, it was not in existence on Dec. 6. It came into existence on Dec. 7. It seems to me that s. 136 (1) of the Act of 1925, must be complied with; and I think I that the notice dated Dec. 6 which purported to be a notice relating to an assignment dated Dec. 6, when there was no such assignment in existence, was not a good notice enabling the assignment which came into existence on the following day to pass the legal right to the debt assigned. I therefore agree that the learned judge came to a correct conclusion.

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* Section 25 (6) of the Supreme Court of Judicature Act, 1873, was repealed by the Law of Property Act, 1925, s. 207, and Sch. 7, and its provisions were re-enacted in the Law of Property Act, 1925, s. 136 (1), which reads: "Any absolute assignment by writing under the hand of the assignor . . . of any debt or other legal thing in action, of which express notice in writing has been given to the debtor . . . is effectual in law . . . to pass and transfer from the date of such notice—(a) the legal right to such debt or thing in action; (b) all legal and other remedies for the same . . ."

PARKER, L.J.: I also agree.

Appeal dismissed.

Solicitors: *R. I. Lewis & Co.*, agents for *Goldrein & Co.*, Liverpool (for the plaintiffs).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Re COCKERELL'S SETTLEMENT TRUSTS. COCKERELL *v.* NATIONAL PROVINCIAL BANK, LTD. AND ANOTHER.

[CHANCERY DIVISION (Upjohn, J.), March 28, 1956.]

Trust and Trustee—Variation of trusts by the court—Administrative power—Sale of reversionary interest by trustees—No power of sale by trustees until interest in possession—Expediency—Sale for benefit of estate—Whether court will sanction sale—Trustee Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 19), *s.* 57 (1).

Settlement—Variation of trusts—Jurisdiction of court to authorise transaction not authorised by settlement—Sale of reversionary interest by trustees—No power to sell until interest in possession—Whether court will sanction sale—Trustee Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 19), *s.* 57 (1).

Under the will of his grandfather dated July 25, 1913, and under an appointment made pursuant to powers conferred by the will, the plaintiff was beneficially interested in two-thirds of the residuary estate subject to the life interest of his mother F., who was sixty-five years of age. By a settlement dated Jan. 27, 1948, the plaintiff settled one equal half-share of his reversionary interest on trust that the trustees should sell it but not until it should fall into possession. It was now desired that the trustees of the settlement should sell to F. the half-share of the plaintiff's reversionary interest which was subject to the trusts of the settlement in order to save estate duty which would otherwise be exigible on F.'s death. The value of the half-share after payment of estate duty on F.'s death at the current rate was some £44,333 odd. The price offered by F. was £80,000. The offer was fair also on an actuarial basis. On an application for an order under the Trustee Act, 1925, s. 57 (1), that the trustees might be authorised to effect the sale,

Held: the court would sanction the transaction under s. 57 (1) of the Act of 1925, since it was for the benefit of the trust, was within the terms of s. 57 and further in no way involved any alteration of the beneficial trusts subsisting under the settlement of Jan. 27, 1948.

Re Heyworth's Settlements (ante, p. 21) distinguished.

Re Wells ([1903] 1 Ch. 848) followed.

[As to the inherent jurisdiction of the court to authorise departure from the terms of a trust, see 33 HALSBURY'S LAWS (2nd Edn.) 297, para. 520; and for cases on the subject, see 43 DIGEST 839-841, *2857-2867*.

For the Trustee Act, 1925, s. 57, see 26 HALSBURY'S STATUTES (2nd Edn.) 138.]

Cases referred to:

(1) *Re Heyworth's Settlements*, ante, p. 21.

(2) *Re Wells*, [1903] 1 Ch. 848; 72 L.J.Ch. 513; 88 L.T. 355; 28 Digest 186, 446.

(3) *Re Chapman's Settlement Trusts*, [1953] 1 All E.R. 103; [1953] Ch. 218; *affd.* H.L. sub nom. *Chapman* v. *Chapman*, [1954] 1 All E.R. 798; [1954] A.C. 429; 3rd Digest Supp.

A **Originating Summons.**

The plaintiff, John Lawrence Pepys Cockerell, applied by originating summons under the Trustee Act, 1925, s. 57, for the following relief, namely, that the defendants, the National Provincial Bank, Ltd., who were the trustees of a settlement dated Jan. 27, 1948, might be authorised to sell to Felicia Louise Marie Cockerell at the price of £80,000 the one-third share to which the defendants B were entitled as trustees in reversion expectant on the death of Felicia Louise Marie Cockerell of and in the residuary estate of her father James Grahame Stewart deceased.

The facts appear in the judgment.

The argument took place in chambers and UPJOHN, J., gave judgment in open court.

C *W. S. Wigglesworth* for the plaintiff.

T. A. C. Burgess for the first defendants, the trustees.

W. T. Elverston for the unborn beneficiaries.

UPJOHN, J.: This is an application by the tenant for life under a settlement dated Jan. 27, 1948, asking that the defendant bank, the trustees of the D settlement, may be authorised to sell to his mother, Mrs. Cockerell, one-third part or share of a reversionary interest expectant on her death which was settled by the settlement. The application is made under s. 57 of the Trustee Act, 1925.

Under the will of his grandfather, who died on Sept. 11, 1913, and an appointment made pursuant to powers conferred by the will, the plaintiff is interested in two-thirds of the residuary estate of his grandfather, subject to the life interest E of his mother, Mrs. Cockerell, who is now aged some sixty-five years. By the settlement of Jan. 27, 1948, the plaintiff settled one equal half-share of his reversionary interest on certain trusts which I need not set out, and on the administrative trust that the trustees should sell that reversionary interest, but not until it should fall into possession. There being no power to sell the interest while it is in reversion, I am asked to confer that power on the trustees. F The circumstances in which I am asked to do that are these: Confessedly to avoid payment of some estate duty on her death, Mrs. Cockerell is anxious to purchase this reversionary interest so as to enlarge her life interest into an absolute interest and she has ample means to do this. With the present rate of estate duty, the value of this reversionary interest which will be received on her death is some £44,333 6s. 8d. The price which Mrs. Cockerell is willing to pay G is some £80,000.

It seems to me quite plainly to be for the benefit of the trust of 1948 that this sale should be permitted. The trustees will receive immediately a very much larger sum in cash than they will receive on the death of a lady now aged sixty-five. The evidence also shows it to be fair from the point of view of an actuarial valuation. It seems to me, therefore, that the transaction is one which is for the H benefit of the estate, and which falls fairly and squarely within the terms of s. 57 of the Trustee Act, 1925. There is property vested in the trustees; the proposed transaction is plainly expedient; it cannot, however, be effected because there is no power to enter into a sale while the property is in reversion. I propose, therefore, to sanction it under s. 57 of the Trustee Act, 1925.

There is no conflict between the order I am making today and my decision in I *Re Heyworth's Settlements* (1) (ante, p. 21) where I refused to sanction the sale of a reversionary property belonging to an infant. In that case the parties could not bring themselves within the provisions of s. 53 of the Trustee Act, 1925, because on the facts there was no intention to apply the capital or income for the maintenance, education or benefit of the infant; and, secondly, I held that there was no jurisdiction to sell the reversionary interest of an infant merely because it was for her benefit, for the effect was, in fact, to alter the trusts declared by the settlement, and the court has no general jurisdiction to do that. This, however, is quite a different case. Here the trust property is a reversionary interest; the effect of my order will not be to alter in the least degree any of the trusts subsisting under the settlement of 1948; I am merely authorising a sale of the trust property, there being no power to do so in the settlement.

It seems to me that this case falls entirely within *Re Wells* (2) ([1903] 1 Ch. 848). The observations of the Court of Appeal in relation to that case in *Re Chapman's Settlement Trusts* (3) ([1953] 1 All E.R. 103 at p. 115) were quoted with approval by LORD MORTON OF HENRYTON on appeal, sub nom. *Chapman* v. *Chapman* (3) ([1954] 1 All E.R. 798 at p. 815). I propose only to read the concluding observations of the Court of Appeal:

> " No alteration was required of any of the trusts of these settlements. What was proposed was that the trustees of the settlements should receive a present and certain subject-matter instead of their previously existing contingent rights."

It seems to me, therefore, that I can properly give authority to enter into this transaction, and I do so accordingly.

Order accordingly.

Solicitors: *E. F. Turner & Sons* (for all parties).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

NOTE.

CORRICK *v.* NORTHAM.

[QUEEN'S BENCH DIVISION (Byrne, J.), April 10, 1956.]

Legal Aid—Costs—Liability of legally assisted person for costs assessed —Change in circumstances—Variation of order against legally assisted person—Legal Aid (General) Regulations, 1950 (*S.I.* 1950 *No.* 1359), *reg.* 17 (4), *as substituted by Legal Aid (General) (Amendment No.* 1) *Regulations,* 1954 (*S.I.* 1954 *No.* 166).

[For the Legal Aid and Advice Act, 1949, see 18 HALSBURY'S STATUTES (2nd Edn.) 532.

For the Legal Aid (General) Regulations, 1950, reg. 17 (4), as substituted by the Legal Aid (General) (Amendment No. 1) Regulations, 1954, see 5 HALSBURY'S STATUTORY INSTRUMENTS 218 and Service.]

Motion after judgment.

This was a motion* on behalf of the defendant, Ray Edna Northam, in whose favour judgment had been given in an action brought by the plaintiff, then June

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* The motion was in accordance with the following procedure approved by the Lord Chief Justice on Mar. 14, 1956:

> " Where a party in whose favour an order for costs has been made against an assisted person after trial by a judge of the Queen's Bench Division in London or on circuit, desires to apply ' to the court ' under the Legal Aid (General) Regulations, 1950, reg. 17 (4) for variation of the order, the application should be made by notice of motion (R.S.C., Ord. 52) before the judge who made the order, if convenient, or to the judge in charge of the appropriate list. The notice of motion, entitled in the action, may be framed from form No. 1 of CHITTY'S QUEEN'S BENCH FORMS (18th Edn.), p. 967. The applicant's solicitor should, through the Crown Office and Associates' Department in London, consult the judge's clerk and ascertain a convenient date and time for the hearing. The notice of motion should be served personally on the assisted person with at least two clear days between the service of the notice of motion and the date of the hearing in accordance with R.S.C., Ord. 52, r. 5. The hearing will be before the judge in open court, when the provisions of reg. 17, in determining the amount of the assisted person's liability for costs in accordance with s. 2 (2) (e) of the Legal Aid and Advice Act, 1949, will apply. Any order made for an increase of the amount of liability shall include a direction that the judgment shall be indorsed accordingly."

A Blatchford, an infant suing by her father as next friend. The action had been heard by BYRNE, J., sitting at Exeter who, on Nov. 10, 1954, directed judgment to be entered for the defendant with costs. The plaintiff had been a legally assisted person at the trial of the action. The order directed that, the plaintiff's liability for costs having been determined in the sum of 6d., pending further order there should be no taxation of costs save that the plaintiff's costs B be taxed as between solicitor and client in accordance with the provisions of Sch. 3 to the Legal Aid and Advice Act, 1949. The plaintiff came of age on June 1, 1955, and on June 11, 1955, married Thomas John Corrick. At the time of the hearing of the action the plaintiff had been a person of small means but affidavit evidence was tendered to show a change in circumstances. The motion was brought to vary the plaintiff's liability for costs under reg. 17 (4) of the Legal Aid C (General) Regulations, 1950, as substituted by the Legal Aid (General) (Amendment No. 1) Regulations, 1954.

J. H. Inskip for the plaintiff.
C. Besley for the defendant.

BYRNE, J.: I am satisfied in this case that there has been a change in D circumstances. It was agreed between the parties that the plaintiff's weekly wage at the time of the action was £4 14s. 6d. and it now transpires from an affidavit by her employer that she is receiving at least £6 a week, because her salary is £5 19s. and there is also commission. This is a case, therefore, in which the order should be varied. When I originally made an order, it was merely to keep the matter alive, she at that time being an assisted person but an infant. E She is now of full age and a married woman. I recognise the fact, as she states in her affidavit, that she is expecting a child in October, 1956, and I think that that is a matter that I should take into consideration in deciding what my order should be.

The order that I propose to make, having regard to all that I have heard, is this, that there will be an order that she pays £75 costs by instalments of £8 a F month, the first instalment to be payable on May 1, and she shall have liberty to apply to me in chambers to vary the amount of the instalments if it becomes necessary.

Then I think it is necessary further to add that the judgment containing the original determination shall be indorsed accordingly.

I make no order as to costs with regard to this application.

G *Order accordingly.*

Solicitors: *Penny & Harward,* Exeter (for the plaintiff); *Martineau & Reid,* agents for *Campion, Symons & Co.,* Exeter (for the defendant).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

GOODRICH *v.* PAISNER AND OTHERS.

[House of Lords (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Radcliffe and Lord Somervell of Harrow), March 12, 13, 14, April 19, 1956.]

Rent Restriction—"*Separate dwelling*"—*Letting of rooms*—*Use of extra bedroom in common with landlord*—*Increase of Rent and Mortgage Interest* (*Restrictions*) *Act*, 1920 (10 *&* 11 *Geo.* 5 *c.* 17), *s.* 12 (2).

By a tenancy agreement, the landlord of a dwelling-house let to the tenant, on a weekly tenancy, four unfurnished rooms on the first floor of the house "together with the use in common with the landlord of the back bedroom on the first floor" and the use, in common with the landlord and others authorised by her, of the bathroom and lavatories. After the death of the landlord, the respondents, her successors in title, determined the tenancy by a notice to quit, but the tenant refused to deliver up possession. In an action by the respondents for possession of the four unfurnished rooms, the tenant claimed that she was entitled to the protection of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, because the rooms were "let as a separate dwelling", within the meaning of s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The respondents contended that, as the tenant had the right to share a living room with the landlord, the premises let to her were not "let as a separate dwelling".

Held (Lord Morton of Henryton dissenting): the four unfurnished rooms were let to the tenant as "a separate dwelling", within the meaning of s. 12 (2), because the words in the tenancy agreement, "the use in common with the landlord of the back bedroom", were too vague to constitute a right to share part of the dwelling sufficient to exclude the operation of the Rent Restrictions Acts, or (per Viscount Simonds, Lord Reid and Lord Somervell of Harrow) created merely a right to the exclusive use of the room from time to time, and did not involve such an evasion of privacy as would exclude the Acts.

Neale v. *Del Soto* ([1945] 1 All E.R. 191); *Cole* v. *Harris* ([1945] 2 All E.R. 146) considered.

Decision of the Court of Appeal sub nom. *Paisner* v. *Goodrich* ([1955] 2 All E.R. 330) reversed.

[As to dwelling-houses "let as a separate dwelling", see 20 Halsbury's Laws (2nd Edn.) 312-315, paras. 369, 370; and for cases on the subject, see 31 Digest (Repl.) 640, 641, *7475-7483*, and 646, 647, *7508-7516*.

For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2), see 13 Halsbury's Statutes (2nd Edn.) 1004.]

Cases referred to:

(1) *Neale* v. *Del Soto*, [1945] 1 All E.R. 191; [1945] K.B. 144; 114 L.J.K.B. 138; 172 L.T. 65; 31 Digest (Repl.) 646, *7508*.

(2) *Cole* v. *Harris*, [1945] 2 All E.R. 146; [1945] K.B. 474; 114 L.J.K.B. 481; 173 L.T. 50; 31 Digest (Repl.) 646, *7509*.

(3) *Hayward* v. *Marshall*, *Winchester* v. *Sharpe*, [1952] 1 All E.R. 663; [1952] 2 Q.B. 89; 3rd Digest Supp.

(4) *Sharpe* v. *Nicholls*, [1945] 2 All E.R. 55; [1945] K.B. 382; 114 L.J.K.B. 409; 172 L.T. 363; 31 Digest (Repl.) 707, *7955*.

(5) *Kenyon* v. *Walker*, *Stevenson* v. *Kenyon*, [1946] 2 All E.R. 595; 31 Digest (Repl.) 647, *7511*.

(6) *Llewellyn* v. *Hinson*, [1948] 2 All E.R. 95; [1948] 2 K.B. 385; [1949] L.J.R. 291; 31 Digest (Repl.) 647, *7513*.

(7) *Baker* v. *Turner*, [1950] 1 All E.R. 834; [1950] A.C. 401; 31 Digest (Repl.) 647, *7516*.

(8) *Prout* v. *Hunter*, [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193; 31 Digest (Repl.) 639, *7467*.

(9) *Remon* v. *City of London Real Property Co.*, [1921] 1 K.B. 49; 89 L.J.K.B. 1105; 123 L.T. 617; 31 Digest (Repl.) 638, *7455*.

(10) *Winters* v. *Dance*, [1949] L.J.R. 165; 31 Digest (Repl.) 647, *7514*.

Appeal.

Appeal by the tenant from an order of the Court of Appeal, dated Apr. 27, 1955, and reported sub nom. *Paisner* v. *Goodrich*, [1955] 2 All E.R. 330, affirming an order made by His Honour Judge Reginald Clark, Q.C., at Ilford County Court on Jan. 13, 1955, in favour of the landlords in an action by them for possession of four rooms in a large house. The facts are set out in the opinion of Lord Morton of Henryton.

Cyril Salmon, Q.C., and *P. J. H. Benenson* for the tenant, the appellant.

Neil Lawson, Q.C., and *G. Avgherinos* for the landlords, the respondents.

The House took time for consideration.

Apr. 19. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the facts of this case and all the relevant authorities are so fully examined in the opinion of my noble and learned friend, Lord Morton of Henryton, which I have been privileged to read, that I can state my own views very briefly.

In my opinion, this appeal should be allowed, but, in coming to that conclusion, I have been influenced solely by the unusual nature of the tenancy agreement which we have had to consider. I do not wish to cast any doubt on the correctness of the decisions of the Court of Appeal in *Neale* v. *Del Soto* (1) ([1945] 1 All E.R. 191), or *Cole* v. *Harris* (2) ([1945] 2 All E.R. 146), and what have been called their satellite cases. Nor, if any formula must be found, can I think of a better one than that stated by my noble and learned friend and approved by MacKinnon, L.J. ([1945] 2 All E.R. at p. 148), namely, that, to create a demise of part of a house as a separate dwelling, there must be an agreement by which the occupier has the exclusive use of the essential living rooms of a separate dwelling-house. This, however, can, at best, be only a general guide. The contrast to the " exclusive " use of a living room by one person is that it is shared by him with another. And, at once, the question arises what constitutes a sharing for this purpose. It would, I think, be in conformity with the decisions of the Court of Appeal, in the many cases which have come before it, if I said that a sharing involves the right of simultaneous use of a living room in such a manner that the privacy of the landlord or tenant, as the case may be, is invaded. On this point, I concur in the opinion of my noble and learned friend, Lord Reid, which also I have had the advantage of reading. Turning to the present case, I find that the tenant has, in addition to the four rooms let to her, which, by themselves, would undoubtedly be a part of a house " let as a separate dwelling ", also " the use in common with the landlord of the back bedroom on the first floor ", and I ask whether this is such a sharing of a living room as to exclude the operation of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939.

My Lords, I must admit that I find great difficulty in giving any effect in law to these words. It may well be that they are too vague to be enforceable. But, in any event, I cannot suppose that they create a right in the tenant at any time, and at all times, to enter and occupy the bedroom. It is, I think, presupposed that there will be some further arrangement by which there will be, not simultaneous user, but separate user at successive times, in fact such user in common, or sharing, as will not involve the invasion by the one of the privacy of the other. If so, it would not, I think, be proper to conclude that, because the appellant has such a right in addition to the four rooms demised to her, she was not the tenant of a separate dwelling and entitled to the protection of the Acts.

I would allow the appeal.

LORD MORTON OF HENRYTON: My Lords, by a memorandum of agreement dated Feb. 1, 1950, and made between Mrs. Ethel Jaffe (therein called

A " the landlord "), of the one part, and the appellant (therein called " the tenant "), of the other part, it was agreed as follows:

> "1. The landlord lets and the tenant takes all those the four rooms now in the occupation of the tenant on the first floor of the dwelling-house known as 4, Mansfield Road, Ilford aforesaid (hereinafter called ' the rooms ') together with the use in common with the landlord of the back bedroom on the first B floor on a weekly tenancy from Oct. 31, 1949, at the rent hereinafter mentioned. 2. The rent shall be at the rate of £1 5s. per week. 3. During the continuance of the tenancy the tenant shall be entitled without any payment beyond the said rent to the use (in common with the landlord and all others authorised by the landlord) of the bathroom and lavatories in the said house. 4. During the tenancy the tenant shall take reasonable care of all fixtures C and fittings in the rooms and shall not cause any damage or permit or suffer any damage to be done to the rooms or the decorations thereof and shall make good and pay for any damage thereto (including accidental damage) caused by any act or neglect on the part of herself her family or visitors and on the determination of the tenancy the tenant shall deliver up the rooms and all the fixtures and fittings therein in a proper condition of cleanliness. D 5. The tenant shall not assign the benefit of this agreement nor assign or sub-let the rooms or any part thereof during the continuance of the tenancy."

Mrs. Jaffe died on May 8, 1954, and thereupon No. 4, Mansfield Road became vested in the respondents, subject to the appellant's tenancy. In December, 1954, the respondents determined the tenancy by a notice to quit, but the appellant refused to deliver up possession, and, on Dec. 15, 1954, the respondents E issued a plaint in the Ilford County Court claiming possession of the four rooms let to the appellant. The appellant defended the action, contending that, at the time when the respondents claimed possession (which is agreed to be the relevant date), the four rooms in question were " let as a separate dwelling " within the meaning of s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and, consequently, the appellant was entitled to the protection F afforded by the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939.

In the county court, evidence was given by two of the respondents and by the appellant and her daughter and son as to the user of the " back bedroom " and other matters, but it is clear that none of the events which happened before December, 1954, gave rise to any change in the rights created by the agreement of 1950. Consequently, your Lordships have only got to consider whether, G by that agreement, the " four rooms on the first floor " were, or were not, let to the appellant as a separate dwelling. The county court judge held that they were not so let. In his judgment, he posed two questions:

> " 1. Is there, under this contract, a sharing of some room not actually included in the tenancy? 2. If so, ' Is that room part of the essential living accommodation? ' (per JENKINS, L.J., in *Hayward* v. *Marshall, Winchester* H v. *Sharpe* (3) ([1952] 1 All E.R. 663 at p. 667)."

The learned judge then continued:

> " I felt that both must be answered in the affirmative. A bedroom, in my view, is clearly part of the essential living accommodation of a dwelling. Accordingly I held this to be a *Neale* v. *Del Soto* (1) ([1945] 1 All E.R. 191) case and made an order for possession." I

The appellant appealed to the Court of Appeal, and DENNING, L.J., would have allowed the appeal, but ROMER and PARKER, L.JJ., felt bound to dismiss it, having regard to *Neale* v. *Del Soto* (1) and other authorities.

In these circumstances, my Lords, it is convenient to turn at once to the relevant authorities, and I trust I may be forgiven if I quote freely from my own judgments, for reasons which will become apparent as I proceed. In *Neale* v. *Del Soto* (1), by an oral agreement, the landlord, Mrs. Del Soto, sub-let to the tenant, Neale, two unfurnished rooms in a house containing seven rooms of which she was the lessee. The agreement provided for the use by the tenant, jointly with the landlord, of the garage, kitchen, bathroom, lavatory, coalhouse and conservatory. The standard rent of the house was such as to bring it within the Rent Acts. The tenant applied to the county court, under s. 12 (3) of the Act of 1920, for an apportionment of the standard rent. The county court judge dismissed the application, holding that the letting was not a letting of part of a house as a separate dwelling within s. 12 (2) of the Act of 1920. His decision was upheld in the Court of Appeal, and I said ([1945] 1 All E.R. at p. 193), in a judgment with which Scott and Finlay, L.JJ., agreed:

> " In the present case, were the two rooms in question ' a part of a house let as a separate dwelling '? In my view, they were not. What was let was the two rooms together with the use in common with the owner of the house of the garage, kitchen, bathroom, lavatory, coalhouse and conservatory . . . and it would be a misuse of language, to my mind, to say that the two rooms and nothing more were let as a separate dwelling. The real substance of the matter is that there was a sharing of this house; each party had the exclusive use of some rooms and the two parties together had the use in common of certain other rooms."

Later I observed (ibid.):

> " It was suggested in the course of the argument that if the county court judge's decision is upheld in this case the result might follow that a letting of two rooms together with the use in common with the landlord of, for instance, the lavatory, would be outside the Act. I am content to leave that matter to be dealt with if, and when, it arises, but it may be that this question is a question of degree and, as the county court judge has observed in the course of his judgment, in the present case a very substantial part of the dwelling was shared, including such a very important room as the kitchen."

Neale v. *Del Soto* (1) was the first reported case in which it was held that a tenant having the exclusive use of part of a house was outside the scope of the Rent Acts if he shared certain other accommodation with the landlord.

Four months later, the Court of Appeal (MacKinnon and Lawrence, L.JJ., and myself) had to consider *Sharpe* v. *Nicholls* (4) ([1945] 2 All E.R. 55). In that case, the county court judge had made an order for possession

> " subject to plaintiff allowing defendant a Rent Act protected tenancy of the front two rooms, together with the joint use of kitchen and out-offices."

The Court of Appeal, following *Neale* v. *Del Soto* (1), held that such a tenancy would not be a " protected tenancy ". It is to be noted that the only accommodation to be shared was the kitchen and the " out-offices ". Next came *Cole* v. *Harris* (2) ([1945] 2 All E.R. 146), where the Court of Appeal had to consider a letting of a living room, bedroom and kitchen, of which the tenant had exclusive use, together with the use, jointly with the landlord and another tenant, of a combined bathroom and w.c. on the first floor and of the garden for drying clothes and storing coal. Thus, the situation arose which had been foreseen in *Neale* v. *Del Soto* (1), and it became necessary to decide whether a sharing of any accommodation, whatever its nature, took the case out of the protection of the Rent Acts, or whether a distinction could be drawn between sharing a kitchen and sharing a combined bathroom and w.c. MacKinnon, L.J., and I thought that the case was distinguishable from *Neale* v. *Del Soto* (1), and I expressed my reasoning in the following words ([1945] 2 All E.R. at p. 152):

> " I think that the true test, where the tenant has the exclusive use of some rooms and shares certain accommodation with others, is as follows: there is a letting of part of a house as a separate dwelling, within the meaning of the relevant Acts if, and only if, the accommodation which is shared with others does not comprise any of the rooms which may fairly be described as ' living

> rooms ' or ' dwelling rooms '. To my mind a kitchen is fairly described as a ' living room ', and thus nobody who shares a kitchen can be said to be tenant of a part of a house let as a separate dwelling. In many households the kitchen is the principal living room, where the occupants spend the greater part of the day. Very often it is the warmest part of the house and the family tend to congregate there for that reason. On the other hand, both the bathroom and the w.c. are rooms which are only visited on occasions for a specific purpose, and I think they may fairly be classed with such a room as a box-room, though no doubt it is not visited so often. I think that this test gives a reasonable construction to the Acts, and one which is in accordance with their general scheme and intention."

MacKinnon, L.J., expressed his agreement with this reasoning as follows (ibid., at p. 148):

> " It is, I think, difficult to formulate any principle of law which separates what I have called the contrasted conceptions of (a) a demise of part of a house as a separate dwelling, and (b) an agreement to share the use and occupation of a house. But I think Morton, L.J., provides the best formula by saying that to create [(a)] there must be an agreement by which the occupier has the exclusive use of the essential *living* rooms of a separate dwelling-house. After all, a dwelling-house is that in which a person dwells or lives, and it seems reasonable that a separate dwelling should be one containing essential living rooms. A w.c. may be essential in modern days, but I do not think it is a living room, whereas a kitchen, I think, is."

It is to be observed that MacKinnon, L.J., in quoting my " formula " with approval, introduced the word " essential ", which did not appear in my judgment, but in subsequent cases I do not think any distinction has been drawn between a " living room " and an " essential living room."

The test suggested in *Cole* v. *Harris* (2) has been applied in a number of reported cases and has, no doubt, been applied in very many cases in the county court which have not been reported. As Denning, L.J., put it in the present case ([1955] 2 All E.R. at p. 332), after referring to *Neale* v. *Del Soto* (1) and *Cole* v. *Harris* (2):

> ". . . the contest ever since has been whether the sharing falls on the *Neale* v. *Del Soto* (1) side of the line or on the *Cole* v. *Harris* (2) side."

I shall next refer to two cases in which the test was considered in the Court of Appeal. In *Kenyon* v. *Walker, Stevenson* v. *Kenyon* (5) ([1946] 2 All E.R. 595), the use of the kitchen was granted only " for the purpose of cooking ", and the Court of Appeal was invited to distinguish the case from *Neale* v. *Del Soto* (1) on this ground. The court unanimously rejected this invitation and I said (ibid., at p. 598):

> " To my mind, ingenious though the argument is, we should be introducing an unwarrantable extra refinement into the test which has been already laid down by this court if we accepted that argument. After all, the primary purpose of a kitchen is for cooking, and in this case there is no doubt that the use of the kitchen, at any rate for that primary purpose, was shared by the parties."

In *Llewellyn* v. *Hinson* (6) ([1948] 2 All E.R. 95) the appellant was the tenant of a flat on the second floor of a dwelling-house in Birmingham. The annual rateable value of the flat was such as to bring it within the Rent Acts. The appellant had the exclusive possession of certain rooms, but was granted, in addition, the joint use of certain other rooms, namely, a bathroom, w.c. and kitchen. Asquith, L.J., in giving the judgment of the court, said (ibid., at p. 96):

> " The issue is whether on these facts, the tenant had let to him ' a part of a house let as a separate dwelling '. The learned county court judge held that

he had not, and he based his decision on the authority of *Neale* v. *Del Soto* (1) and the Court of Appeal cases following and interpreting that decision. The question is whether he was right in so holding. We think he was. This court cannot consider whether *Neale* v. *Del Soto* (1) and its satellite cases were properly decided. It can only inquire what they, in fact, decided, and about this there can, in our view, be little doubt. The gist of those decisions is that where what the landlord under the agreement of tenancy parts with to the tenant consists of two things (a) exclusive possession of a room or rooms, plus (b) user, jointly with some one else, of another living room or rooms, then the tenant cannot say that he is the tenant of a 'house or part of a house, let as a separate dwelling'. The ratio is that the 'dwelling' of the tenant on the facts assumed consists of the totality constituted by (a) plus (b), and that part of the totality is not 'separately' let to him because the possession or user of it is to be shared by him with others, a state of affairs which is inconsistent with the word 'separately', and, indeed, with the word 'let', for both of these terms connote exclusive possession or enjoyment."

It is convenient next to refer to the Landlord and Tenant (Rent Control) Act, 1949, s. 7 whereof is as follows:

> "Where under any contract—(a) a tenant has the exclusive occupation of any accommodation, (b) the terms on which he holds the accommodation include the use of other accommodation in common with his landlord or with his landlord and other persons, and (c) by reason only of the circumstances mentioned in para. (b) of this section, the accommodation referred to in para. (a) thereof is not a dwelling-house to which the principal Acts apply, [the Furnished Houses (Rent Control) Act, 1946] shall apply to the contract notwithstanding that the rent does not include payment for the use of furniture or for services."

It is unnecessary, for the present purpose, to quote the terms of the Act of 1946. The importance of s. 7 of the Act of 1949 lies in the recognition by Parliament of the fact that, even if a tenant has the exclusive occupation of some accommodation, his tenancy may be taken out of the protection of the Rent Acts if the terms on which he holds the accommodation include the use of other accommodation in common with his landlord, or with his landlord and other persons. The section does not specify the nature of the user in common which would have this result, but it is, I think, a fair inference that the legislature had in mind the test laid down in *Cole* v. *Harris* (2) and its re-statement in *Llewellyn* v. *Hinson* (6).

In *Baker* v. *Turner* (7) ([1950] 1 All E.R. 834), the *Neale* v. *Del Soto* (1) line of cases came to the attention of your Lordships' House. The facts in that case were that, in a dwelling-house which was subject to the Rent and Mortgage Interest Restrictions Act, 1939, the tenant sub-let a furnished bed-sitting room with use of kitchen. The landlord obtained an order for possession of the entire premises on the ground that, after that sub-letting, neither the part sub-let nor the part retained was let as a separate dwelling-house*. Counsel for the tenant said:

> "The correctness of the decision in *Neale* v. *Del Soto* (1) and the cases following it is not challenged. It is conceded that, on account of the sharing of the kitchen, the sub-tenant has not a separate dwelling . . ."

He went on to argue that, nevertheless, the tenant who had sub-let had a separate dwelling. In these circumstances, it was not necessary for this House to decide whether or not *Neale* v. *Del Soto* (1) and the cases following it were rightly decided, but each of their Lordships referred to that line of authority. Two short passages from the speeches may be quoted. LORD PORTER said ([1950] 1 All E.R. at p. 839):

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* The House of Lords held that the house was still let to the tenant as a separate dwelling, and the landlord was not entitled to recover possession.

> "The main results of decisions may, I think, be tabulated as follows: (i) A portion of a house which is let by a landlord to a tenant, even if in itself separate, ceases to be a separate dwelling or to be protected by the Acts if the terms of the letting contain a provision that the tenant shall have the right of using a living room belonging to the landlord: *Neale* v. *Del Soto* (1)."

Lord Porter went on to summarise the effect of the decisions in *Cole* v. *Harris* (2), *Llewellyn* v. *Hinson* (6) and *Kenyon* v. *Walker* (5), and added (ibid.):

> "The material time at which it has to be determined whether the house is protected or not is the moment when action is brought: *Prout* v. *Hunter* (8) ([1924] 2 K.B. 736), and *Remon* v. *City of London Real Property Co.* (9) ([1921] 1 K.B. 49)."

Lord Reid ([1950] 1 All E.R. at p. 854) referred to *Neale* v. *Del Soto* (1) and *Llewellyn* v. *Hinson* (6), and continued:

> "In these cases, it was held that no separate dwelling had been let. I have no doubt that these decisions are correct. If a tenant has to share with another person a living room which is not let to him, it is, in my view, impossible to find anything which is let to him as a separate dwelling. It cannot be the let rooms plus the right to use the other room, because that other room is not let to him at all—he is only a licensee there. And it cannot be the let rooms alone, because his having to share another room shows that the let rooms are only a part of his dwelling place."

I venture to think that this passage from Lord Reid's judgment states the ratio decidendi of the *Neale* v. *Del Soto* (1) line of cases more accurately than the passage already quoted from the judgment of the Court of Appeal in *Llewellyn* v. *Hinson* (6).

My Lords, two questions emerge from these authorities, questions which have not yet been decided by this House. First, were *Neale* v. *Del Soto* (1) and *Cole* v. *Harris* (2) rightly decided? I understand that your Lordships are all of opinion that they were, and I need only say that I share that opinion. I now turn to the second question: does the test suggested in *Cole* v. *Harris* (2) meet with the approval of this House? It was suggested in the course of the argument that, in *Cole* v. *Harris* (2), the Court of Appeal attempted to lay down a rule of law. I think it is more accurate to say that the majority of that court expressed a view as to the true construction of s. 12 (2) of the Act of 1920, and, in so doing, supplied a test for the assistance of the county court judges, on the frequent occasions when it would fall to their lot to determine whether particular premises were, or were not, let as separate dwellings.

For my part, after carefully reconsidering the *Cole* v. *Harris* (2) test, and the reasoning on which it was based, so clearly stated by my noble and learned friend, Lord Reid, in *Baker* v. *Turner* (7), I am of opinion that the test is a sound and useful one, based on a correct interpretation of the language of s. 12 (2) of the Act of 1920. It is, however, a fair criticism of the test that it throws no light on what is generally to be considered as a living room. In view of your Lordships' approval of *Neale* v. *Del Soto* (1), it is clear that a kitchen is to be considered as a living room, and it seems to me that (to quote the expressive language used by counsel for the appellant in the course of his argument) "a living room is a room wherein you cook, eat, sleep and put your feet on the fender." In other words, a kitchen, a dining room, a bedroom and a sitting room are living rooms in the ordinary sense of the word. It is to be noted that, in *Baker* v. *Turner* (7), both Lord Porter and Lord Reid used the phrase "a living room" without the adjective "essential", and I do not think that adjective is particularly appropriate. Some people find it possible to cook, eat, sleep and spend their leisure time in one and the same room. If there is a sharing in any living room, prima facie the letting is outside the Acts. But sharing may differ widely in kind and degree; the test must be applied with due regard to the facts of each case and, in particular, to the nature and extent of the rights of user granted to the tenant over the living room. A recent instance of a case where a letting was held to be " separate ", although the tenant was given a limited right of user of the kitchen, is *Hayward* v. *Marshall* (3). One tenant of unfurnished rooms had the right to draw water in the kitchen, and to use the gas stove in the kitchen once a week for the purpose of boiling her washing, but had no other right to use the kitchen. Another tenant had only the right to draw water in the kitchen. I agree with the reasoning which led the Court of Appeal to decide that, in each case, there was a separate letting, and I also agree with the reasoning which led the Court of Appeal to reach the opposite conclusion in *Winters* v. *Dance* (10) ([1949] L.J.R. 165), where the right granted was to use what was called a kitchenette " in common with the landlord ", with no restriction as to the nature of the user. In the former case, the position was similar to the position when a tenant is granted the right to use a bathroom. The latter case was, in my view, indistinguishable from *Neale* v. *Del Soto* (1); the so-called kitchenette was merely a small kitchen. I think that, in using the words " as a separate dwelling ", Parliament must have had in mind the awkward situations which might arise if a landlord had to share a living room for an indefinite time with a tenant whose tenancy had been determined by notice; and the intention of Parliament was, in my view, carried out in each of the two cases just cited.

The test suggested in *Cole* v. *Harris* (2) has been applied in many cases and has been stated, in terms which certainly did not indicate any disapproval, in your Lordships' House in *Baker* v. *Turner* (7). Further, although I cannot suggest that the test was expressly approved by Parliament in the Act of 1949, it was, at least, recognised that some forms of sharing would take a letting outside the Act. There must, I think, be many tenancies in existence today which have been granted on the footing that this test was the right one. It was, however, suggested in the course of the argument that the test now under consideration led to a wrong approach to the problem, and that the court must look at the character of the rooms let for the separate occupation of the tenant and ask:

> " Do the rooms so let in fact contain the essentials of a separate dwelling, or is what is let a separate dwelling only if you include with it the other rights or conveniences which the tenancy agreement confers? "

My Lords, I cannot accept this suggestion. The letting for separate occupation is usually, as in the present case, simply a letting of one, two or more rooms. These rooms will be either unfurnished or sparsely furnished, having regard to the terms of the proviso to s. 12 (2) of the Act of 1920, as amended by s. 10 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, whereby the Rent Acts do not apply to a dwelling-house bona fide let at a rent which includes payments in respect of the use of furniture, if the amount of rent which is fairly attributable to the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent. The use to which the rooms are put may vary from time to time at the will of the tenant. Whatever the rooms may look like at any particular time, it is impossible to tell merely by looking at them whether they are, or are not, *let as* a separate dwelling. The only way in which this can be finally determined is to look at the rooms whereof the tenant is given the use in common with the landlord or others. To quote again the words of LORD REID in *Baker* v. *Turner* (7) ([1950] 1 All E.R. at p. 854):

> " If a tenant has to share with another person a living room which is not let to him, it is . . . impossible to find anything which is let to him as a separate dwelling . . . his having to share another room shows that the let rooms are only a part of his dwelling place."

So far, my Lords, I have been dealing with questions of wide general importance, on which the courts will look to your Lordships for guidance. I now turn at last to the consideration of the case now under appeal. It would appear that this is the first occasion on which the courts have had to consider a case in which the tenant is given user of a bedroom in common with the landlord. I recognise that, in the majority of such cases, the arrangement contemplated would be one under which the landlord and tenant would each have the separate use of the bedroom for periods to be mutually agreed between them, but there might well be cases where a contemporaneous user was contemplated. For instance, it might be intended that two beds should be placed in the bedroom, one to be occupied by a woman landlord (if that is not a contradiction in terms) and the other by a woman tenant, perhaps for the sake of company. Again, it might be intended that one bed should be occupied by a son of the landlord and the other by a son of the tenant. In the present case, the words are " together with the use in common with the landlord of the back bedroom on the first floor". There is nothing in the agreement which limits or defines in any way the nature of the user.

I think this is essentially a case in which the success of the " use in common " must depend on the good nature and good sense of the parties concerned, and, in fact, trouble arose at an early stage because Mrs. Jaffe locked the door against the appellant. Surely, my Lords, this is just the kind of letting which was intended to be excluded from the Acts, so that a common user should not continue indefinitely against the will of one of the parties. The fact that the nature and extent of the use in common is not defined at all makes the domestic situation more awkward. If only a defined and limited use had been granted to the tenant, it might have been possible to treat the case as being on the same footing as *Hayward* v. *Marshall* (3). As it is, I find it impossible to distinguish the case from *Neale* v. *Del Soto* (1) and numerous other cases in which the tenant has been granted the use of a kitchen " in common with " or " jointly with " the landlord. I cannot regard it as a sufficient distinction that the use in common of a kitchen would more often involve contemporaneous user than the use in common of a bedroom. As PARKER, L.J., said in the Court of Appeal ([1955] 2 All E.R. at p. 337):

> " There is no express stipulation for exclusive user by the tenant for any period and indeed on the face of the agreement there is nothing to prevent a contemporaneous user."

In my opinion, the majority of the Court of Appeal came to the right conclusion and this appeal should be dismissed.

LORD REID: My Lords, s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides that the Act " shall apply to a house or a part of a house let as a separate dwelling ", and the question is whether the premises let to the appellant were let as a separate dwelling. The only reason why the Rent Acts are said not to apply is that, under the agreement of Feb. 1, 1950, the landlord let to the appellant, in addition to four rooms and the use of the bathroom and lavatories, " the use in common with the landlord of the back bedroom on the first floor ". It is said that this involves " sharing " a living room and prevents the premises from being held to be let as a separate dwelling.

In my opinion, this agreement does not give the parties a right to occupy the bedroom at the same time. No doubt, the terms of an agreement might be such as to confer such a right. It was suggested in argument that a landlord and tenant might agree to their children sharing a bedroom in this way. In any ordinary case, however, the objections to a landlord and tenant, or members of their households, sharing a bedroom are so obvious that I would not be prepared to hold that a let of several rooms, together with the use in common of a bedroom, means that there is to be such sharing unless there were something to indicate that that was the parties' intention. Use in common can also mean that the parties have each the right to the exclusive use of the room from time to time and, in my opinion, that is the meaning here. It is true that there is no provision for determining which is to have the preference at any particular time, but the parties are expected to behave reasonably. In the event of a disagreement the tenant might find it difficult to enforce her right, but I think that the intention to be inferred from the agreement was that each should have the exclusive use for approximately equal periods if desired.

I have no doubt that a right to share a living room in the ordinary sense puts the tenancy outside the protection of the Acts and for this reason. The use of the words " let as a *separate* dwelling ", in s. 12 (2), shows that some tenants of dwellings are to be protected and others not. Parliament could not be unaware of the domestic difficulties which might arise if an indefinite right to remain in possession were given to tenants who had a right to invade the privacy of another home. If a dividing line is to be drawn, one would expect it to exclude tenants who have a right to the daily use of a living room simultaneously with members of another household, and I think that the words " let as a separate dwelling " do clearly exclude such tenants.

On the other hand, it was notorious that very many thousands of tenants of what would otherwise be entirely separate dwellings had to use a w.c. in common with other households. These tenants would be the last whom one would expect Parliament to exclude from the protection of the Act, and only the clearest words would make me accept the position that Parliament must be held to have intended to exclude them. I think that, if any ordinary person were asked whether a tenant of a self-contained flat without conveniences, but with a right to use a w.c. in common, was the tenant of a separate dwelling, he would unhesitatingly answer " Yes ".

There are a great many intermediate stages between the tenant who has the right to share in the daily use of a living room and the tenant who only shares the use of a w.c., and I do not think there can be any test of universal application other than the intention of the Act as gathered from its words. No court is entitled to substitute its words for the words of the Act. A court, however, can, and must, decide what is the appropriate test in a particular case and, when the Court of Appeal has laid down a test, that test ought to be followed in all cases which do not present substantial relevant differences. The Court of Appeal laid down such a test in *Cole* v. *Harris* (2) ([1945] 2 All E.R. 146). I think that, for all ordinary cases, that test is in accordance with the intention of the Act, and, even if I had doubts about it, so many lettings must have taken place with it in view that I would not depart from it. But that does not mean that the words used by the Court of Appeal are to be treated as if they were words in an Act of Parliament. In substantially different circumstances they are only a guide, and not a rule. How far they are applicable must be considered in any case where the facts are substantially different in a relevant respect.

The right to share the use of a living room may be of a limited character, and then it must be a question of degree whether it prevents the tenant's premises from being let as a separate dwelling. In *Hayward* v. *Marshall* (3) ([1952] 1 All E.R. 663) a very limited right to use the kitchen was held not to have that result, and I think that this decision was right. It appears to me that, when one comes to a case where the circumstances are unusual, one must go back to the Act. The circumstances of the present case are unusual, and I think that an appropriate question to ask here is whether the tenant's right to use the bedroom involves a great invasion of the privacy of the landlord's home, as in the case of a right to the daily use of a living room simultaneously with the landlord and his family, or a comparatively small invasion, as in the case of a right to use a bathroom and w.c. in common. I do not say that that would be the right question to ask oneself in all unusual cases; I cannot foresee what they might be. In this case, however, there is no true sharing: there is really no invasion of the landlord's privacy

involved in the exclusive use of this bedroom, be it for a day or a week or a A
month. There is far more involved in the daily use of a bathroom or w.c. in common. It is true that the use there is also not simultaneous, but I do not think that that is the only thing to consider. Domestic difficulties can easily arise with regard to the use in common of a bathroom and w.c. in a way in which they could not arise with regard to the use of this bedroom, say, week about: but it has been held, and I think rightly, that the right to use these facilities in B
common does not put the case outside the Act. I am not conscious that anything that I have said is in conflict or hard to reconcile with what was said in *Baker* v. *Turner* (7) ([1950] 1 All E.R. 834). That was a case where the sub-tenant had an ordinary right to share in the use of a room. This is not such a case. I am of opinion that this appeal should be allowed.

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LORD RADCLIFFE: My Lords, when this case was before the Court of Appeal, the three members of the court differed in their views. Whereas one of them thought that the appellant's four rooms were " let as a separate dwelling " within the meaning of the Rent Restrictions Acts and that it was open to him in law so to decide, the other two came to the conclusion that they were precluded by what is called the principle laid down in *Neale* v. *Del Soto* (1) ([1945] 1 All E.R. D
191), from treating them as a separate dwelling. But for their understanding of what that principle required, they would have taken a different view. ROMER, L.J., arrived at his decision with regret, regarding it as unfortunate and saying ([1955] 2 All E.R. at p. 334):

> ". . . were we able to approach this case unfettered by authority, my strong inclination would be to hold that the four rooms which were let to the E
> tenant constituted a separate dwelling for the purpose of the Acts . . ."

PARKER, L.J., who also expressed his reluctance to dismiss the appellant's appeal, stated (ibid., at p. 337) that, apart from authority, he would have had little doubt that what was let to her was a separate dwelling.

It looks, therefore, as if something might have gone astray in the application F
of the principle of *Neale* v. *Del Soto* (1), and that, as at present understood, that principle is capable of producing results which are fairly regarded as unjust. If so, it appears to me that your Lordships are bound to indicate what it is that seems to you to be amiss, even though, in so doing, you may weaken the force of what has seemed hitherto to be a satisfactory and convenient rule. Then, what is the principle of *Neale* v. *Del Soto* (1)? The first difficulty is that there is nothing G
in that decision itself which is inimical to the success of the appeal in this case. What it involves is that, if some part of a house is let unfurnished separately from the rest of the house, that part is not necessarily to be treated as let as a separate dwelling. That surely must be good law. The court must take into account any further arrangements between landlord and tenant which are relevant to the question whether the part let is let in the capacity of a separate dwelling. H
In *Neale* v. *Del Soto* (1), the sum of the arrangements amounted, in the court's view, to a sharing of the house itself between the two persons concerned; and, on that view of the facts, a situation in which part of the house was let as a separate dwelling had not arisen.

What circumstances amount to such a sharing of the house as to negative the constitution of a separate dwelling must be a question of degree. That, also, I
was envisaged by the decision in *Neale* v. *Del Soto* (1). If, however, the statute leaves it unresolved by what tests the question of degree is to be determined, I do not think that it is open to the courts to make a law for themselves to the effect that, if certain conditions laid down by them are found to exist, then it is impossible for there to be a letting as a separate dwelling under the Acts. And that, I think, is the trouble to which the later extensions of the principle of *Neale* v. *Del Soto* (1) have led, and is the trouble responsible for the appellant's predicament in this case. For, when *Cole* v. *Harris* (2) ([1945] 2 All E.R. 146)

came to be decided, the decision of the majority of the members of the Court of Appeal was expressed in these words (ibid., at p. 152):

> ". . . there is a letting of part of a house as a separate dwelling, within the meaning of the relevant Acts if, and only if, the accommodation which is shared with others does not comprise any of the rooms which may fairly be described as 'living rooms' or 'dwelling rooms'."

A test of that sort may be (and, I am sure, has been) very helpful in deciding the question of degree that has to be solved afresh in every individual case. I dare say, too, that the significance which *Cole* v. *Harris* (2) attached to common user of a kitchen corresponds with good sense in most cases. But, on the other hand, it seems to me impossible to say that such a test can be presented as a construction of the actual statutory phrase "let as a separate dwelling", and it is no reflection on it to say that it does not appear to me to be completely satisfactory as an exhaustive statement of the relevant issue. It substitutes for what is, I think, the better test, as approved in *Neale* v. *Del Soto* (1), whether the divided house is, in substance, shared, the inquiry what is the kind of accommodation that is "shared" in common. For this purpose, "shared" is not altogether a happy expression, as has already been pointed out by this House in *Baker* v. *Turner* (7) ([1950] 1 All E.R. 834): see, for instance, ibid., at p. 844, per LORD NORMAND. It tends to obscure the fact that the degree of sharing may vary from case to case, where rights of joint or common user are concerned, and the degree of variation may well be relevant in considering whether there is a separate dwelling. *Hayward* v. *Marshall* (3) ([1952] 1 All E.R. 663) affords an instance of this and, in my view, the present case affords another.

Secondly, it cannot always be clear what ought to be treated as a "living room" for this purpose. The complexities of individual situations and requirements are infinitely various, since patterns of living themselves vary so much, and what is important or even essential for one occupant of rooms separately let may be unimportant or unnecessary for another. I cannot, myself, frame any formula which, in this context, necessarily embraces a kitchen but necessarily excludes a bathroom. The difficulty has led to attempts to speak of "essential living rooms" or "essential manifestations of living"; but I am bound to say that these glosses seem to me either to beg the question or to confuse the issue. And I am afraid that I cannot see anything more satisfying in the definition offered during the course of argument in this case: "a living room is a room wherein you cook, eat, sleep and put your feet on the fender". Why ever should courts of law tie themselves down in this way? As I see it, the truth is that a living room is not something which can be identified objectively without regard to the situation of its particular occupant, occupants or users. What, indeed, may be a living room if in single occupation, as for instance a kitchen, is not necessarily a living room if it has to be made available for the use of several distinct households; and I should say the same of a bathroom and, again, of a spare bedroom.

In my opinion, therefore, the question whether the appellant's four rooms were let as a separate dwelling is not solved merely by predicating that the bedroom of which a right of common user was given was, objectively, a "living room" and then concluding that, since there was common user of it, there could not be a letting of the other rooms as a separate dwelling. That seems to me, with all respect, to put the emphasis of this case in the wrong place. It seems to me that the first and most important thing is that, under the tenancy agreement, the appellant obtained the exclusive possession of four unfurnished rooms on the first floor of the house, which rooms she was in fact already occupying: and the next thing is to inquire whether, giving due weight to that fact, which certainly suggests the constitution of a separate dwelling, the suggestion is negatived by the fact that she also enjoyed the common use of a back bedroom on the first floor and the bathroom and lavatories in the house. Of course, there can be difference of opinion about the right answer to give to that question, just because these are questions of degree; but, in my view, the whole arrangement did not amount to a sharing of the house between the two ladies or of those parts of it which between them they enjoyed separately or in common. I do not think that the right to use the bathroom and lavatories negatives the letting of the four rooms as a separate dwelling; or that the right to use the back bedroom, taken by itself or together with the other right, alters the situation. For myself, I do not know what is the exact legal consequence of a tenant's right to use a bedroom in common with his landlord. If the parties themselves do not define the right with more precision, or work it out by current give and take, I very much doubt whether the law can supply any rules that will define it for them. But the only relevance which I see in that is that a right so vague ought not to be treated as playing any important part in the whole arrangement about the division of the house. I agree that the appeal should be allowed.

LORD SOMERVELL OF HARROW: My Lords, in *Neale* v. *Del Soto* (1) ([1945] 1 All E.R. 191) the county court judge held that a letting of two unfurnished rooms in a house, together with the use, jointly with the landlord, of the kitchen, bathroom, lavatory, garage and other rooms, was not a letting of part of a house as a separate dwelling within s. 12 (2) of the Act of 1920. The Court of Appeal decided that he had not made any error of law in so holding. It follows that, where in addition to rooms let there are in the one agreement rights of joint user, the living facilities must be considered as a whole. In *Cole* v. *Harris* (2) ([1945] 2 All E.R. 146) the county court judge came to the conclusion that *Neale* v. *Del Soto* (1) laid down the principle that

> " the sharing of any part of the accommodation included in the tenancy contract which is essential to the conception of a dwelling-house, according to ideas held at the present day, prevents the letting from being a letting of a part of a house as a separate dwelling."

The Court of Appeal held that *Neale* v. *Del Soto* (1) laid down no such principle. The shared user was of a bathroom and w.c. It was thought, no doubt rightly, that there were many " separate dwellings " in the ordinary sense where lavatory accommodation was shared. A test was suggested which has been elaborated and applied in later cases. There must not, it was said, be a sharing of any of the rooms which may fairly be described as " living rooms " or " dwelling rooms ". This may well be a useful guide, but each case must, I think, be considered by the tribunal of fact in the light of the words of the Act. Two contrasted cases will make my difficulty clear. A single room in a small house is let unfurnished with the right to share the landlord's meals in the landlord's dining room. I would have said the single room was not let as a separate dwelling. On the other hand, the decision might be different if there was a common room in which meals were provided for the tenants of a number of separate one-room flats with their own front doors. One has in each case to consider the agreement as a whole with any relevant surrounding circumstances. Is the alleged tenant a lodger with the exclusive use of some of the rooms in the house, or is he a tenant, giving words their ordinary meaning, of a separate dwelling, with, ex hypothesi, certain additional rights of joint user ?

In the present case, I cannot construe the words as contemplating a joint and contemporaneous user of the bedroom. The rights are so vague that they may be unenforceable. At the highest, they could not confer a greater right than a user for six months in the year at periods within the control of the landlord. Having regard to all the facts, including the number of rooms let, I do not think that the rights over this fifth room lead to the conclusion that the appellant was not the tenant of a separate dwelling. It must in each case, as my noble and learned friend, Lord Morton of Henryton suggested in *Neale* v. *Del Soto* (1), be a question of degree. I would allow the appeal for the above reasons, which are substantially those given by DENNING, L.J. *Appeal allowed.*

Solicitors: *Richardson Sowerby, Holden & Co.* (for the tenant, the appellant); *Paisner & Co.* (for the landlords, the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

BROWN AND OTHERS *v.* DIRECTOR OF PUBLIC PROSECUTIONS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Donovan, JJ.), April 17, 1956.]

Local Authority—Councillors—Disqualification for voting—"Pecuniary interest"—Tenants of council—Question relating to rent of council houses—Whether housing a "service"—Local Government Act, 1933 (23 *&* 24 *Geo.* 5 *c.* 51), *s.* 76 (1).

Six members of the council of a local authority were tenants of houses owned and let to them by the authority. Council tenants who had taken lodgers had to pay an increased rent. Three of the councillors had lodgers. At a council meeting a resolution was moved that in future no additional charge should be made for having sub-tenants or lodgers but that this resolution should not apply to tenants who were members of the council. An amendment was moved to delete that proviso. All six councillors declared their interest in the matter, voted against the amendment and for the resolution. They were found guilty of having committed an offence against s. 76 (1)* of the Local Government Act, 1933, in that they voted on a question relating to a matter in which they had a pecuniary interest. On appeal,

Held: the councillors were not entitled to vote on any question relating to the rent of council houses because they had a pecuniary interest in that matter and housing was not a service offered to the public within the meaning of the proviso to s. 76 (1) of the Act of 1933.

Appeal dismissed.

[For the Local Government Act, 1933, s. 76 (1), see 14 HALSBURY'S STATUTES (2nd Edn.) 395.]

Case Stated.

This was a Case Stated by justices for the county borough of Northampton in respect of their adjudication as a magistrates' court on July 25, 1955.

The appellants were councillors of the Northampton County Borough Council and on May 23, 1955, informations were preferred on behalf of the Director of Public Prosecutions against each of them that on Apr. 4, 1955, each appellant being a member of a local authority and having a pecuniary interest in additional payments by council tenants in respect of lodgers and being present at a meeting of the council at which additional payments were under consideration voted thereon contrary to s. 76 (1) of the Local Government Act, 1933. At a meeting of the council prior to Apr. 4, 1955, the council had resolved that council tenants who sub-let or took in lodgers should pay an additional rent to the council. On July 25, 1955, the justices found the following facts: The appellants were present at the meeting of the council on Apr. 4, 1955. Each of the appellants was the tenant of a dwelling, the property of the said council; the council was engaged in an expanding housing programme and owned about eight thousand houses in the borough whose population was about one hundred and four thousand, and operated for the selection of tenants a points scheme. Of the six appellants three had lodgers in their dwellings. At the meeting of the council on Apr. 4, 1955, a recommendation of the housing committee was before the council to the effect that the additional payments in respect of sub-tenants and lodgers should cease to operate in the case of council tenants who were not members of the council. A verbal amendment was moved to delete the exception regarding the council members. Each of the appellants then declared his interest in the matter as a tenant of the council. The town clerk drew attention to the provisions of s. 76 of the Act of 1933. The appellants voted against the amendment and in favour of the resolution. It was contended by the appellants that (i) housing is a service offered to the public and, therefore, came within the proviso to s. 76 (1) of the Act of 1933; (ii) when voting on the amendment and on the substantive resolution the appellants had no pecuniary interest in the matter in that they were merely subjecting themselves to a specific pecuniary detriment; (iii) three appellants, having no lodgers, had no pecuniary interest in either the amendment or the resolution. It was contended by the respondent that (i) the proviso to s. 76 (1) did not apply, and (ii) the appellants had a pecuniary interest as council house tenants in any matter affecting the conditions of tenancy of council houses. The justices were of opinion that in voting in the circumstances each of the appellants committed an offence contrary to s. 76 of the Act of 1933, and fined each of the appellants the sum of £2.

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* The terms of s. 76 (1) and of the proviso thereto are printed on p. 190, letter I, p. 191, letter D, *post.*

Sir Hartley Shawcross, Q.C., and *Miss J. Graham Hall* for the appellants.

The Solicitor-General (*Sir Harry Hylton-Foster, Q.C.*), *Rodger Winn* and *Paul Wrightson* for the respondent.

LORD GODDARD, C.J.: There is no suggestion in the present case of any corruption or improper motive on the part of the appellants, and the justices in convicting only inflicted a nominal fine because they recognised this. The simple question is whether or not the vote they gave on Apr. 4, 1955, was contrary to s. 76 (1) of the Local Government Act, 1933, and it is of the greatest importance that there should be a strict observance of the Act. At the meeting of the council on that date a resolution was proposed:

> " That except in the case of tenants of council dwellings who are members of the council the requirements contained in recommendation (2) of para. (8) of the report of the Housing Committee of Feb. 15, 1954, that tenants of council houses who sub-let or take a lodger or lodgers shall make payments to the council in respect thereof, shall cease to operate as from May 2, 1955 . . ."

If that resolution had gone through, the effect would have been that persons who were not councillors but who occupied council houses would not have to pay, but members of the council if they had council houses would have to pay this extra levy if they sub-let or took in lodgers. An amendment was then moved:

> " That the words ' except in the case of tenants of council dwellings who are members of the council ' be deleted from the recommendation."

That would put the members of the council on the same footing as other tenants of the council, and if that amendment had been carried, it would have been a pecuniary benefit to the members of the council who were tenants of council houses. The appellants voted against that amendment and so were not voting in favour of their getting a pecuniary advantage.

The first point to consider in the present case is whether it makes any difference that the appellants got any pecuniary advantage or disadvantage. Section 76 (1) reads as follows:

> " If a member of a local authority has any pecuniary interest, direct or indirect, in any contract or proposed contract or other matter, and is present at a meeting of the local authority at which the contract or other matter is the subject of consideration, he shall at the meeting, as soon as practicable after the commencement thereof, disclose the fact, and shall not

> take part in the consideration or discussion of, or vote on any question with respect to, the contract or other matter."

These six persons did disclose their interest, but they did vote. It seems to me that the sub-section is drawn in such terms that it does not matter whether the result of the vote would be to the pecuniary advantage or disadvantage of the person voting. Parliament has not said that they may vote against their interest and not for their interest; it says they must not vote on any matter in which they have a pecuniary interest. For myself I cannot see that councillors who are tenants of council houses and are paying the rent of those houses have not a pecuniary interest. It seems to me that they have a pecuniary interest. If, therefore, any question comes up with regard to the rents of those houses, they must not vote. That is the only construction I can put on the very wide terms of this sub-section which, it will be observed, relate not only to direct, but also to indirect, interest. A man undoubtedly has a pecuniary interest if he is paying a rent for a house. Parliament has said that on any matter in which he has a pecuniary interest he should not vote at all, and it is no answer to say that the vote which he recorded was a vote against his pecuniary advantage. The reply to that is that it was a vote in respect of his pecuniary interest, and he must not vote at all.

The next matter that has to be considered is this: the sub-section contains a proviso

> "that this section shall not apply to an interest in a contract or other matter which a member may have as a ratepayer or inhabitant of the area, or as an ordinary consumer of gas, electricity or water, or to an interest in any matter relating to the terms on which the right to participate in any service, including the supply of goods, is offered to the public."

Counsel for the appellants submitted to us and contended that housing is a service. In one sense, no doubt, it is regarded nowadays as a social service, but it does not seem to me that the provision of a house is a service within the terms of this sub-section. A landlord who has houses to let is not as a rule regarded as rendering a service. He has houses which, as a commercial proposition, he is willing to let to tenants, and a tenant who rents a house is not as a rule said to be taking the advantage of a service. He is the tenant of a house for which he pays a rent. I think that "to participate in any service" refers to services which local authorities provide for the public, not to the provision of a house in which a person may live. Another thing which has certainly influenced me in coming to a conclusion is that the words of the proviso are

> "an interest in any matter relating to the terms on which the right to participate in any service . . . is offered to the public."

I suppose "right" must mean legal right. A person, either a ratepayer or anybody else, has no right to get a house. He may get a house if the local authority choose to let him have one. Once the local authority let a person have a house, no doubt, services, sanitary and otherwise must be provided, in the same way that a householder is entitled to become an ordinary consumer of gas or water supplied by the undertaking for the area where the house is situated. I think that point also fails.

The last point taken by counsel for the appellants was that three of the councillors had no lodgers at the time when they voted. Counsel therefore says that they had no pecuniary interest in the matter which was under discussion, and it is not enough to say they might take in lodgers. The answer is the same as the answer to the first point, that the resolution dealt with the rents of council houses, and the councillors who are tenants of council houses must abstain from voting on any matter relating to housing. It is perfectly true to say that anomalies may occur, if they are really anomalies, though I do not think they are, e.g., councillors might vote on those matters knowing perhaps that in a

fortnight's time or a month's time they themselves would be the occupiers of A
council houses and pay rent. One cannot deal with every point that arises, but if a person occupies a council house, I think he is debarred by the terms of the sub-section from voting on any matter relating to those houses. For these reasons I think the justices came to a correct decision, and the appeal fails.

CASSELS, J.: I agree. I am satisfied that the appellants acted bona fide, B
but they acted in breach of s. 76 (1) of the Local Government Act, 1933. I should be prepared to hold that housing is not a service within the meaning of the proviso to that sub-section. I think that it is an activity on the part of the local authority, and if a councillor happens to be the tenant of a council house, it is quite clear that s. 76 (1) precludes him from taking part in any discussion concerning matters of rent with regard to council houses. I have nothing further C
to add.

DONOVAN, J.: I agree with what LORD GODDARD, C.J., and CASSELS, J., said about the construction to be put on the word "service" in the proviso to s. 76 (1). With regard to the other matters, the effect of the amendment which was proposed would have been that three of the appellants would be under liability to make the additional "lodgers payment" and to free the other three D
from a future liability to do so should they ever, as regards the council house they had, decide to take in lodgers or sub-let. That being so, the amendment in my view was a matter in which all the appellants had a pecuniary interest, and they all voted on it. It is true they voted against the amendment, but the sub-section prohibits them from voting at all.

As regards the substantive resolution, the position is this: the council was E
voting to free all tenants other than councillor tenants from the liability to make future additional payments in respect of lodgers or sub-letting. The appellants voted in favour of that proposal, and, therefore, voted to preserve their own liability, actual or possible. The object of s. 76 (1) is clearly to prevent councillors from voting on a matter which may affect their own pockets and, therefore, may affect their judgment, and a councillor's judgment may be affected by F
a proposal to preserve his liability just as much as by a proposal to terminate it, particularly where other persons in a like situation are being relieved from the same liability. In those circumstances, no narrow construction ought to be put on the words "pecuniary interest" in their context in s. 76 (1); in particular they ought not to be construed—and the contrary has not been suggested—as meaning pecuniary advantage. The appellants had a pecuniary interest in the sense G
that an existing liability in the case of some, and a possible future liability in the case of others, was going to be maintained, and in that way their pockets were or might be affected. Speaking for myself, I think that is enough, and it is therefore immaterial that the appellants voted in favour of preserving the liability. When I say that three councillors might have their pockets affected in future, I am referring to the others who had not taken in lodgers or sub-let. H
They each had a house which was a potential income-producing asset, and their case is different from that of the councillor who merely had a hope of getting a house in future. I agree with the other members of the court that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Parker, Thomas & Co.*, agents for *Max Engel & Co.*, Northampton (for the appellants); *Director of Public Prosecutions.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* BUTTERLEY CO., LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Radcliffe and Lord Somervell of Harrow), March 14, 15, 19, 20, April 19, 1956.]

Profits Tax—Computation of profits—Profits of trade or business—Income received from investments or other property—Nationalisation of colliery undertaking—Interim income payments pending satisfaction of compensation—Cesser of colliery trade—Continuance of other separate trades—Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 54), *Sch.* 4, *para.* 7, *as amended by Finance Act,* 1947 (10 *&* 11 *Geo.* 6 *c.* 35), *s.* 32 (1)—*Coal Industry Nationalisation Act,* 1946 (9 *&* 10 *Geo.* 6 *c.* 59), *s.* 22 (2), (3)—*Coal Industry* (*No.* 2) *Act,* 1949 (12, 13 *&* 14 *Geo.* 6 *c.* 79), *s.* 1 (2).

Under the Coal Industry Nationalisation Act, 1946, a colliery concern, carried on by a company as a separate trade among several trades, was nationalised. On Jan. 1, 1947, the assets of the concern vested in the National Coal Board, and, under s. 19 (1) of the Act, the company became entitled, in respect of the transferred assets, to compensation which was due on that date subject to determination of its amount. For the period between Jan. 1, 1947, and the date on which the compensation was fully satisfied the company became entitled to payments as follows: (i) interim income under s. 19 (2), comprising, under s. 22 (2) (a), " a money payment of an amount equal to interest for that period on [the] amount of compensation " at prescribed rates; (ii) revenue payments under s. 22 (3) (a) for 1947 and 1948 " equal to one half of the comparable ascertained revenue of the concern . . . attributable to activities thereof for which the transferred interests thereof were used or owned " before nationalisation; and (iii) further revenue payments for 1949 and subsequent years under the Coal Industry (No. 2) Act, 1949, s. 1 (2). The sums due under heads (ii) and (iii) alike were payable in part in substitution for the right to the interim income provided for under head (i). The Special Commissioners held that the payments were not receipts of any trade carried on by the company in the relevant chargeable accounting periods or income received from investments or other property and should not be included in the company's profits as computed for profits tax purposes. It was conceded by the company that the payments were income of the company and by the Crown that the payments were only chargeable to profits tax if they were profits of a trade or business carried on by the company.

Held: the interim income, revenue and further revenue payments received by the company ought not to be included in the profits of the company for the purposes of profits tax because

(i) although para. 7 (1) of Sch. 4 to the Finance Act, 1937, as amended, provided that income " received from investments or other property " should be included in the profits, yet these income payments did not arise from the source specified in s. 19 (1) of that Act, viz., a trade or business carried on by the company; moreover

(ii) (per VISCOUNT SIMONDS, LORD REID concurring, and per LORD RADCLIFFE) these income payments were not income of " investments or other property " within para. 7 (1) of Sch. 4 to the Finance Act, 1937, as amended, and

(iii) (per LORD MORTON OF HENRYTON, LORD REID concurring, and per LORD RADCLIFFE) even if the income payments had arisen from a trade or business carried on by the company, they were not as such taxable profits since the trade or business was not carried on in the periods when the income payments were made (see p. 204, letter H, to p. 205, letter A, p. 205, letter G, post).

Per Viscount Simonds: if the question is whether certain receipts of a company are profits of a trade carried on by it during a certain period, the determining factor is not what use the company makes of them when received, but what is the source from which they are derived (see p. 204, letter C, post).

Observations of Viscount Simonds and Lord Radcliffe on the possibility that a company may own assets which are not capital of its trade or business for the purpose of charging profits tax in relation to income derived therefrom or from the same source (see p. 203, letter G, to p. 204, letter A, and p. 207, letters D to H, post).

Decision of the Court of Appeal ([1955] 1 All E.R. 891) affirmed.

[For the Finance Act, 1937, Sch. 4, para. 7 (1), as substituted by the Finance Act, 1947, s. 32 (1), see 12 Halsbury's Statutes (2nd Edn.) 383.

For the Coal Industry Nationalisation Act, 1946, s. 22, see 16 Halsbury's Statutes (2nd Edn.) 304; and for the Coal Industry (No. 2) Act, 1949, s. 1, see 28 Halsbury's Statutes (2nd Edn.) 1014.]

Cases referred to:

(1) *Liverpool & London & Globe Insurance Co.* v. *Bennett*, [1913] A.C. 610; 82 L.J.K.B. 1221; 109 L.T. 483; 6 Tax Cas. 327; 28 Digest 60, *304*.

(2) *Birmingham Small Arms Co., Ltd.* v. *Inland Revenue Comrs.*, [1951] 2 All E.R. 296; 2nd Digest Supp.

Appeal.

Appeal by the Crown from an order of the Court of Appeal, dated Mar. 10, 1955, and reported [1955] 1 All E.R. 891, reversing an order of Roxburgh, J., dated July 27, 1954, and reported [1954] 3 All E.R. 69, allowing an appeal by the Crown by way of Case Stated by the Special Commissioners of Income Tax. The Special Commissioners held that payments received by the company, Butterley Co., Ltd., under s. 19 (2), s. 22 (2) and (3) of the Coal Industry Nationalisation Act, 1946, and s. 1 (2) of the Coal Industry (No. 2) Act, 1949, were not liable to profits tax.

The facts appear in the opinion of Viscount Simonds.

Geoffrey Cross, Q.C., Sir Reginald Hills and *E. B. Stamp* for the Crown.

Charles Russell, Q.C., J. Senter, Q.C., D. C. Miller and *C. P. F. Jenkin* for the company.

The House took time for consideration.

Apr. 19. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appears to me to be a very clear case, and I have no doubt that this appeal should be dismissed. That does not mean that there have not been questions raised in the course of the argument which may be extremely difficult to decide. They are not, however, necessary for the decision of this case. The short point for determination is whether the assessment of the respondent company to profits tax for the accounting periods Jan. 1, 1947, to Dec. 31, 1950, ought or ought not to include certain payments made to the company under the Coal Industry Nationalisation Act, 1946, and the Coal Industry (No. 2) Act, 1949.

The company was incorporated in the United Kingdom in 1888, and thereafter carried on a number of trades or businesses, amongst them the trade or business of colliery owners. By virtue of s. 5 (1) of the Coal Industry Nationalisation Act, 1946, the colliery assets of the company became vested in the National Coal Board on Jan. 1, 1947, and thereupon, as was found in the Case to which I will presently refer, its colliery trade ceased entirely. But it continued to carry on its other trades or businesses. The Coal Industry Nationalisation Act, 1946, which provided for the compulsory transfer of colliery assets to the National Coal Board, provided also for compensation being paid to the former owners.

These provisions were of a complicated character, and I will only say of the compensation of a capital nature, first, that it was clear from the outset that a substantial time must elapse before the amount payable could be ascertained, and, secondly, that the compensation was entirely or largely to consist of government stock which was subject to severe restrictions in regard to disposal. But, because there was seen to be this inevitable delay in assessing and paying compensation, the Coal Industry Nationalisation Act, 1946, provided, by s. 19 (2), that, until such compensation was fully satisfied, there should be a right to interim income which was to be satisfied as provided by s. 22. The relevant provisions of that section and of later sections of the Act of 1946, together with the supplementary provisions of the Act of 1949 and a statement of the sums received by the company under those provisions respectively, are set out succinctly in the Case Stated by the Special Commissioners and, in substance, I repeat their statement here.

Section 22 (2) is as follows:

> " Subject to the provisions of sub-s. (3) and sub-s. (4) of this section as to the revenue payments therein mentioned,—(a) the said right conferred by s. 19 (2) of this Act shall be satisfied, so far as regards interim income for the period between the primary vesting date and the time when any amount of compensation in respect of a transfer of transferred interests or of an overhead expenses increase is satisfied, by making, in addition to the issue of the stock then issued in satisfaction of that amount of compensation or to the making of the money payment then made in satisfaction of that amount of compensation, as the case may be, a money payment of an amount equal to interest for that period on that amount of compensation at such rate or rates as may be prescribed as respects that period or different parts thereof by order of the Treasury."

Under this sub-section the company received on Jan. 14, 1949, £415 13s. 6d., net £228 12s. 5d.; on Feb. 15, 1950, £64 3s. 5d., net £35 5s. 11d.; on Mar. 17, 1950, £353 7s. 2d., net £194 6s. 11d.; on July 5, 1950, £27,123 5s. 8d., net £14,917 16s. 1d.; and on Jan. 2, 1951, £1,882 18s., net £1,035 11s. 11d. These payments were all in respect of a broken period from the end of the year down to the date when compensation under s. 10 to s. 17 of the Act of 1946 was paid, and represented " amounts equal to interest " at rates prescribed by the Treasury varying between 2½ and 4½ per cent. per annum.

The relevant provisions relating to the payments arising under s. 22 (3) are as follows:

> " The following provisions of this sub-section shall have effect as to the making to colliery concerns . . . of payments in respect of each of the two years beginning with the primary vesting date and the first anniversary thereof respectively, that is to say,—(a) a colliery concern . . . shall be entitled in respect of each of the said two years to a payment of an amount equal to one half of the comparable ascertained revenue of the concern . . . attributable to activities thereof for which the transferred interests thereof were used or owned."

The payments under this sub-section were based on the amount of profit earned in the period before the colliery assets vested in the Coal Board. The said payments were for the first two years after the vesting of the assets in the Coal Board and, under s. 22 (4) were

> " . . . deemed . . . to be in substitution for the provisions of sub-s. (2) of this section, so far as regards additions thereunder for the said two years or any part thereof to compensation for a transfer of transferred interests being compensation attributable to transferred interests of that concern . . . except as to any excess of the aggregate amount of such additions over the aggregate amount of the revenue payments of that concern . . . "

Under this sub-section the company received on Jan. 7, 1948, a sum of £66,189, net £36,403 19s.; on Apr. 26, 1948, a sum of £66,189, net £36,403 19s.; on Aug. 17, 1948, a sum of £66,189, net £36,403 19s.; on Feb. 22, 1949, a sum of £84,249 8s. 7d., net £46,337 3s. 9d. The said money payments are described as "revenue payments" by s. 22 (3) (b). A

Finally, the company received on Mar. 17, 1950, a sum of £76,430 6s. 10d., net £42,036 13s. 9d., under the provisions of s. 1 (2) of the Coal Industry (No. 2) Act, 1949. This payment was made under the provisions of s. 1 (2) of the Coal Industry (No. 2) Act, 1949, which, so far as relevant, is as follows: B

> "A colliery concern . . . shall, in respect of the year 1949 and in respect of any subsequent year before that in which compensation under the principal Act in respect of the transfer of the transferred interests of the concern . . . is satisfied in full, be entitled to a payment of an amount equal to the amount by which one-third of the comparable ascertained revenue of the concern . . . attributable to activities thereof for which the transferred interests thereof were used or owned exceeds an amount equal to interest for the year in question on the aggregate amount of that compensation satisfied before the end of that year." C

D

Under s. 1 (3) the said payment was to be treated, for the purposes of s. 22 (2) (a) of the Act of 1946

> ". . . as being made towards satisfaction of the aggregate of the proportions attributable to that year of amounts which that paragraph requires to be paid as additions to stock issued or money payments made after the expiration of that year in satisfaction of compensation in respect of transfers of transferred interests of the concern . . ." E

These are the sums which were, as the Crown claims, rightly and, as the company claim, wrongly included in the company's assessments to profits tax for the chargeable accounting periods from Jan. 1, 1947, to Dec. 31, 1950. I have set out the relevant statutory provisions with what may seem to be unnecessary elaboration in order that the nature of the payments may be clearly understood. F

It is now necessary to refer to the relevant provisions of the Finance Acts, 1937 and 1946, and I summarise them as follows:—Profits tax was imposed (under the title of national defence contribution) in Part 3 of the Finance Act, 1937 (the title being altered to profits tax by s. 44 of the Finance Act, 1946). By s. 19 (1) of the Finance Act, 1937, the tax was charged G

> "on the profits arising in each chargeable accounting period . . . . from any trade or business"

to which the section applied. By s. 19 (2), the trades and businesses to which the section applied were "all trades or businesses of any description carried on in the United Kingdom . . ." Section 19 (4) provides:

> "Where the functions of a company or society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this section to be a business carried on by the company or society." H

Section 20 (1) of the Finance Act, 1937, provides: I

> "For the purpose of the national defence contribution, the profits arising from a trade or business in each chargeable accounting period shall be separately computed, and shall be so computed on income tax principles as adapted in accordance with the provisions of Sch. 4 to this Act. For the purpose of this sub-section, the expression 'income tax principles' in relation to a trade or business means the principles on which the profits arising from the trade or business are computed for the purpose of income

> tax under Case I of Sch. D, or would be so computed if income tax were chargeable under that Case in respect of the profits so arising."

The adaptations of income tax principles for computing profits made in Sch. 4 include provisions allowing interest, annuities, and annual payments out of profits to be deducted (the deduction of which is disallowed under the Rules of Case I of Sch. D), and disallowing the deduction in respect of annual value of land (which is allowed for income tax under those rules).

With regard to income received from investments or other property, para. 7 of the Schedule (as originally enacted) provided for the inclusion of such income in the profits in the cases therein mentioned only, such as the business of a building society or a banking business, insurance business or business consisting wholly or mainly in the dealing in or holding of investments or other property (with certain exceptions in those cases as regards certain dividends or distributions of profits and as regards income to which the person carrying on the trade was not beneficially entitled). Subject to these and other provisions as to income from investments or other property, it was declared (in para. 8 of the Schedule) that

> ". . . the profits shall include all such income arising from the trade or business as is chargeable to income tax under Case I of Sch. D, or would be so chargeable if the profits of the trade or business were chargeable under that Case, except income which is, or would be, exempted from income tax by virtue of s. 39 of the Income Tax Act, 1918, or s. 30 of the Finance Act, 1921."

By s. 31 (1) of the Finance Act, 1947, it was provided that (subject to certain exceptions) profits tax should not apply to any trade or business not carried on by a body corporate, or unincorporated society or other body. By s. 31 (2) of the Finance Act, 1947, it was provided that s. 19 of the Finance Act, 1937, should not apply to any trade or business carried on by a body corporate where, in the conditions therein prescribed,

> ". . . the actual income of the body corporate from all sources is apportioned under or for the purposes of s. 21 of the Finance Act, 1922, and all the persons to whom it is apportioned are individuals."

By s. 32 of the Finance Act, 1947, the provisions of para. 7 of Sch. 4 to the Finance Act, 1937, with regard to investment income and income from property were replaced by provisions whereby, in the case of all trades and businesses, such income should be included in the computation of profits subject to similar exceptions as regards dividends and distribution of profits and income to which the person carrying on the trade is not beneficially entitled as were contained in para. 7 as originally enacted. By s. 43 (1) of the Finance Act, 1947, it was enacted that all trades and businesses to which s. 19 of the Finance Act, 1937, applies carried on by the same person should be treated as one trade or business for the purposes of the enactments relating to the profits tax.

The company, having been assessed to profits tax in the manner that I have mentioned, appealed against such assessments to the Special Commissioners. It was contended before them by the Crown (i) that the payments in question were

> " income of the company proper to be included in the computation of the profits of its trade or business for the purpose of the profits tax ";

(ii) that, under the provisions of s. 19 (1) and (2) of the Finance Act, 1937, the said payments were part of the trade or business carried on by the company in the chargeable accounting periods; and (iii) in the alternative that the said payments,

> " arising from the right to ' interim income ' ' revenue payments ' and further ' income payments ' provided by the Coal Act, 1946, and the Coal

> Act, 1949, were, on the true construction of para. 7 (1), Sch. 4, Finance Act, 1937, as amended by s. 32 (1), Finance Act, 1947, 'income received from investments or other property'."

For the company, the first contention, which was afterwards abandoned, was that the payments in question were not income, but, further, they contended, and have since maintained, that the payments were not part of the profits of the trades or businesses carried on by them during the relevant chargeable accounting periods, but arose from their colliery concern, which trade ceased entirely on Jan. 1, 1947, and, further, that they were not "income received from investments or other property" within the meaning of the amended para. 7.

The commissioners decided in favour of the company, holding that the payments constituted income of the company, but that (a) the company's composite trade or business consisted at the material time (scilicet, before Jan. 1, 1947) of a number of separate and severable trades of which their colliery concern was one, and that that trade ceased entirely on Jan. 1, 1947, and (b) that, as a consequence of that finding of fact, the payments in question were not receipts of any trade carried on by the company during the relevant chargeable accounting periods, and (c) that, on the proper construction of the relevant statutes, the payments were not "income received from investments or other property." The Crown having expressed dissatisfaction with this determination, the commissioners stated a Case for the opinion of the court, which was heard by Roxburgh, J. That learned judge disposed of the matters in favour of the Crown on the short ground that the payments were income from property, namely, a chose in action consisting of compensation due but not yet paid*. The company thereupon appealed to the Court of Appeal, which unanimously reversed the judgment of Roxburgh, J.†

I must, at this stage, mention a concession made by counsel for the Crown in the Court of Appeal which is thus stated in the judgment of Jenkins, L.J. ([1955] 1 All E.R. at pp. 905, 906):

> "In this court counsel for the company abandoned the contention that the interim income payments were not income at all, while counsel for the Crown abandoned the contention that the claim to tax could be established merely by showing that the interim income payments were income received from property. It thus became common ground that the interim income payments, whether they were or were not income received from property, were only chargeable to profits tax if they were profits of a trade or business carried on by the company during the relevant chargeable accounting periods. This must, I think, be the right view."

My Lords, I agree that this must be the right view, for it is just what the Act says, and, in so far as Roxburgh, J., decided that it was enough to bring a payment within the reach of profits tax that it should be income derived from property of the company without regard to the question whether it arose from a trade or business carried on by the company during the relevant period, he was clearly wrong. But that leaves open the troublesome question what, in view of the provisions of s. 20 of the Finance Act, 1937, and Sch. 4 to that Act, as amended by the Finance Act, 1947, are to be regarded as the profits arising from any trade or business carried on in the United Kingdom in the relevant period. This is, at best, a very artificial conception, and the width of the new para. 7, which was imported by s. 32 of the Finance Act, 1947, may be estimated by the apparent necessity to exclude "(c) income to which the persons carrying on the trade or business are not beneficially entitled", and thus colour is given to the view that profits of a trade carried on by the company have become identified with income of any property of the company. This, notwithstanding the concession to which I have referred, was, in effect, the contention of the Crown.

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* See [1954] 3 All E.R. 69.

† See [1955] 1 All E.R. 891.

During the relevant periods, they said, the company carried on a number of trades or businesses; the payments in question were available for the carrying on of those trades or businesses in the same way as the dividends or interest on war loan or any other capital investment of the company; therefore, the payments were profits arising from the trade. And they fortified their contention by reference to the accounts of the company, in which the payments in question were lumped together with other trading receipts. With this latter aspect of the matter I will deal presently. My present concern is with its broader aspect, in which the source of the income is disregarded if it is available for employment in a trade, which is, in effect, to say that, for the purpose of profits tax, the income of a company is equivalent to the profits of its trade. My Lords, while I am satisfied that this is a wholly wrong view of the scope of profits tax, I am conscious of the familiar difficulty of drawing the line. That the line must be drawn somewhere is apparent (and the Crown appeared to concede it) for, fundamentally, the tax is a tax on the profits of a trade or business whether, as was formerly the case, carried on by an individual or a company, or, as now, carried on by a company. And, if, artificially, the income of any investments is to be treated as part of the profits of a trade, it can only be those investments which are somehow related to the trade in question. It is not, I think, necessary to state categorically that the provisions of the Schedule cannot enlarge the scope of the charging section (s. 19 of the Act of 1937), for s. 20, with which the Schedule must be read, can fairly be said to give an artificial meaning to the words of the charging section. But, at least, the dominant words " the profits arising in each accounting period from any trade or business " must not be lost sight of. That is why I use the vague and general words " somehow related to the trade in question ", and, doing so, am well aware that I have not yet drawn the hypothetical line. But I am unwilling to go further than is necessary for the decision of the present case. We have been told that it has been the practice since 1947 to include in an assessment to profits tax income derived from investments representing the general reserve of a trading company and having no closer association with its trade than its general availability for the lawful uses of the company, and I would not say anything to affirm or to cast any doubt on the validity of the practice, which may be said to find its analogue in *Liverpool & London & Globe Insurance Co.* v. *Bennett* (1) ([1913] A.C. 610).

In the present case, however, there are considerations which, if they do not entitle me to say that it is sui generis, at least remove it from the generality of cases. As my noble and learned friend, LORD RADCLIFFE, said in *Birmingham Small Arms Co., Ltd.* v. *Inland Revenue Comrs.* (2) ([1951] 2 All E.R. 296 at p. 303): ". . . a company . . . may, obviously, own capital or assets that are not the capital . . . of . . . its trade or business ". And, if it was sought to give a conspicuous example of an asset which was not the asset of a trade or business carried on by a company, I should select a right to compensation payable at some future date in respect of a trade which it had ceased to carry on. And it is the corollary of this that any income of such an asset cannot be regarded as the income of " investments or other property " within the meaning of the new para. 7. The matter does not, however, rest there. For, though the payments in question are conceded by the company to be income for the purpose of the Income Tax Acts, it would be a misuse of language to speak of them as income of an " investment or other property ". This sufficiently appears from the somewhat lengthy description of their character which I have already given. I concur in the view expressed by the learned Master of the Rolls that the language of s. 19 and s. 22 of the Coal Industry Nationalisation Act, 1946, is carefully and deliberately chosen to avoid the result that the interim income is income of or from the compensation provided for in s. 19 (1). It thus appears that neither is the capital asset, viz., the right to receive compensation, an asset so related to any trade or business carried on by the company that it falls within para. 7, nor, if it were, are the money payments in question " income " of that asset.

It remains to deal with some other contentions of the Crown. I have mentioned that they have relied on the fact that, in their reports and accounts for the relevant years, the company aggregated the payments in question with trading receipts. This contention was not raised before the Special Commissioners; no question was asked of the company's chairman of directors or chief accountant who were called as witnesses at the hearing before them; the matter was mentioned only cursorily in the Court of Appeal*. Your Lordships are, therefore, without the explanation or guidance that might have been available. But I do not doubt that, here, first thoughts were right. For, if the question is whether certain receipts of a company are profits of a trade carried on by it during a certain period, the determining factor is not what use the company makes of them when received, but what is the source from which they are derived. Apart, therefore, from the fact that the reports and accounts would not, by themselves and without any explanation, justify a conclusion adverse to the company, the argument that has been founded on them proceeds from the same fallacy as the main argument.

Then reliance was placed on s. 43 of the Finance Act, 1947. It will be remembered that this section provided that all trades and businesses, to which s. 19 of the Act of 1937 applied, carried on by the same person should be treated as one trade or business for the purposes of the enactments relating to the profits tax. It was not made clear to me how this helps the argument. If the payments in question could not be computed in the profits of any one of the trades carried on by the company after Jan. 1, 1947, they could not be computed in the profits of all of such trades treated as one trade. I asked in the course of the argument how, if s. 43 had not been enacted, the matter would have been dealt with, that is, to the profits of which of several continuing trades the payments would have to be allocated. I got no satisfactory answer. The enactment of s. 43 does not supply one. Then it was urged that, even if the colliery trade of the company was properly regarded for profits tax purposes as a separate trade and as having ceased on Jan. 1, 1947, the process of ascertaining and getting in the compensation payable to them under the Coal Acts constituted a trade or business carried on by them within the meaning of s. 19 (1) of the Finance Act, 1937, and the payments in question were receipts of that trade or business. This was a contention that had never been raised in any form until it found a place in the last formal reason of the Crown's case, and your Lordships were unanimous in thinking that the Crown should not be allowed to raise it. I have little doubt that, in the shipwreck of their other contentions, it would not have availed them as a tabula in naufragio.

In the result this appeal should, in my opinion, be dismissed with costs.

LORD MORTON OF HENRYTON: My Lords, I agree that the payments now in question, which are admittedly income receipts of the respondent company, are not " profits arising from any trade or business " within s. 19 of the Finance Act, 1937. I only desire to add that, even if I had arrived at the contrary conclusion, I should still have thought that they are not profits arising from any trade or business carried on within the relevant period. Assuming that these payments are " profits " and that they arise from a trade or business, they can only be regarded, in my view, as arising from the trade of colliery proprietors carried on by the company until Jan. 1, 1947. The Special Commissioners have found as a fact that the trade just mentioned constituted a trade separate from the other trades carried on by the company, and that that trade ceased entirely on Jan. 1, 1947. On that date, the company obtained certain rights, including the right to receive the payments in question, as compensation for the loss of

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* See [1955] 1 All E.R. at p. 900, letter H, at p. 901, letter D.

A that trade and the assets wherewith it was carried on. It follows, to my mind, that the only trade from which the payments in question can have arisen was a trade which was not " carried on " during any part of the relevant period.

I agree that the appeal should be dismissed.

LORD REID: My Lords, I concur.

B **LORD RADCLIFFE:** My Lords, I agree that this appeal ought not to succeed.

In my opinion, the determining factor is the very special nature of the receipts involved. The Coal Industry Nationalisation Act, 1946, legislated for a revolution in the coal industry of this country, and in the system of ownership, management and working on which the industry was based. It was inevitable that the far- C reaching disturbance of rights which this involved should require a period of several years for the adjustment of its consequences. These interim income payments which are now in question are the product of that disturbance and adjustment, and it does not seem to me at all surprising that they cannot well be related to any of those other kinds of receipt which normally come into the accounts of a company conducting a trade or business. They are sui generis D and it would, I think, lead to confusion if they were described in any terms except those which are strictly applicable to their own special circumstances. Thus, they were paid because the nationalisation statute decreed that they should be paid. They would not have been payable to the company if they had not been conducting a colliery business at the vesting date and in that sense, of course, they were paid to and received by the company for no other reason than that E they had been owners of colliery assets and had been in the colliery trade. Equally, of course, the interim income payments that the company got were fixed either as a proportion of the profits which they had been earning in the colliery trade before the date of vesting or by a computation of interest at varying rates on sums received from time to time by way of capital compensation. But, when all that is said, the fact remains that the only identifiable origin of the F payments was the statute which authorised them and, at the same time, defined their terms and methods of computation.

It is natural enough that moneys paid in this way, described by their instrument of creation as " interim income ", should be regarded as inherently of an income nature when the question arises of subjecting them to any tax that bears on income as a chargeable subject. But I do not think that in any proper G use of the words can they be said to arise from a source of income, in the sense that income or profits (for the moment I am not concerned with any difference between the two terms) can be said to arise from a trade or a business, or an investment, or some other piece of property that admits of use or enjoyment. They cannot arise from the colliery trade, for, as the Case finds, that trade ceased entirely on Jan. 1, 1947; and, short of special enactment, taxable income cannot H arise in one year from a source that ceased to exist in a previous year. Nor did they arise from an investment. There was no investment until the compensation stock was issued, and any payments of interest on that stock, when received, are outside the range of payments with which this appeal is concerned. It is true that so much of the payments made as fell under s. 22 (2) (a) of the Act of 1946 was paid as " a money payment of an amount equal to interest for that I period " on each amount of compensation that came to be satisfied; but this amount " equal to " interest on a future sum covering the period until it was paid was not income from an investment or interest on a loan but an indemnity against loss suffered by the deferment of the payment. In fact, the bulk of the money received was received as " revenue payments " under s. 22 (3) (b); and these payments, for the years 1947 and 1948 at any rate, remained the property of the recipients without accountability, whatever might prove to be their ultimate amount of compensation or the prescribed rate of interest on it.

Such payments, then, do not present themselves as natural subjects of the profits tax charge. The basic subject of charge consists of

> " . . . the profits arising in each chargeable accounting period . . . from any trade or business to which this section applies . . ." (Finance Act, 1937, s. 19 (1)).

We were rightly reminded that this is not the same thing as a charge on the income or profits of a person or company carrying on a trade or business. On the contrary, it is a charge on the profits properly attributable to a defined source. The only real difficulty that this appeal raises is that it is by no means easy to say what, in the context of profits tax, is to be understood by the words " profits arising from any trade or business ". I think that they are, at any rate, of a wider import than might at first sight appear.

Profits tax uses the same description of the chargeable subject as was used by the excess profits tax—profits arising in any chargeable accounting period from any trade or business. On the other hand, income tax, though charging the profits arising from " trade, profession, employment or vocation " does not, so far as I know, treat a business as such as a source of taxable income. Profits tax, like excess profits tax, having described the chargeable subject, proceeds to provide in the same general way for the computation of the profits concerned; that is, they are to be computed according to the principles on which the profits arising from a trade are computed for the purposes of Case I of Sch. D, or would be so computed if income tax were chargeable under that Case in respect of such profits, but subject to very considerable adaptations or modifications of those principles set out in a schedule to the taxing statute. Both profits tax and excess profits tax, therefore, imported conceptions closely related to the conceptions on which are based assessments under Case I of Sch. D, but each contained departures from those conceptions. In particular, these taxes were able to treat the chargeable subject as a single entity, and so escaped some of the complications that are involved in the income tax scheme of assessing different items of a taxpayer's total income under different schedules and different cases of schedules, and of allowing or requiring deduction of tax at source from annual payments.

Among the adaptations of income tax principles for the purposes of profits tax which were required by Sch. 4 to the Finance Act, 1937, was the rule that dealt with the inclusion in profits of income from investments or other property (para. 7 of that Schedule). The general effect of the paragraph, in its original form, was to say that such income should not be included in profits. On the other hand, when the tax was remodelled in 1947, its name being changed from national defence contribution to profits tax and its ambit confined to corporations, the general effect of the paragraph was reversed and, in its present form, it enacts that " income received from investments or other property shall be included in the profits ", except for what is known as " franked investment income " and for income to which the recipient is not beneficially entitled (see Finance Act, 1947, s. 32 (1)).

In the High Court, Roxburgh, J., evidently regarded this provision as being conclusive of the case in favour of the Crown. On the other hand, in the Court of Appeal and before this House counsel for both parties concurred in treating para. 7 as referring only to income received from investments or other property the income from which formed part of the profits arising from the trade or business (I quote from Jenkins, L.J.'s statement of the position in his judgment in the Court of Appeal). My Lords, I have never been able to feel sure that I understand what this proposition is supposed to convey. In one sense, it appears to deprive para. 7 in its amended form of any meaning whatever except as a singularly contorted way of exempting franked investment income and non-beneficial income. I think, myself, that there may still be a good deal to be said for the view that the legislature, appreciating that the words " profits arising from a trade or business " are by no means self-explanatory, as this case, among others, shows, had it in mind both in 1937 and in 1947 to lay down a positive rule as to the inclusion or exclusion of investment income which would set the question at rest for the purposes of all assessments. But I do not think that it is necessary to come to any final view on that point, because, in my opinion, the payments that we are now considering were not income of investments or other property, so that para. 7 does not apply to them in any event. I have already explained why they were not income from investments. By a similar process of reasoning they were not, in my view, income from property. It does not clear up the matter to say that the right to compensation—and, for that matter, the right to interim income—was a chose in action. The interim income payments did not arise from the right to compensation as income arises from income-producing property. They arose from the statute itself which decreed that they were to be paid.

The Crown's case does not, however, depend necessarily, or even primarily, on the effect of para. 7. For it is their general position that the company, being a limited company engaged in business both after 1947 and before, received the interim income payments as receipts for the credit of their business and that the payments ought, accordingly, to be treated as contributing to the profits arising from that business. For profits tax purposes, s. 43 of the Act of 1947 has the effect of turning the separate continuing trades into one trade. But I do not think that the Crown's argument on this point is either aided or impeded by that.

I do not accept the Crown's proposition. Strictly, it means that, at any rate where profits tax is concerned, every part of the income of a company which is carrying on a business is, in law, income of that business. That seems to me too arbitrary. I do not think it possible to say that a company cannot own beneficially assets which do not belong to any trade or business which it conducts, or that it cannot receive income beneficially which, nevertheless, is not income of such a trade or business. In other words, a company's business does not embrace the whole activity of being a company. But, that being said, I think it an extremely difficult undertaking to identify by a general description the kinds of income which would be at once income received by the company and not income of any trade or business which it was conducting. It is established law that the income arising from a trade even for the purposes of an assessment under Case I of Sch. D can properly include income the source of which is investments having no more immediate connection with the trade than that they are held as a general reserve available for its support (*Liverpool & London & Globe Insurance Co.* v. *Bennett* (1), [1913] A.C. 610). It may be necessary at some time, but not now, to consider how far this decision depended, or should be treated today as depending, on the special requirements of insurance business. For there is an infinite variety in the purposes for which moneys reserved are translated into investments, and those purposes may range from a temporary obtaining of interest on funds shortly to be reinvested in the active conduct of the business to such special cases as the funding of a pension scheme for employees or a capital redemption reserve fund for redeemable preference shares. But, for the purposes of the present appeal, a general description is not required.

It is sufficient to say that, if the Crown's general proposition does not carry them home, the payments which they seek to charge in this case are not in any proper sense receipts of the company's continuing business. They received them while continuing to carry on business. That is true. But what else could they do in the circumstances ? They carried them into their profit and loss account as a specified item of their trading profits. In a different situation there might be importance in this. But it was not the company's fault that the nationalisation Act had divested them of their colliery assets on the vesting date without giving them any means of stating in their accounts what equivalent value they had obtained in exchange or, accordingly, of drawing up a balance sheet or profit and loss account that could present an adequate statement of so abnormal a position.

I do not, therefore, attach any significance to the accounts, even if I could, considering that no questions on them were put to the company's witnesses when the hearing took place before the Special Commissioners.

I said before that I regard these payments as sui generis. The main feature of them which impresses me is that they were not income which arose from any disposable source under the company's control. I can see that, if income arises from an investment or other kind of property which can be either disposed of or retained, a company which retains the source may, at any rate, have to meet the challenge: " What did you keep it for except for the purposes of your business ? " But that challenge cannot be issued in this case because the effect of nationalisation had been to leave the company with no option but to take the interim payments which the statute provided and to wait until it received its compensation to decide (so far as it was allowed to) what use it would make of it in or out of its business. In my opinion, that consideration should conclude this appeal.

LORD SOMERVELL OF HARROW: My Lords, until Jan. 1, 1947, the respondent company carried on a colliery undertaking. On that date, the assets vested in the National Coal Board under the Coal Industry Nationalisation Act, 1946, and the colliery trade of the company ceased entirely. Under s. 19 (1) of the Coal Industry Nationalisation Act, 1946, compensation for the transferred interests was due on that same date. For the period between that date and the date on which compensation, having been assessed, was fully satisfied, a right to " interim income " was given by s. 19 and s. 22. There were to be for the first two years revenue payments equal to one-half of the ascertained revenue of the concern. With any instalments of compensation in stock or money there was to be a money payment equal to interest at a prescribed rate. There were provisions for adjustment, and the two years were extended where necessary by the Coal Industry (No. 2) Act, 1949. The details are not relevant. These interim payments were compensation for the delay after the due date in ascertaining and satisfying the principal claim for compensation. It is now admitted by the company that these payments are liable to income tax. The question is whether they are " profits " for the purpose of profits tax.

The profits tax started life under the Finance Act, 1937, as the national defence contribution. Its name was changed to profits tax as from the beginning of 1947 (Finance Act, 1946, s. 44). Although there were many amendments between the Finance Act, 1937, and the Finance Act, 1947, the last Finance Act relevant to this appeal, s. 19 of the earlier Act has remained the section which charges the tax. It is so described in s. 31 (1) (a) of the Finance Act, 1947. Under s. 19 of the Act of 1937, the tax is to be charged on the profits arising in each chargeable accounting period from any trade or business of any description. Under s. 20, the profits arising in each chargeable accounting period are to be computed on income tax principles as adapted in accordance with the provisions of Sch. 4. The adaptations are substantial. The first question, however, to be answered is whether the sums in question can be brought within the words of the charging section. They must arise from a trade or business carried on in the chargeable accounting period. One may well ask how the sums arising under the statute from the appropriation of the colliery undertaking could arise from a trade or business. No one suggested that the company made a business of having its undertakings nationalised.

The suggested answer by the Crown is ingenious. Before and after the vesting date, the company carried on other trades which, for income tax purposes, were separate from the trade of the colliery. It is from the profits of these trades that the interim income payments are said to arise. On the face of it, this would seem absurd. It is submitted, however, that any income received by a limited company carrying on a trade is, as a matter of law, a profit from the trade it carries on. It is said to be analogous to income from invested reserves. On the vesting of the colliery undertaking, the rights of the company under the Coal

A Industry Nationalisation Act, 1946, became an asset, like a block of shares, of the other trades, and any income arising under the compensation provisions of the Act became, in law, profits arising from the trades being carried on after that date. I agree with JENKINS, L.J., that the point can be shortly disposed of. He said ([1955] 1 All E.R. at p. 908):

> B " Profits tax is charged on the profits arising from any trade or business carried on during any given chargeable accounting period, and not on the income from all sources of the person carrying on any trade or business during any given chargeable accounting period."

The sums received could be used in the other trades being carried on, but arose from the rights conferred by the Coal Industry Nationalisation Act, 1946.

C On this basis, it becomes unnecessary to consider the question whether these sums were within the words of para. 7 of Sch. 4, as amended by s. 32 of the Finance Act, 1947. ROXBURGH, J., had held that these sums were within the words " income from investments or other property ", relying on the words " other property ". I share the doubt expressed by the Master of the Rolls on this point, but it is unnecessary to decide it.

D The Crown in the alternative sought to rely on the company's accounts as showing that these sums, when received, were dealt with as profits of the trade. This would not, for reasons which I have stated, make them profits within s. 19.

Questions arose during the course of the argument as to the extent to which the charging words would cover income from the various categories of investment income which might be held by persons carrying on various kinds of trade or E business. They do not, however, arise for decision in this appeal.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Thicknesse & Hull* (for the company).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

F

NOTE.

G

DIVORCE REGISTRY.

Divorce—Costs—Taxation—Polish translations.

The Senior Registrar, after consultation with the Masters of the Supreme Court Taxing Office, is of opinion that under present conditions it is more H appropriate to treat Polish on the same basis as French, German, Spanish, etc., than as an " other language " (ANNUAL PRACTICE, 1956, p. 1483) for the purpose of fixing the rate allowed on taxation for translations.

He is also of opinion that the employment of a translator as an intermediary between a Polish assisted party and his own solicitor requires to be strictly justified, and should in any event be kept to a minimum. In particular, the I translation of simple letters (such as " Writing petitioner to call ") from a solicitor to a Polish client resident in England should seldom be necessary.

April 19, 1956.

D. A. NEWTON,
Secretary.

INLAND REVENUE COMMISSIONERS *v.* BEW ESTATES, LTD.
INLAND REVENUE COMMISSIONERS *v.* BRIAN WESTBURY.
INLAND REVENUE COMMISSIONERS *v.* ERIC WESTBURY.

[CHANCERY DIVISION (Roxburgh, J.), March 13, 14, 27, 28, 1956.]

Income Tax—Interest—Interest on value payments under the War Damage Act, 1943—*Whether chargeable under Sch. C or Sch. D—Whether " interest . . . payable out of any public revenue by any public office or department of the Crown "—Income Tax Act,* 1918 (8 *& 9 Geo.* 5 *c.* 40), *Sch. C, and fourth r.* 1, *Sch. D, r.* 1 (*b*)*—Finance Act,* 1939 (2 *&* 3 *Geo.* 6 *c.* 41), *s.* 14 (8)*—War Damage Act,* 1943 (6 *&* 7 *Geo.* 6 *c.* 21), *s.* 3.

War Damage Commission—Whether a body distinct from its members—Whether a " public office " within the fourth r. 1 *of Sch. C. to the Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5 *c.* 40).

An investment company within the meaning of s. 20 of the Finance Act, 1936, received value payments from the War Damage Commission under the War Damage Act, 1943, in respect of war damage sustained by properties which it owned and received also accumulated interest on the value payments. A surtax direction was made on the company for the apportionment of its income in the years 1947-48 and 1948-49 among its members under s. 21 (1) of the Finance Act, 1922, and s. 14 (1) of the Finance Act, 1939, on the footing that the interest on the value payments was included in such part of the actual income of the company as was not " estate or trading income " as defined in s. 14 (8) of the Act of 1939. The company contended that the interest was received under s. 10 and s. 12 of the War Damage Act, 1943, in respect of its proprietary interest in the properties affected by war damage and represented income arising in respect of the ownership of land, and thus was " estate or trading income " (which term included " income arising in respect of the ownership or occupation of land which was chargeable to income tax under Sch. D ") and therefore, by virtue of s. 14 (4) of the Act of 1939, should not be apportioned. The Crown contended that the interest on the value payments was chargeable under Sch. C to the Income Tax Act, 1918*, the War Damage Commission (who were constituted under s. 3 of the War Damage Act, 1943) being a public office within the fourth r. 1 to that Schedule, and that therefore the interest was not chargeable under Sch. D, was not " estate or trading income " within s. 14 (8) of the Act of 1939 and ought to be apportioned.

Held: the surtax direction must be sustained because (i) the interest on the value payments was interest payable out of public revenue by a public office within the fourth r. 1 of Sch. C to the Income Tax Act, 1918, and was chargeable to tax under that Schedule, as the War Damage Commission was a quasi-corporation, and a public office within that rule*, and (ii) although para. 1 (b) of Sch. D to the Income Tax Act, 1918, was expressed to extend to " interest . . . not charged " under Sch. C, the interest on the value payments did not fall within that sub-paragraph, even if no machinery existed for charging the interest to tax under Sch. C, since the word " charged " in para. 1 (b) of Sch. D meant " chargeable ".

Appeals allowed.

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* The terms of Sch. C are printed at p. 212, letter B, post, and the terms of the fourth r. 1 to Sch. C, which is the first rule under the heading " Rules as to interest, etc., payable out of public revenue by any public department " of Sch. C, are printed at p. 212, letter I, post.

[As to interest chargeable to tax under Sch. C to the Income Tax Act, 1918, see 17 Halsbury's Laws (2nd Edn.) 74, paras. 149, 150; and for cases on the subject, see 28 Digest 17, *84-86*.

For the Income Tax Act, 1918, Sch. C, and r. 1, and Rules applicable to Sch. C, fourth r. 1 and Rules applicable to Sch. D, r. 1 (b), see 12 Halsbury's Statutes (2nd Edn.) 146, 150, 151; and for the replacing Sch. C to the Income Tax Act, 1952, and para. 1 of the machinery for assessment in Sch. 8, Part 2, of that Act, see 31 Halsbury's Statutes (2nd Edn.) 107, 519.

For the Finance Act, 1939, s. 14 (8), see 12 Halsbury's Statutes (2nd Edn.) 429; and for the corresponding provision of the Income Tax Act, 1952, viz., s. 262 (8), see 31 Halsbury's Statutes (2nd Edn.) 254.

For the War Damage Act, 1943, s. 1 (1), s. 3, Sch. 1, paras 6, 7 and 8, see 26 Halsbury's Statutes (2nd Edn.) 473, 474, 606.]

Case Stated.

The appellant taxpayer company appealed against apportionments under s. 21 of the Finance Act, 1922, and s. 14 of the Finance Act, 1939, in respect of such part of its income as was not estate or trading income for 1947-48 and 1948-49 and the two individual taxpayers appealed against assessments to surtax under s. 21 of the Act of 1922 in respect of the apportioned income of the company made on them in the name of the company in both cases in the following sums: 1947-48, £767; 1948-49, £5,474. The company was a property owning company, its assets consisting mainly of freehold property in the Borough, London, S.E. It was an investment company as defined in s. 20 of the Finance Act, 1936, and was therefore subject to automatic direction by virtue of the Finance Act, 1939, s. 14 (1). War damage was sustained by certain properties owned by the company, in consequence of which it was awarded value payments in respect of its proprietary interest therein under Part 1 of the War Damage Act, 1943. These value payments were satisfied by several payments to the company made in the years of assessment 1947-48 and 1948-49. The company also received accumulated interest on the payments under s. 10 (5) of the War Damage Act, 1943, amounting to £2,010 in 1947-48 and £13,343 in 1948-49. Directions and apportionments for those years were made on the company under s. 14 of the Finance Act, 1939, on the footing that the interest was to be included in such part of the actual income of the company as was not estate or trading income.

The commissioners held, upholding the contentions of the taxpayers, that the interest was paid in respect of the company's proprietary interest in the properties which suffered war damage under s. 10 and s. 12 of the War Damage Act, 1943, and that it arose in respect of the ownership of land and was therefore estate or trading income of the company within the meaning of s. 14 (8) of the Finance Act, 1939. It therefore fell to be excluded from apportionments under s. 21 of the Finance Act, 1922, and s. 14 of the Finance Act, 1939. The commissioners discharged the apportionments and both the consequential surtax assessments made on the individual taxpayers. The Crown appealed. The Crown on June 27, 1955, gave the solicitors for the company notice that they intended to contend that the interest was chargeable under Sch. C and not Sch. D.

Sir Frank Soskice, Q.C., and *Sir Reginald Hills* for the Crown.

S. M. Young and *R. B. S. Instone* for the taxpayers.

ROXBURGH, J.: The question which is common to these three appeals is whether the interest on value payments under the War Damage Act, 1943, falls within s. 14 (8) of the Finance Act, 1939, as

> ". . . income arising in respect of the ownership or occupation of land which is chargeable to income tax under Sch. D . . ."

Everybody seems to have assumed before the Special Commissioners that the interest was chargeable to tax under Sch. D, but by a notice dated June 27, 1955, the Crown gave notice to the solicitors for Bew Estates, Ltd., the respondent taxpayer company in the first case, that they intended to contend before me that it was chargeable, not under Sch. D, but under Sch. C. If it is so chargeable, evidently it cannot come within the description of income which I have cited from s. 14 (8) of the Act of 1939. After very full argument and considerable investigation, I allowed the point to be taken, provided no additional evidence was required. In my judgment, it succeeds.

Schedule C to the Income Tax Act, 1918, provided:

> " Tax under Sch. C shall be charged in respect of all profits arising from interest, annuities, dividends, and shares of annuities payable out of any public revenue . . ."

That is the whole of Sch. C*—I distinguish the rules applicable thereto. As it is conceded that this interest is " payable out of any public revenue ", it would at first sight appear to be obviously chargeable under Sch. C; but, owing to the complexity of the drafting of income tax legislation, what seems obvious at first sight quickly recedes into obscurity. I am not going to consider whether it would be possible for a rule applicable to a schedule to override the schedule itself, because in my view that question does not arise.

Rule 1 provided:

> " Tax under this Schedule—(a) shall extend to all profits arising from interest, public annuities, dividends and shares of annuities payable in the United Kingdom out of any public revenue in the United Kingdom or elsewhere, in any year of assessment; and (b) shall be charged by the commissioners designated for that purpose by this Act . . ."

It is admitted that the interest falls within the description, but it is said (I think, truly) that, if no commissioners could be designated for that purpose by this Act, it is difficult to see how tax could be charged under Sch. C in spite of the quite plain language of the Schedule. It is extraordinary that, after all these years, this sort of situation should exist in an Act of Parliament.

It is certainly extremely difficult to find the commissioners designated for this purpose. It is not made easier by the fact that several of the Rules applicable to Sch. C had the same numbers. After r. 2 and r. 3 came the sub-heading:

> " Rules as to interest, etc., payable out of public revenue to or through the Bank of England or the Bank of Ireland, or by the National Debt Commissioners."

Then came r. 1, bis (presumably) to r. 10. Then after

> " Rules as to interest, etc., with the payment of which persons other than the Bank of England, the Bank of Ireland and the National Debt Commissioners are intrusted "

came r. 1 to r. 9 and following them

> " Rules as to interest, etc., payable out of public revenue by any public department "

under which r. 1, i.e., the fourth r. 1 to Sch. C, is the material rule here. It provided:

> " Interest, annuities, dividends and shares of annuities payable out of any public revenue by any public office or department of the Crown shall be charged under this Schedule by the commissioners for offices in the said public office or department."

It is common ground that no other rule could apply.

To exclude Sch. C—I am not considering on whom the burden of proof lies, and I do not think it matters—it would have to appear that no such commissioners could be designated under the Act, because s. 14 (8) used the word "chargeable ", not " charged ". If the statute provided that the interest in question was to be charged under Sch. C, and indicated how the charging commissioners were to be determined, it could be no answer to say that the commissioners had not in fact been constituted. That is important because of the artificial atmosphere in which this case has necessarily proceeded. As this point was never taken before the Special Commissioners, and, accordingly, they did not find any of the facts relevant to it, and as I allowed the point to be taken only on the footing that no supplementary evidence would be allowed, the court does not know whether anybody purported to designate any such commissioners or not. But counsel for the Crown has satisfied me that the court need not know that for the reason stated. In the last of this series of rules, I should expect to find a provision which swept up all cases of distribution of public revenue which had not been dealt with by the preceding series of rules. It would be strange if it did not sweep in everybody who paid away public revenue, because that is the scope of the Schedule and one would naturally expect the rules to fit that scope. Therefore, I approach this question expecting that any body of persons authorised by Parliament to dispense public revenue would be a public office for the purpose of this rule.

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* The drafting of Sch. C. in the Income Tax Act, 1952, is different, and the Schedule in that, the current, Act, as distinct from any rules or machinery provisions, consists of seven separate paragraphs; see 31 HALSBURY'S STATUTES (2nd Edn.) 107.

That, however, is only a prima facie approach. In the last resort the matter must depend on an investigation of the nature of the alleged public office. Again, there is no evidence as to its nature for the reason already given, but, in my judgment, no such evidence would be relevant because the alleged public office is constituted by an Act of Parliament, and its nature must be determined by the true view of that Act, and not by reference to any practice which it may have adopted. The practice could not vary the true construction of the Act of Parliament.

I therefore turn to the War Damage Act, 1943, to see what the War Damage Commission is. I shall not consider whether it is a department of the Crown—I should need more instruction before expressing any opinion on what that is—but I do not think that there is any difference between a public office and a public department. It is the words " of the Crown " that introduce certain complications. I shall base my decision, not on some other statute (I was referred to one), but on what I believe is the right approach to the War Damage Act, 1943. Parliament has recently shown an increasing fondness for creating quasi-corporations, i.e., bodies different from the aggregate of the members, e.g., a members' club, and yet not corporations in the language of jurisprudence. In my judgment, the War Damage Commission is such a quasi-corporation, though counsel have argued that it is nothing but the aggregate of its members.

The War Damage Act, 1943, s. 1, provides:

> " There shall be made, subject to and in accordance with the provisions of Part 1 of this Act,—(a) payments by the War Damage Commission out of moneys provided by Parliament in respect of war damage to land occurring during the risk period . . ."

Section 3 provides:

> " (1) For the purposes of this Act, there shall be constituted a commission, to be called the War Damage Commission (hereinafter referred to as ' the commission '), consisting of persons appointed by the Treasury in accordance with Sch. 1 to this Act, which shall be charged with the duty of executing the provisions of Part 1 of this Act relating to the making of payments in respect of war damage to land, and shall exercise such other functions as are conferred upon them by this Act . . . (3) The provisions of Sch. 1 to this Act shall have effect with respect to the constitution and procedure of the commission."

Schedule 1, para. 6, provides:

> " Subject to the preceding provisions of this Schedule, the commission shall have power to regulate their own procedure, including the manner in which, and the officers of the commission by whom, questions subject to

> determination by the commission under this Act are to be determined and the manner in which determinations made by officers acting in any locality are to be subject to review by a deputy commissioner or other superior officer or by members of the commission."

Paragraph 7 provides:

> "The Treasury may appoint a secretary to the commission, and the commission may appoint such deputy commissioners and other officers, and such servants, as the Treasury may determine."

I stress that. It seems to me to differentiate the commission from the mere aggregate of members who could appoint any officers or servants they liked. Paragraph 8 provides:

> "There shall be paid out of moneys provided by Parliament to the members officers and servants of the commission such remuneration . . . and such allowances, as the Treasury may determine."

I stress that, too, as Parliament does not usually pay to provide servants for an aggregate of individuals. In my judgment, the War Damage Commission is something different from the aggregate of its members. It is a quasi-corporation, which has to make the appropriate payments on the true construction of the War Damage Act, 1943, and I should have thought that without any possible doubt it is "a public office".

Accordingly, this was "interest payable out of public revenue by a public office" within the fourth r. 1 of Sch. C, and fell to be charged under Sch. C by "the commissioners for offices in the said public department". I do not have to determine what is meant by "the commissioners for offices", because, if the Act provides for the proper appointment of an assessing commissioner, it can be no answer to say that that direction has not been carried out. I do not know whether it has or has not been carried out. That cannot affect the question whether the interest is "chargeable" under Sch. C; "chargeable" is the word used in s. 14 (8) of the Finance Act, 1939.

It was argued that, if the tax was not in fact charged, i.e., if the machinery of assessment or charge was not carried through, the interest would be chargeable under Sch. D, and that, as there was no evidence that the machinery had been complied with under Sch. C, I must hold that it could and should be charged under Sch. D. In my judgment, that argument is fallacious. Section 14 (8) of the Finance Act, 1939, used the word "chargeable", but the Income Tax Act, 1918, Sch. C, said "charged". The same comment applies to Sch. D, which began in this way:

> "Tax under this Schedule shall be charged in respect of . . . (b) All interest of money . . . not charged under Sch. A, B, C, or E, and not specially exempted from tax . . ."

The word used is "charged", not "chargeable". It has been argued that, as there is no evidence that this interest has in fact been charged under Sch. C, it ought to be or could be charged under Sch. D, para. 1 (b). In my judgment, that is an impossible interpretation of the word "charged" in Sch. D. When para. 1 (b) uses the word "charged", it is referring to Sch. C—not to the rules under Sch. C but to Sch. C itself. Indeed, that is what the sub-paragraph says, viz., "not charged under Sch. C". It does not say "not charged under the Rules applicable to Sch. C." In the opening words of Sch. C, the word "charged" must mean "chargeable" and therefore in the phrase "charged under Sch. C" in para. 1 (b) of Sch. D, the word "charged" must mean "chargeable".

The contrary view would result in the incidence of tax varying with the efficiency of administration, and it would hardly be fair to Parliament to construe its language on that basis. Therefore, in my judgment, this appeal succeeds on the point not taken before the Special Commissioners. I do not propose to decide whether it would have succeeded on any of the other points which are more difficult.

Appeals allowed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Swepstone, Walsh & Son* (for the taxpayers).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

LABONE *v.* LITHERLAND URBAN DISTRICT COUNCIL (LIVERPOOL CO-OPERATIVE SOCIETY, LTD. and GOURLEY BROTHERS, LTD., Third Parties).

[LIVERPOOL ASSIZES (McNair, J.), February 6, 7, 20, 1956.]

Landlord and Tenant—Restrictive covenant—Premises let to baker and confectioner—Landlord's covenant not to permit adjacent premises to be used for " business of bread and confectionery "—Adjacent premises let to grocers—Grocers selling bread and confectionery on premises.

The defendants, in the course of developing a shopping centre for a housing estate on their property, granted a lease of a shop to the plaintiff, a baker and confectioner, for a term of seven years from Nov. 9, 1953 (the date of the lease), to carry on the trade or business of " bread and confectionery ", and covenanted " not during the period of tenancy to . . . permit or suffer to be carried on by others in or upon the adjoining or adjacent premises . . . belonging to the [defendants], the trade or business for which the demised premises are let ". Leases of two adjacent premises were granted by the defendants to two companies, on terms, in each case, that the trade or business of a grocer should be there carried on and that the company would not, without the previous consent of the defendants, carry on " any trade or business whatever other than that of grocer ". One of these leases was executed on Oct. 7, 1953, and the other on Nov. 18, 1953. In the district the sale of bread and confectionery was part of the normal trade of a grocer, and each of the companies, as part of its grocery business, offered for sale bread and confectionery, but in neither case did the sales exceed 2¼ per cent. of the company's total sales. The plaintiff claimed damages against the defendants for breach of covenant and, in respect of the sale of bread and confectionery on the premises let before the date of the plaintiff's lease, for breach of an implied term or warranty in his lease that the defendants had reserved the right to restrain the tenants of adjacent premises from carrying on the trade or business carried on by the plaintiff or had imposed on them effective restraint to that effect.

Held: the defendants were not in breach of their covenant because on its true construction it was a covenant that a trade or business which in substance consisted in selling only bread and confectionery would not be permitted to be carried on at premises adjoining or adjacent to the plaintiff's and, on the facts, neither of the companies was carrying on such a trade or business; accordingly neither were the defendants in breach of any implied warranty in the plaintiff's lease.

Per CURIAM: even if the covenant were to be construed as a covenant not to permit the carrying on the trade or business of *selling* bread and confectionery, it was to be distinguished from a covenant not to sell bread and confectionery by way of trade or business, which would be broken by any sale (except, possibly, sales of minimal quantities).

Lewis (A.) & Co. (Westminster), Ltd. v. *Bell Property Trust, Ltd.* ([1940] 1 All E.R. 570) applied.

[As to restrictions on user of adjoining premises, see 20 HALSBURY'S LAWS (2nd Edn.) 225-229, paras. 247, 249; and for cases on the subject, see 31 DIGEST (Repl.) 180-182, *3127-3143.*]

Cases referred to:

(1) *Lewis (A.) & Co. (Westminster), Ltd.* v. *Bell Property Trust, Ltd.*, [1940] 1 All E.R. 570; [1940] Ch. 345; 109 L.J.Ch. 132; 163 L.T. 37; 31 Digest (Repl.) 181, *3134.*

(2) *Stuart* v. *Diplock*, (1889), 43 Ch.D. 343; 59 L.J.Ch. 142; 62 L.T. 333; 31 Digest (Repl.) 181, *3132.*

(3) *Elliston* v. *Reacher*, [1908] 2 Ch. 374; 77 L.J.Ch. 617; 99 L.T. 346; *on appeal*, [1908] 2 Ch. 665; 78 L.J.Ch. 87; 99 L.T. 701; 40 Digest 309, *2646.*

Action.

The plaintiff, who was the tenant of a shop under a lease granted by the defendants, the owners of a housing estate and shopping centre, claimed damages against the defendants for breach of a covenant contained in the lease, and restricting the user of adjacent premises, and for breach of an implied term or warranty in the lease that the defendants had reserved, or would reserve, the right to restrain the tenants of adjacent premises from carrying on the trade or business which was carried on by the plaintiff in his shop, or had imposed on the tenants of adjacent premises effective restraint to that effect. The plaintiff also sought an injunction restraining the defendants from committing further breaches of covenant, and a mandatory injunction. The defendants brought in, as third parties, the tenants of two adjacent shops and claimed indemnity against the third parties in respect of their liability to the plaintiff.

The facts appear in the judgment.

R. G. Clover for the plaintiff.

A. E. Baucher for Litherland Urban District Council, the defendants.

G. G. Blackledge, Q.C., and *H. S. L. Rigg* for Liverpool Co-operative Society, Ltd., third party.

G. Newman for Gourley Brothers, Ltd., third party.

Cur. adv. vult.

Feb. 20. **McNAIR, J.:** In these proceedings the plaintiff, Leonard Stuart Labone, master baker and confectioner, and a tenant of a lock-up shop, known as No. 22, Kirkstone Road North, under a lease granted by the defendants, Litherland Urban District Council, claims to recover damages against the defendants for breach of a covenant contained in the lease. By the lease, dated Nov. 9, 1953, the defendants leased to the plaintiff the lock-up shop abovementioned for the term of seven years from Nov. 9, 1953, for a rent of £415 per annum. By cl. 2 (10) of the lease, the lessee covenanted

> "not without previous consent in writing of the landlords to carry on, or permit or suffer to be carried on, in or upon the demised premises or any part of them, any trade or business whatsoever other than that of bread and confectionery, and, at all times of the year during usual business hours of the locality, to keep the demised premises open as a shop for carrying on the said business."

The words "bread and confectionery" were written in ink in the typed form of lease. By cl. 3 (1) of the lease, the landlords covenanted

> "not during the period of tenancy to carry on, or permit or suffer to be carried on by others in or upon the adjoining or adjacent premises in Kirkstone Road North belonging to the landlords, the trade or business for which the demised premises are let."

The plaintiff alleges, by para. 5 of his statement of claim, that since Nov. 9, 1953, the date of his lease, the defendants have, in breach of their covenant, permitted and suffered two other persons, Liverpool Co-operative Society, Ltd., and Gourley Brothers, Ltd., to whom Nos. 4 and 30, respectively, of Kirkstone Road North were let on terms that the trade or business of grocers should be there carried on, to carry on at their premises the trade or business for which No. 22 was let to the plaintiff. As it appears that the lease granted to Liverpool Co-operative Society, Ltd., was earlier in date than the plaintiff's lease, the plaintiff, by amended pleas in paras. 7 and 8 of his statement of claim, alleges that the defendants, by granting to Liverpool Co-operative Society a lease which did not effectually prevent them from carrying on the trade or business of selling bread and confectionery at No. 4, were in breach of an implied term or warranty, alleged to be found in the plaintiff's lease, to the effect that the defendants had reserved or would reserve the right to restrain others from carrying on that trade or business, or had imposed on all other persons who were lessees of adjacent premises effective restraint to that effect, or had not and would not lease such premises to others without such restraint.

The defendants' defence is summarised as follows. The three leases in question, namely, the plaintiff's lease and the leases of Liverpool Co-operative Society and Gourley Brothers, were granted in pursuance of a building and letting scheme covering the new shopping centre in Kirkstone Road North, under which shops covered by the scheme were to be allocated to a number of different trades and businesses so as to avoid, as far as possible, overlapping. The defendants alleged that the plaintiff, in taking the lease of his shop, had full knowledge that the two other shops in question had been allocated to Liverpool Co-operative Society and Gourley Brothers for the purpose of carrying on the trade or business of grocers. Secondly, the defendants submitted that, if, contrary to their contention, Liverpool Co-operative Society or Gourley Brothers were, in fact, carrying on the trade or business of selling bread and confectionery, and if the carrying on of such trade or business was in breach of the covenants contained in their respective leases, the plaintiff was entitled to enforce those covenants by direct action against those companies. Thirdly, in further argument before me, the defendants submitted that, on the true construction of the covenants of the leases granted to the two companies, those covenants should be read as confining the lessees to carrying on the trade of grocers, except for the sale of bread and confectionery. In third-party proceedings, which were heard concurrently with the main action, the defendants brought in the two companies (referred to hereinafter as the third parties), claiming from them indemnity in the event of being found liable to the plaintiff.

Before considering the terms of the lease in detail, it may be convenient that I should set out certain further facts which were proved or admitted before me, whilst reserving for the moment the question how far, if at all, certain facts are relevant on the question of the construction of the plaintiff's lease. In February, 1953, the defendants, who had previously developed a housing estate in the neighbourhood of Kirkstone Road North, caused advertisements, in the following terms, to be inserted in the local press:

> "Litherland Urban District Council. Tenancy of shops—Kirkstone Road North. The council invite tenders for the tenancy of shops in Kirkstone Road North, Litherland. The shops will be allocated to the following businesses: bread and confectionery, butcher (2), chemist, grocer (2), fried fish and chips, wet fish and poultry, greengrocery, sweets, and tobacco, and newsagent, footwear repairs and sales, draper, chandler, ladies' and gentlemen's hairdresser, dairy and cooked meats. Conditions of letting and official tender form may be obtained from the clerk to the council."

It is to be observed that this scheme provided for an allocation of shops, and that, inevitably, there must be some overlapping as regards the commodities which might be expected to be on sale in those shops. For instance, a good chemist's might be expected to sell a variety of toilet articles commonly sold in the ladies' and gentlemen's hairdresser's. The butcher might well be expected to sell poultry, which would also be available in the shop allocated to wet fish and poultry. Further examples could be given.

In due course tenders were sent in by people desiring shops, including the plaintiff and the third parties, and on Mar. 3 notices of acceptance were dispatched. The letter of acceptance of the plaintiff's tender was in this form:

> " Shop—Kirkstone Road North. I have to inform you that at a meeting of the housing committee . . . it was resolved that your tender for the tenancy of the bread and confectionery shop at an annual rent of £415, be accepted."

Thereafter discussions took place as to the precise terms of the leases within the framework of the conditions of tender. On Oct. 7 the lease of No. 4 was executed in favour of Liverpool Co-operative Society with a covenant by the tenant, in cl. 2 (10), in the following terms:

> " Not without previous consent in writing of the landlords to carry on, or permit, or suffer to be carried on, in or upon the demised premises, or any part thereof, any trade or business whatever other than that of grocer."

But that lease contained no landlord's covenant corresponding to the landlord's covenant in cl. 3 (1) of the plaintiff's lease, restricting the business to be carried on in adjacent premises. On Nov. 9 the lease of No. 22 was executed in favour of the plaintiff, with the covenants previously mentioned; and on Nov. 18 the lease of No. 30 was executed in favour of Gourley Brothers, in the same terms as those in the lease of Liverpool Co-operative Society. It was common ground and admitted before me that Nos. 4 and 30 were adjoining or adjacent premises in Kirkstone Road North in relation to the plaintiff's premises at No. 22.

Since the grants of these respective leases, the third parties have, as part of their grocery businesses, offered for sale bread and confectionery. In the case of Liverpool Co-operative Society, the sales of bread and confectionery realise about £25 to £30 a week, and represent about 2¼ per cent. of the total sales. In the case of Gourley Brothers, the sale of bread realises £10 to £12 a week, and represents 1½ per cent. of the total sales. In neither case is any distinct section of the shop devoted to the sale of bread and confectionery. The sale of bread and confectionery is part of the normal trade of a grocer in the Liverpool area, which includes Litherland. Of forty-eight shops selected at random in that area, forty-three sell bread and cakes, three sell no bread but sell cakes, and two sell neither bread nor cakes. One of the largest firms of wholesale bakers and confectioners in the area supplied four hundred grocers in Liverpool with bread and cakes. The plaintiff's sales at the demised premises, in value, are distributed as follows: forty-five per cent. bread (of which fifteen per cent. is purchased from other wholesalers, and the balance is from his own production), fifty per cent. cakes, and five per cent. meat pies, savouries and sausage rolls.

On behalf of the plaintiff it was submitted that his rights in this action depended solely on the true construction of the terms of his own particular lease, and that, in deciding the question of construction, the advertisement, the tenders and the conditions of sale, in the absence of any plea for rectification, were irrelevant. I accept this submission as accurate. The breach alleged is a breach of cl. 3 (1). By cl. 3 (1) the defendants undertake not to carry on, permit or suffer to be carried on by others, in or on the adjoining or adjacent premises in Kirkstone Road North belonging to the defendants, the trade or business for which the demised premises are to be let. The " trade or business for which the demised premises are to be let " is nowhere expressly defined, but it is common ground and, indeed, indisputable, that this expression means the trade or business of " bread and confectionery." This is clearly a proleptic expression, since, strictly speaking, " bread and confectionery " is not a trade or business as is " chemist " or " grocer ".

A It was contended on behalf of the plaintiff that the trade or business in question was the trade or business of selling bread and confectionery. In my judgment, the more natural or grammatical construction of the words "bread and confectionery" is to treat them as words of description, as words describing the class of trade or business. The class of trade or business, the monopoly of which is reserved to the plaintiff, is, in my judgment, the trade or business of a bread and B confectionery shop, that is, a shop in which, substantially, only bread and confectionery are sold—the trade or business of a shop, on the fascia of which one would find, for example, the words: "J. Smith, Bread and Confectionery". If this is correct as a matter of construction, then the claim of the plaintiff fails, for neither of the third parties is carrying on the trade or business of such a shop. Even accepting the plaintiff's contention that the trade or business of "bread C and confectionery" means the trade or business of selling bread and confectionery, in my judgment the same result follows. The covenant not to carry on the trade or business of selling bread and confectionery, plainly is different from a covenant not to sell bread and confectionery by way of trade or business. The latter covenant would be breached by any sale (beyond possibly minimal quantities) of bread and confectionery.

D To ascertain whether there has been, on the facts here admitted or proved, a breach of the covenant in the former form, that is, a covenant against carrying on the trade or business of selling bread and confectionery, one has to ask oneself whether, on the fair meaning of the covenant so expressed, and according to the ordinary use of language, it can be said of either of the third parties that they carried on at their respective shops the trade or business of selling bread or E confectionery. Although, no doubt, at the same premises two or more trades or businesses may be carried on, it is wholly artificial to say that at a grocer's shop there is being carried on the trade or business of selling each substantial group of articles which a grocer commonly sells. In ordinary parlance, a grocer is carrying on the trade or business of a grocer, and not carrying on the trade or business of selling tea, or the trade or business of selling tinned fruit, or the F trade or business of selling bacon; nor, if he sells bread and confectionery, is he carrying on the trade or business of selling bread or confectionery. In my judgment, even accepting the plaintiff's construction of this clause, his case fails on the facts. Although the result of this case must turn on the terms of the covenant, I am fortified in the conclusion which I have reached by the reasoning of SIMONDS, J., in *A. Lewis & Co. (Westminster), Ltd.* v. *Bell Property Trust, Ltd.* (1) G ([1940] 1 All E.R. 570). In that case it was held that the sale of cigarettes in a tea-shop did not involve a breach of covenant against the use of the premises for the business of the sale of tobacco, cigars, and cigarettes. Two passages illustrate the view which I have formed as to the construction of the material covenant in the present case. SIMONDS, J., said (ibid., at p. 573):

> "In my view, what is done at these premises is the carrying on of the H business of a tea-shop and restaurant, and that involves, amongst other things, the sale of cigarettes. It is common—indeed, I am told that it is almost universal—for cigarettes to be sold in tea-shops of this character. Accordingly, it appears to me that it is no more right to predicate of this shop that there is carried on there the business of the sale of tobacco, cigars and cigarettes than it is to say of it that there is carried on there the business I of the sale of milk, or the business of the sale of confectionery. There is carried on there the usual business of a tea-shop, which involves the sale of a number of articles therein usually sold."

After referring to a syllogism for which BOWEN, L.J., was responsible in *Stuart* v. *Diplock* (2) ((1889) 43 Ch.D. 343 at p. 352), SIMONDS, J., said ([1940] 1 All E.R. at p. 574):

> "The syllogism which BOWEN, L.J., stated there, translated into terms of this case, would be: 'The business of the sale of tobacco, cigars and

> cigarettes consists in selling tobacco, cigars and cigarettes. The A.B.C. tea-shop sells cigarettes. Therefore, the A.B.C. tea-shop carry on the business of selling tobacco, cigars and cigarettes'. That, of course, is a fallacy. The tea-shop do not carry on the business of a tobacconist, or the business of selling tobacco, cigars and cigarettes, because, as part of their business, they sell cigarettes, any more than they carry on, in ordinary parlance, the business of a retailer of milk because, in the course of their business, they sell milk, either in glasses or as an ingredient of a cup of tea."

The conclusion which I have reached makes it unnecessary for me to express any final view on the alternative submission advanced by counsel for the defendants. As I understand his argument, it ran as follows. (i) Each of the three leases in question, the plaintiff's and the two granted to the third parties, formed part of, and were issued in conformity with, one single building and letting scheme, the basis of which is outlined in the published advertisement, and each shop should be confined to its own particular business with no overlapping. (ii) Each lessee was bound in equity to the other lessees to respect the right of exclusive user conferred on each, and each lessee could proceed direct against any other lessee to protect that exclusive right of user. (iii) To give proper effect to the scheme, the covenant contained in the leases of the third parties must be read as conferring on them the exclusive right to carry on the trade or business of grocers, except the sale of bread and confectionery.

I think that there is some support in *Elliston* v. *Reacher* (3) ([1908] 2 Ch. 374), in the judgment of PARKER, J., which was confirmed by the Court of Appeal ([1908] 2 Ch. 665), for the proposition that, in the present case, there was sufficient identity of interest between the plaintiff and the third parties to enable the plaintiff to sue the third parties direct. I am quite unable to appreciate by what principle of construction the express right of the third parties to use their respective premises for their trade or business as grocers can be cut down in the way suggested. Even if one were quite unfettered by any rules of construction, it would, in my judgment, be quite impossible to work out any practicable strict monopoly scheme within the framework of the advertisement. Nearly every business mentioned involves some overlapping with one or two of the other businesses mentioned. The truth is that the scheme was designed, not to confer monopolies, but to regulate in an orderly manner the provision of a range of shops, none of which has the exclusive right of sale of articles commonly sold by other shops. In my judgment, accordingly, the defendants are entitled to judgment on the claim, and the third parties are entitled to judgment in the third-party proceedings. Had I been persuaded that the trade or business carried on by the third parties was in conflict with the rights conferred on the plaintiff by cl. 3 (1) of his lease, I should have held that the defendants were, as regards Gourley Brothers' activities, in breach of their express covenant, and, as regards the activities of the Liverpool Co-operative Society, in breach of the implied term or warranty alleged. On that basis I should have assessed the damages recoverable at the sum of £1,500, this figure being my assessment, on the evidence, of the general loss suffered by the plaintiff during the term of his lease, by way of loss of profitable trade by reason of the competitive activities of the third parties.

Judgment for the defendants against the plaintiff. Judgment for the third parties against the defendants.

Solicitors: *Forwood, Williams & Co.*, Liverpool (for the plaintiff); *William Boys*, Litherland (for the defendants); *Herbert J. Davis, Berthen & Munro*, Liverpool (for Liverpool Co-operative Society, Ltd.); *Cooke, Patterson & Co.*, Liverpool (for Gourley Brothers, Ltd.).

[*Reported by* K. BUCKLEY EDWARDS, ESQ., *Barrister-at-Law.*]

SPRING *v.* NATIONAL AMALGAMATED STEVEDORES AND DOCKERS SOCIETY.

[CHANCERY COURT OF THE COUNTY PALATINE OF LANCASTER (Sir Leonard Stone, V.-C.), March 6, 7, 8, 9, 13, 14, 1956.]

Trade Union—Expulsion—Expulsion by union, affiliated to Trades Union Congress, pursuant to award of disputes committee—All members recruited in certain areas after a certain time to be excluded—Recruitment in disregard of principles of Bridlington Agreement—Whether term implied in contract of membership that union entitled to do everything necessary to conform with Bridlington Agreement.

Both the defendant union and the T. Union were affiliated members of the Trades Union Congress. In 1939 the Trades Union Congress at Bridlington affirmed and revised certain principles (known as the Bridlington Agreement) with regard to relationship between trades unions for the purpose of avoiding disputes. Neither the rules of the defendant union nor those of the T. Union referred to the Bridlington Agreement. The principles included a principle that no man who was or had recently been a member of any trade union should be accepted into membership of another union without inquiries being made, among which was to be an inquiry whether he had resigned from his former union and was clear on their books; and a further principle was that no member should be allowed to escape his financial obligations by leaving one union while in arrears and joining another. The Bridlington Agreement constituted in effect a morally binding code of conduct between trade unions. It contained nothing about expulsion of members of trade unions from their unions or about what members of trades unions were to do or to abstain from doing. In 1954 a large number of dockers at northern ports wanted to leave the T. Union and to join the defendant union. By the rules of the T. Union a member who was more than thirteen weeks in arrears was deemed to be no longer a member. At the end of March or the beginning of April, 1955, the plaintiff, who was then more than thirteen weeks in arrear with his contributions to the T. Union, was locally accepted at Merseyside into membership of the defendant union on signing its acceptance form, which was filled up in the handwriting of one K., who was the chairman of the Merseyside executive council of the defendant union, and on paying his membership fee, but without, e.g., having been required to be clear on the books of the T. Union. The plaintiff was not at that date aware of the terms of the Bridlington Agreement. In June, 1955, the defendant union and the T. Union appeared before the disputes committee of the Trades Union Congress in reference to the conduct of the defendant union and the Bridlington Agreement, and the committee awarded that the defendant union should exclude from their organisation all members recruited since Aug. 17, 1954, at, among other places, Liverpool. The defendant union took steps to inform all such members, including the plaintiff, that they were excluded from membership. The plaintiff having brought an action for a declaration that he was a member of the defendant union and that his purported exclusion was ultra vires, the defendant union contended, among other contentions, that there was an implied term in the plaintiff's contract of membership that the defendant union should have the right to do all such things as should be proper to comply with the Bridlington Agreement, and thus was entitled to exclude the plaintiff from membership pursuant to the award of the disputes committee.

Held: no term that the defendant union might exclude the plaintiff from membership in pursuance of the principles embodied in the Bridlington Agreement was implied in the plaintiff's contract of membership with the defendant union because (a) the plaintiff did not know of the Bridlington Agreement when he became a member of the defendant union, (b) the Bridlington Agreement contained no rules about what a member of a trade union should do or should abstain from doing, and (c) contained no power of expulsion; accordingly the purported exclusion of the plaintiff from membership of the defendant union was ultra vires and void.

Dicta of MacKinnon, L.J., in *Shirlaw* v. *Southern Foundries (1926), Ltd.* ([1939] 2 All E.R. at p. 124) applied.

[As to expulsion from membership of a trade union, see 32 Halsbury's Laws (2nd Edn.) 481, para. 770; and for cases on the subject, see 43 Digest 98-101, *1032-1052*.

As to the implication of terms in a contract, see 8 Halsbury's Laws (3rd Edn.) 121-124, paras. 212-215; and for cases on the subject, see 12 Digest (Repl.) 685-688, *5269-5285*.]

Cases referred to:

(1) *Shirlaw* v. *Southern Foundries (1926), Ltd.*, [1939] 2 All E.R. 113; [1939] 2 K.B. 206; 108 L.J.K.B. 747; 160 L.T. 353; *affd.* H.L. sub nom. *Southern Foundries (1926), Ltd.* v. *Shirlaw*, [1940] 2 All E.R. 445; [1940] A.C. 701; 109 L.J.K.B. 461; 164 L.T. 251; 9 Digest (Repl.) 557, *3689*.

(2) *The Moorcock*, (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 12 Digest (Repl.) 686, *5274*.

Action.

The plaintiff, Francis Spring, who was a registered dock worker in Liverpool, brought an action against the defendant trade union, the National Amalgamated Stevedores and Dockers Society, claiming (a) a declaration that since Apr. 2, 1955, he had been a member of the defendant trade union; (b) a declaration that the defendant's action in purporting to exclude him from membership since July 6, 1955, was ultra vires, illegal, unconstitutional and void; and (c) an injunction restraining the defendant union from preventing him from exercising his privileges or rights of membership in the defendant union. The defendant union counterclaimed for a declaration that the plaintiff's contract of membership was void, and, alternatively, for rescission of his contract of membership.

The action was brought in the Chancery Division of the High Court, but, by an application under the Court of Chancery of Lancaster Act, 1952, the plaintiff asked for the action to be transferred to the Court of Chancery of the County Palatine of Lancaster (Liverpool District). The application, which came before Roxburgh, J., on Dec. 6 and 7, 1955, was resisted by the defendant union on the ground of inconvenience, as the union's witnesses were all in London. By an order, made on Dec. 7, 1955, Roxburgh, J., granted the application on the ground that, although the issue of expulsion raised important questions which could best be tried in London, that issue fell to the ground if the facts justified a finding that the defendant union was entitled to rescind the plaintiff's contract of membership, and, as the witnesses on the question of misrepresentation by the plaintiff, on which the issue of rescission depended, were at Liverpool, the action would be more conveniently tried there.

The facts appear in the judgment and are summarised in the headnote.

Neville Gray, Q.C., and *J. J. Somerville* for the plaintiff.
I. J. Linder, Q.C., and *J. Monckton* for the defendant union.

SIR LEONARD STONE, V.-C.: By this action the plaintiff claims declarations that since Apr. 2, 1955, he has been a member of the defendant trade union, and that the defendant's action in purporting to exclude him from membership since July 6, 1955, is ultra vires, illegal, unconstitutional, and void; and, by way of ancillary relief, the plaintiff claims an injunction restraining the defendant union from preventing him from exercising all or any of his privileges or rights of membership in the defendant union. To these claims the defendant union raises four grounds of defence and bases on them a counterclaim for a declaration that the plaintiff's contract of membership is void, and, alternatively, rescission of his contract of membership.

The first two grounds of defence are to the effect that the plaintiff, when he signed an acceptance form relative to joining the defendant union, made certain statements and representations as to his position with regard to his former trade union, the Transport and General Workers' Union, which were not true, and it is alleged that, if he had not made these statements, the defendant union would not have accepted him as a member, and that, in the result, the defendant union was under a mistake of fact when the plaintiff's contract of membership was made.

The other grounds of the defence are of an entirely different character. It is alleged that the defendant union is an affiliated member of the Trades Union Congress and, as such, is bound by certain trade union principles known as " the Bridlington Agreement ", and that, accordingly, it is an implied term of the plaintiff's contract of membership that the defendant union should have the right to do all such things as might be necessary and proper to comply with its lawful agreements, and that, in the exercise of that right, the defendant union has determined the membership of the plaintiff. Further, it is alleged that it is an implied term of membership of the defendant union that members will act in conformity with the lawful and proper agreements of the defendant union. The agreement pleaded as fundamental to both these contentions is usually referred to as " the Bridlington Agreement ", and the defendant union pleads an award of the disputes committee of the Trades Union Congress, dated June 27, 1955, whereby the complaints of the Transport and General Workers' Union against the defendant union were upheld and the defendant union was required to exclude from membership all its members recruited in Hull, Birkenhead, Liverpool and Manchester, since Aug. 17, 1954, one of these recruits being the plaintiff. The defence alleges that the conclusion of the disputes sub-committee was correct.

By his reply and defence to the counterclaim, the plaintiff alleges that it is idle for the defendant union to suggest that it was misled or made any mistake through any misstatement or misrepresentation of the plaintiff, because, before the plaintiff's admission to membership of the defendant union, the defendant union had entered on a campaign of recruiting dissatisfied members of the Transport and General Workers' Union, one of whom was the plaintiff. The plaintiff also alleges that he is not bound by any of the terms of the Bridlington Agreement.

The important issues raised by the pleadings in this case may affect the lives of many of those who work in the docks and cannot be approached without some knowledge of the history and background against which the dock strikes of 1954 and 1955 took place, and also some knowledge of the inter-relationship of the trades unions with the Trades Union Congress as their ultimate and authoritative link.

The defendant union was founded in 1872 and was registered as a trade union on Mar. 23, 1898. In 1924 at the Trades Union Congress certain principles were laid down with regard to inter-trades union relationship for the purpose of avoiding disputes between trades unions. On Feb. 28, 1928, the current edition of the rules of the defendant trade union was adopted, there being no mention in them of the principles laid down at the Trades Union Congress of 1924. In 1939 the Trades Union Congress was held at Bridlington and the principles of 1924 which were then affirmed and revised are generally known as " the Bridlington

Agreement ". They are of fundamental importance to every issue which I have to determine in this action, and I propose to refer to them at once and in full. They are conveniently set out in a pamphlet issued by the Trades Union Congress called " Relationships between Unions ". Under the heading of " Main Principles for the Avoidance of Disputes, re-affirmed and revised by the Bridlington Congress, 1939 " are set out four principles:

> " 1. The application for membership form of the union should contain an inquiry to be answered by the candidate as to whether he is or has been a member of any other union, and, if so, what his financial relationship to that union is. 2. As a general principle no man who is or has recently been a member of any trade union should be accepted into membership in another without inquiry of his present or former union. The present or former union shall be under obligation to reply within fourteen days of the inquiry, stating: (a) whether the applicant has tendered his resignation; (b) whether he is clear on the books; (c) whether he is under discipline or penalty; (d) whether there are any other reasons why the applicant should not be accepted. Under no circumstances should a union accept a member who is at the time of his application in dispute with his union or the subject of disciplinary action or penalty. 3. No member should be allowed to escape his financial obligations by leaving one union while in arrears and by joining another. 4. Under no circumstances should a union accept members from any other union which is engaged in a trade dispute. It should be a general understanding that both national and local officials of trade unions should refrain from speaking or acting adversely to the interests of any other union during any period in which the members of the latter union are participating in a trade dispute. Much trouble could be avoided if unions about to participate in a trade dispute would take care to inform other unions whose members would be likely to be affected thereby."

Those principles are followed by some recommendations, also adopted at the Bridlington Congress of 1939. Recommendations Nos. 2, 3, 4 and 6 implement main principle No. 2, whereas recommendations 1 and 5 add something to the main principles, and are as follows:

> "1. Consider the possibility of joint working agreements with unions with whom they are in frequent contact; such agreements to deal, where possible, with: (a) spheres of influence; (b) recognition of cards; (c) machinery for composing difficulties; (d) conditions for transfer of members. 5. Not commence organising activities at any establishment or undertaking in respect of any grade or grades of workers in which another union has the majority of workers employed and negotiates wages and conditions, unless by arrangement with that union."

Overleaf some regulations are set out which govern the procedure in regard to dispute between unions. Finally, there are two forms, which, it is recommended, should be used when one trade union is making the inquiry referred to in principle No. 2 from another union. The first form headed " Inquiry Form " leaves blank spaces for the name of the inquiring union and the name of the union to whom the inquiry is addressed, and continues:

> " We have received an application:
> Dated ....from
> Name ....
> Address ....
> Employed at ....
> to join our union.

> Before accepting the application we should be glad if you would, in accordance with the decision of the Trades Union Congress, let us have your comments on the points raised overleaf."

Overleaf is the second form headed " Reply to Inquiry ". At the top there is a quotation from main principle No. 2:

> " The present or former union (of a member making application to another union) shall be under obligation to reply within fourteen days of the inquiry."

The form proceeds:

> " In regard to the person named overleaf, I desire to reply as follows:
> (i) Has the applicant tendered his resignation?
> Answer......................
> (ii) Was he clear on the books on the date he made application?
> Answer......................
> (iii) Was he under discipline or penalty on that date?
> Answer......................
> (iv) Any other reason why application should not be accepted?
> Answer......................"

That form has to be signed by the present or former union of the applicant.

Printed in the same pamphlet are r. 12 and r. 13 of the Rules and Standing Orders of the Trades Union Congress. Rule 12 empowers the General Council of the Trades Union Congress to use its influence to promote a settlement in the case of any dispute between affiliated organisations and, if necessary, to investigate cases of dispute; and the rule goes on to provide power for the General Council to summon contending affiliated organisations to appear before the disputes committee of the General Council to submit all evidence and information which the disputes committee may deem essential, and there is a provision as to payment of costs. Then comes cl. (f):

> " Should any affiliated organisation not carry into effect any decision of the General Council in connection with cases under this rule the General Council may at once issue a report to all affiliated organisations. If the decision of the General Council is still not carried out, the General Council may, at its discretion, adopt either of the following methods of procedure: The General Council may report the matter to the next Annual Congress to deal with as may be decided upon; or deal with the organisation under cll. (b), (c) and (d) of r. 13."

Clauses (b), (c) and (d) of r. 13 become of importance in this case. They read as follows:

> " (b) If after such investigation the General Council decides that the activities of the organisation concerned are detrimental to the interests of the trade union movement or contrary to the declared principles of Congress, the General Council shall direct the organisation to discontinue such activities forthwith and undertake not to engage therein in the future. (c) Should the organisation disobey such direction, or fail to give such undertaking, the General Council is hereby empowered in its discretion to order that the organisation be forthwith suspended from membership of the Congress until the next Annual Congress. (d) The General Council shall submit a report upon the matter to the next Annual Congress."

Mr. Victor Feather, the assistant secretary of the Trades Union Congress and the officer whose duty is the settlement of inter-union and industrial differences before they reach the stage of open dispute, said in his evidence that the principles laid down at Bridlington were not points of law. He described them as being a morally binding code of conduct made between persons of similar views. I understand from his evidence that that is the view of the Trades Union Congress, and it is one which, I think, it would be difficult to challenge as being otherwise than an accurate definition of the Bridlington principles.

The stevedores and dockers in this country belong either to the defendant union or to the Transport and General Workers' Union. Up to August, 1954, the membership of the defendant union was a little under seven thousand, the members being stevedores and dockers in London and some in Rochester. The Transport and General Workers' Union, on the other hand, had a membership of over a million and a quarter, excluding its railway members, and the stevedore and docker members of the Transport and General Workers' Union were not only in London, where the two unions were in competition, but in all the other ports, and in those (with the exception of Rochester) the Transport and General Workers' Union had an exclusive monopoly of the membership.

The plaintiff, as a checker at Liverpool Docks, had joined the Transport and General Workers' Union in 1940 at the age of seventeen, and, except for war service in the Royal Navy and a period of about a year in 1953 when he temporarily left his work in Liverpool Docks, he had been a member of the Transport and General Workers' Union until the events immediately relevant to this action occurred.

The rules of the Transport and General Workers' Union were registered on Aug. 19, 1939, and, like the rules of the defendant union, they make no reference to the principles which had been laid down at the Trades Union Congress of 1924. By Sch. 2, cl. (e), to the Transport and General Workers' Union Rules, it is provided that:

> " any member, except members covered by r. 18, cl. 13, [which relates to members who are at sea,] exceeding thirteen weeks in arrears shall be deemed to be no longer a member of the union unless the branch and/or the district committee as the case may be, decides by resolution to keep his name on the books. Should a person allow his membership to lapse and be desirous of resuming his membership or of rejoining the union, it shall be within the discretion of the branch and/or the district committee as the case may be to decide the terms of his re-admission."

As will hereinafter appear, that clause was invoked during the break away from the Transport and General Workers' Union of its members who intended to join the defendant union.

In August, 1954, there was a dock strike at Hull and the stevedores and dockers became dissatisfied with the way in which their union, the Transport and General Workers' Union, were handling matters on their behalf. Ultimately, the dissatisfaction spread from Hull to Birkenhead, Manchester and Liverpool. Whether there was any justification for the dissatisfaction is quite irrelevant to any issue which I have to determine, and I say nothing about it. What is relevant, however, is that a representative of the dockers at Hull came to the main executive council of the defendant union sitting in London and told the council that the Hull dockers wanted to leave the Transport and General Workers' Union and come over in a body to the defendant union as members. Mr. Barrett, the general secretary of the defendant union at that time, took the view that, provided a member of the Transport and General Workers' Union was clear on the books, that is to say, had paid all his contributions and dues to date and had notified his previous union of his intention to resign, the spirit of the Bridlington principles had been complied with. There was, indeed, some reason for this view, which conflicts with the actual terms of the Bridlington principles, because, in para. 57 of the report of the proceedings before the disputes committee of the Trades Union Congress which was made much later, but which referred to the relationship between these two unions in London in August, 1954, and previously, it is stated:

> "Both the National Amalgamated Stevedores and Dockers and the Transport and General Workers' Union, in response to a query from the chairman, agreed that they accepted members of each other's organisation without inquiry, providing the workpeople concerned were clear on the books."

Accordingly, having ascertained that a very large number of the dockers at Hull wanted to come over to the defendant union, the defendant union had two forms printed for the purpose of their recruitment. The first form is called an application form. It is headed with the name of the defendant union, and, after various blank spaces which are to be filled up with the date, the name of the applicant, his age, his registered number in the docks, and his address, it continues:

> "I am making an application for membership of the National Amalgamated Stevedores and Dockers. In making this application for membership of the National Amalgamated Stevedores and Dockers I am acting freely, without duress, or any soliciting by the National Amalgamated Stevedores and Dockers and will leave my present union with a clear trade union card in order that I may be acceptable for membership of the National Amalgamated Stevedores and Dockers."

The second form is called a form of acceptance. Again, it is headed with the name of the defendant union and appropriate blank spaces are left for filling up the same particulars as before. The form continues:

> "I   having made application for membership into the National Amalgamated Stevedores and Dockers by filling in the form of application issued at my request, confirm that my acceptance and entry in the National Amalgamated Stevedores and Dockers is in accordance with the conditions stated on the application form for membership. Further, having been a member of the   Union I have notified the said trade union of my intention to withdraw from membership, and from the date as above by payment of the entrance fee as determined by the executive council of the National Amalgamated Stevedores and Dockers, have assumed membership of that union."

It was not long before a complaint was made by the Transport and General Workers' Union to Sir Vincent Tewson, the general secretary of the Trades Union Congress, and during the early part of September, 1954, Sir Vincent wrote to Mr. Barrett about fixing a date for the disputes sub-committee to meet, but events at the ports were moving quickly. On Sunday, Sept. 12, 1954, a mass meeting of dockers was held at Birkenhead at which the following resolution was passed and conveyed to the defendant union:

> "This mass meeting of Birkenhead dockers hereby declares that we have no further confidence in the officials and policy or the undemocratic structure of [the Transport and General Workers' Union]. We therefore resolve to dissociate ourselves from [the Transport and General Workers' Union] and make application for membership of the National Amalgamated Stevedores and Dockers Union."

This resolution was said to be carried with not one vote against.

A mass meeting of the defendant union's London members was held on Oct. 1 to hear reports on the positions at Hull and Birkenhead, where recruiting for the defendant union had been in active progress. On Oct. 8 Sir Vincent Tewson called on the defendant union to give an undertaking to cease forthwith any organising activities such as the admission of members, the collection of contributions, and the convening of meetings. No such undertaking being forthcoming, the defendant union was, on Oct. 27, 1954, suspended from membership of the Trades Union Congress until the next Annual Congress. A

On Nov. 6, 1954, Mr. Waterson, on behalf of the Liverpool dockers, wrote the following letter to Mr. Barrett:

> " Dear Bro. Barrett, On behalf of Merseyside port workers, I respectfully forward this application for membership of the Amalgamated Stevedores and Dockers Union. On Tuesday last, a campaign was started in all control points, 1-11, and Garston. Reports from all control meetings, and mass meetings of control representatives, show an overwhelming desire to join your union. Signatures to date total over eight thousand, out of a total of approximately twelve thousand five hundred. Trusting this application meets with the approval of your union." B C

The defendant union, however, was cautious and, having interviewed Mr. Waterson, required more concrete proof of the wish of the men themselves to join the defendant union. Accordingly, Mr. Waterson returned to Liverpool and a petition was organised by the Liverpool men themselves. It was headed " Application to join N.A.S.D.U.", and a large number of sheets of paper with that heading were signed by men in Liverpool Docks and forwarded to the defendant union. D

On Nov. 14 a meeting of Liverpool dockers was held in Liverpool Stadium and was addressed by Mr. Barrett, but he withdrew before any resolution was put to the vote, because the officers and delegates of the defendant union, notwithstanding the suspension of their union imposed by the Trades Union Congress, were still keeping to their original plan that any move to join the defendant union must come spontaneously from the dockers of the northern ports without persuasion from them. The vote being in favour of joining, six members of the defendant union from London who were either delegates or officers came to Liverpool to enrol all those members of the Transport and General Workers' Union who wished to leave that union and join the defendant union. At first, recruiting took place on the basis that a man, to be accepted, must be clear on the books of the Transport and General Workers' Union and must have notified that union of his intention to resign, but, even at the beginning, the application form was dispensed with at Liverpool, and a docker, on joining the defendant union, was merely required to pay up all his arrears to the Transport and General Workers' Union and to sign the defendant union's acceptance form. Mr. Freeman, the present president of the defendant union and Mr. Newman, who was formerly assistant general secretary, had to admit under cross-examination that, even before Dec. 20, the acceptance form was used only for the purpose of record, that is to say, as a convenient form on which such particulars as name, age, address, and registered number with the Dock Labour Board could be recorded for the defendant union's register of members. E F G

By Dec. 20 the six representatives from London, having trained local men to take their places as organisers and branch delegates, returned to London. Commencing on Jan. 1, 1955, the defendant union circulated on Merseyside what is called " N.A.S. & D. Mersey Broadsheet—News of the 'Blues'—Official Organ of the National Amalgamated Stevedores and Dockers Union ", the price of which was 1d. The aims of the broadsheet, declared in its first issue, were as follows: H I

> " This bulletin, which is an official publication of the N.A.S.D.U., will appear weekly. Its aim will be: To report on the progress and developments of the union in Merseyside. To inform new members to which branch they belong. To publish the times and places of branch meetings and the names of branch officials when elected. To give news from the branches and, whenever possible, to give prior notice of important items coming up for discussion. To answer attacks made upon our union. To

> present news from other ports. To supply information on the national policy of our union."

Those broadsheets continued to be issued weekly up to and including May 31.

On Jan. 3, 1955, Mr. William Johnson of Birkenhead became a paid official of the defendant union—the first local man to do so—and on Jan. 17, Mr. Aylward and Mr. Constable, two officials of the defendant union from London, went to Liverpool to speed recruiting. On Jan. 23 there was another mass meeting at Liverpool Stadium which was addressed by Mr. Barrett, but, in spite of all these activities, the numbers coming in to join the defendant union were disappointing to the defendant union. By the end of January it seems that only about eleven hundred members had been recruited, and it was Mr. Johnson, the local organiser and a Birkenhead man, who suggested that the reason was the insistence of the defendant union that a recruit, before he could be accepted to membership, not only had to pay an entrance fee of 5s., but was also required to be clear on the books of his former union. There is no doubt that the London members of the main executive council were divided on the question whether, as a matter of propriety, this requirement could or should be dispensed with, but there is also no doubt that those who were working on the spot did, in fact, discard the requirement, and in lieu thereof resort was had to cl. (e) of Sch. 2 to the Rules of the Transport and General Workers' Union, which provides that, if a member should be thirteen weeks in arrears with his contributions, he should be deemed to be no longer a member of that union*, and the dockers were told that they were then no longer trade unionists. This led to an increase in membership, as also did the success, from the Liverpool dockers' point of view, of a short three-day strike, called the " Book Strike ", at the end of March.

On Mar. 31, or Apr. 2, the plaintiff, who was then more than thirteen weeks in arrear with his contributions to the Transport and General Workers' Union, signed an acceptance form, paid his 5s., and was accepted into membership by the defendant union, his acceptance form being filled up in the handwriting of Mr. Kerrigan, a local man, who had become chairman of the Merseyside executive council of the defendant union and a delegate to their National Council which was set up in London, and which, as ultimately composed, consisted of six delegates from the London docks, three from Liverpool, one from Hull, one from Birkenhead, and one from Manchester. This composition, be it noted, caused the north and south to be equally represented on the National Council.

Although the point has been contested throughout, it is, in my judgment, an untenable proposition to maintain that the defendant union was misled or made any mistake in its acceptance of the plaintiff. The defendant union knew long before the end of March, 1955, that it was recruiting men who were thirteen weeks in arrear with their contributions to the Transport and General Workers' Union, and who were said by the defendant union's own officers and delegates to be no longer trade unionists, because of the rule whereby they were to be deemed to be no longer members of the Transport and General Workers' Union. I am satisfied on the evidence that at Liverpool the acceptance forms were used for record purposes only, although in the earlier days, that is to say, in December, 1954, a recruit was required to pay up his arrears to the Transport and General Workers' Union.

There were sixteen branches of the defendant union on Merseyside with their unpaid delegates, and, in addition, five men from the northern ports became paid officials of the defendant union. Perhaps the expansion was too rapid. It is sufficient to say, without going into detail, that, commencing in May, 1955, there was a dock strike, which lasted six weeks and was known as " the strike for recognition ", and that, under the stresses of that strike, differences of opinion commenced to develop. Sometimes, as the minutes of the strike

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*** See p. 226, letter E, ante.**

committee show, the voting of delegates on vital matters was equally divided. On June 17, 1955, Mr. Barrett, the general secretary, tendered his resignation, which was accepted. A few days later an approach was made to the Trades Union Congress for removal of the suspension, and on June 24 and 27, 1955, the defendant union and the Transport and General Workers' Union appeared before the disputes committee of the Trades Union Congress, which made the following award:

> " The disputes committee therefore award that the National Amalgamated Stevedores and Dockers shall now exclude from their organisation all members recruited by them in Hull, Birkenhead, Liverpool and Manchester, since Aug. 17, 1954, and shall not proceed to re-establish organisation in those ports except in accordance with the terms of the Bridlington Agreement."

As I read that award, the disputes committee must be taken to have intended that the exclusions should be by lawful means. Indeed, Mr. Feather, in his evidence said that he did not think that the General Council considered that there might be cases of breaches of contract involved in the exclusion award. However, on July 6, 1955, to implement that award, the defendant union wrote the following letter to all the branches in the northern ports. It is addressed to all branch secretaries in Hull, Liverpool, Birkenhead, Garston and Manchester:

> " Dear Sir and Brother,
>
> *Re Implementation of T.U.C. Disputes Committee Decision.*
>
> I am to inform you that to comply with the accepted decision of the T.U.C. disputes committee, you are instructed by the executive council to call special branch meetings and to inform members that from the date of this letter they are all excluded from membership of the National Amalgamated Stevedores and Dockers.
>
> You are also instructed by the executive council not to accept any obligations or commitments, financial or otherwise, in the name of the National Amalgamated Stevedores and Dockers as and from the above date.
>
> Yours fraternally,
>
> *signed*, S. Wood, Acting general secretary."

Meetings were summoned pursuant to that letter and the members were informed of its contents.

That brings me to the points raised in paras. 14 and 15 of the defence, in regard to the implied terms, that is to say, that it was an implied term of the plaintiff's contract of membership of the defendant union that the union should have the right to do all things which may be necessary and proper to comply with its lawful and proper agreements; and further, that it was an implied term that members would act in conformity with the lawful and proper agreements of the defendant union, meaning thereby the Bridlington Agreement. To that line of defence several submissions were made by counsel for the plaintiff. The first was that the plaintiff in his evidence, which I entirely accept, said that it was not until " the recognition strike ", that is to say, some five or six weeks after he had been accepted as a member of the defendant union, that he first heard of the Bridlington Agreement. Even in this court his ideas about its effect were quite inaccurate and imperfect. I was referred to the well-known passage in the judgment of MacKinnon, L.J., in *Shirlaw* v. *Southern Foundries (1926), Ltd.* (1) ([1939] 2 All E.R. 113 at p. 124), where the lord justice said:

> " I recognise that the right or duty of a court to find the existence of an implied term or implied terms in a written contract is a matter to be exercised with care, and a court is too often invited to do so upon vague and uncertain grounds. Too often, also, such an invitation is backed by the citation of a

> sentence or two from the judgment of BOWEN, L.J., in *The Moorcock* (2) ((1889) 14 P.D. 64). They are sentences from an extempore judgment as sound and sensible as are all the utterances of that great judge, but I fancy that he would have been rather surprised if he could have foreseen that these general remarks of his would come to be a favourite citation of a supposed principle of law, and I even think that he might sympathise with the occasional impatience of his successors when *The Moorcock* (2) is so often flashed before them in that guise. For my part, I think that there is a test that may be at least as useful as such generalities. If I may quote from an essay which I wrote some years ago, I then said: 'Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying'. Thus, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common: 'Oh, of course'."

If that test were to be applied to the facts of this case and the bystander had asked the plaintiff, at the time when the plaintiff paid his 5s. and signed the acceptance form, "Won't you put into it some reference to the Bridlington Agreement ?" I think (indeed, I have no doubt) that the plaintiff would have answered, "What's that ?" In my judgment, that is sufficient to dispose of this case, but, as two further grounds have been argued with regard to the Bridlington Agreement being applied to the terms of this contract, I intend to express my views on them out of deference to the arguments.

It is said that, when the Bridlington Agreement is examined, every term of it contains something which a trade union as an entity must do or abstain from doing, and that there is nothing in it which a member of a trade union has to do or abstain from doing. That is so, and I do not know how a member who is intending to join a new union, and does, in fact, join a new union, can, by the importation of some implied term, be made liable for some infraction by the trade union of principles which are laid down as a morally binding code of conduct in the relationship between trade unions. Further, there is no power of expulsion in the Bridlington Agreement. That code is concerned with the admission of new members, and nothing at all is laid down in it about getting rid of them. The only sanctions for observance of the Bridlington Agreement are those mentioned in r. 13 of the Rules and Standing Orders of the Trades Union Congress*:

> "(b) . . . the General Council shall direct the organisation to discontinue such activities forthwith and undertake not to engage therein in the future. (c) Should the organisation disobey such direction, or fail to give such undertaking, the General Council is hereby empowered in its discretion to order that the organisation be forthwith suspended from membership of the Congress until the next Annual Congress."

There is nothing else—no other sanction and no other power in the General Council to inflict a penalty on a union which is held to be in default.

Counsel have throughout this case, while doing their duty, refrained from using any language which might re-kindle any of the feelings of bitterness that some of the facts of this case would at one time have provoked, and I hope that nothing that has fallen from me could do so either. The defendant union, in loyalty to the award imposed on it, has by this action done its best to get rid of the plaintiff. That it has failed in law to do so is not its fault.

As to the relief to which the plaintiff is entitled, counsel for the defendant union urged that none of the relief claimed, the declarations or an injunction, being equitable forms of relief, should be granted in the circumstances of this case. The answer to that is that the defendant union, by its invitation to the plaintiff to allow his contributions to the Transport and General Workers' Union to become in arrear and to join the defendant union, has not only induced the plaintiff materially to alter his position, but has also conferred on him contractual rights, and that he is entitled to the relief claimed; but, as an injunction granted today would not give the defendant union any opportunity of making any arrangements to meet the embarrassing circumstances in which it may well be placed, and counsel for the plaintiff not objecting, I will only make the two declarations asked for by the statement of claim; that is to say, a declaration that the purported action of the executive committee or council of the defendant union in excluding or causing the plaintiff to be expelled from membership of the union is ultra vires the union, and is illegal, unconstitutional, and void; secondly, a declaration that the plaintiff, notwithstanding such purported exclusion or expulsion from the defendant union, was and has always been a member of the union since Apr. 2, 1955, and is and has been entitled to all the benefits and privileges of membership of the union from such date on payment of all arrears of quarterly contributions now due and payable by him, and henceforth to become due and payable by him, to the union. Then I will give liberty to apply for an injunction. The action succeeds with costs, and the counterclaim must be dismissed with costs.

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* Compare p. 225, letters D to I, ante.

Judgment for the plaintiff.

Solicitors: *Canter, Levin & Mannheim*, Liverpool (for the plaintiff); *Shaen, Roscoe & Co.* (for the defendant union).

[*Reported by* K. BUCKLEY EDWARDS, ESQ., *Barrister-at-Law.*]

FULLERTON *v.* RYMAN.

[CHANCERY DIVISION (Upjohn, J.), March 16, 1956.]

Practice—Motion to discharge district registrar's order—Action in Chancery Division of High Court in London—Action in warned list at date of application to district registrar.

Practice—Transfer of action—Whether action should be transferred to Court of Chancery of Lancaster—Court of Chancery of Lancaster Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2 *c.* 49), *s.* 1.

An action, relating to land at Colwyn Bay in the County of Denbigh, was set down for trial in the Chancery Division of the High Court of Justice in London. April 10, 1956, had been fixed for hearing the action, which appeared in the warned list. There had been several previous postponements. The plaintiff obtained an order under s. 1 of the Court of Chancery of Lancaster Act, 1952*, from the district registrar of the district registry at Liverpool transferring the action to the Court of Chancery of the County Palatine of Lancaster on the ground that, as the parties and witnesses all lived at Colwyn Bay, which was near Liverpool, Liverpool was the convenient venue. On a motion by the defendant to discharge the order,

Held: (i) although generally a motion to vary or discharge an order made by a Master in the Chancery Division would be refused with costs, since the proper course was for the matter to be adjourned to the judge, yet, as the action was in the warned list, the district registrar should of his own motion have adjourned the application to the judge and accordingly the court would consider the application on its merits.

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* Section 1 of the Court of Chancery of Lancaster Act, 1952, reads: " Any cause or matter pending in the High Court (except an appeal, whether by way of case stated or otherwise) may at any time and at any stage, upon the application of any of the parties thereto be transferred from the High Court to the Court of Chancery of the County Palatine of Lancaster by an order either of the High Court or of a judge thereof if the cause or matter is for the time being assigned to the Chancery Division . . ."

Harrington v. *Ramage* ([1907] W.N. 137) distinguished.

(ii) it was desirable that the action should be tried expeditiously and, as in the circumstances trial would probably take place sooner in London, the action would not be transferred and the district registrar's order would be discharged.

[**Editorial Note.** The case of *Spring* v. *National Amalgamated Stevedores and Dockers Society* (ante p. 222, letters G and H), which was cited in argument in the present case, illustrates other considerations which may influence the court in deciding whether to transfer an action to the Chancery Court of Lancaster for trial. In that case an issue of expulsion from a trade union raised important questions suitable to be tried in London, but, since that issue did not arise unless and until it was determined that the plaintiff's membership of the trade union was not able to be rescinded by the defendants for misrepresentation, and the issue of misrepresentation was more conveniently triable locally, as the witnesses were at Liverpool, the action was transferred.

By para. 6 of the Practice Directions for witness actions in the Chancery Division (see ANNUAL PRACTICE, 1956, p. 3806) all applications with regard to cases appearing in the witness list are to be made to the judge notified in the daily cause list as the judge in charge of the list.

As to motions to the court to discharge orders of masters, see 26 HALSBURY'S LAWS (2nd Edn.) 45, para. 70; and for cases on the subject, see DIGEST (Practice) 735-737, *3171-3189*.

As to the Chancery Court of the County Palatine of Lancaster, see 9 HALSBURY'S LAWS (3rd Edn.) 473-478, paras. 1081-1088.

For the Court of Chancery of Lancaster Act, 1952, s. 1, see 32 HALSBURY'S STATUTES (2nd Edn.) 58.]

Case referred to:

(1) *Harrington* v. *Ramage*, [1907] W.N. 137; Digest (Practice) 736, *3175*.

Motion.

The applicant, Madeline Phyllis Ryman, of Colwyn Bay, was the defendant in an action brought by Christina Brown Fullerton for a declaration that certain land at Colwyn Bay which had been conveyed to the defendant but for which the plaintiff had provided the purchase money was held by the defendant on trust for the plaintiff. The action was set down for hearing in London on Nov. 7, 1955, and the date originally fixed for the hearing was Jan. 16, 1956. On Jan. 4, 1956, on a summons for further directions, the plaintiff was given leave by the district registrar to amend her pleadings. In these circumstances an application was made by the plaintiff to postpone the hearing and the new date fixed by the judge was Mar. 5, 1956. On Feb. 22, 1956, the defendant applied for a further postponement because of the illness of one of her witnesses, and the new date fixed by the judge for the hearing was Apr. 10, 1956. On Feb. 28, 1956, the plaintiff applied for, and obtained from the district registrar, an order transferring the action from the Chancery Division of the High Court in London to the Court of Chancery of the County Palatine of Lancaster in Liverpool on the ground that, since the parties and witnesses all lived at Colwyn Bay, which was only fifty miles from Liverpool, Liverpool was a more convenient venue. The defendant now applied to have this order of the district registrar discharged.

H. E. Francis for the defendant, the applicant.

A. C. Sparrow for the plaintiff, the respondent.

UPJOHN, J., stated the facts and said: Counsel for the plaintiff has very properly called my attention to the decision of KEKEWICH, J., in *Harrington* v. *Ramage* (1) ([1907] W.N. 137) to the effect that a motion to set aside or vary a master's order should be dismissed with costs without going into the merits, since the proper course for a party who wanted a matter to be dealt with by the judge was to ask the master, before his order was drawn up, to adjourn the matter to the judge. However, that does not cover the present case, since here the date of the hearing had already been fixed and the action was in the warned list when the application to transfer the action was made to the district registrar. In these circumstances, in accordance with the usual practice, the district registrar should not have heard the application but should of his own motion have immediately adjourned it to the judge.

I must, therefore, deal with the present application on its merits. I have no doubt that under s. 1 of the Court of Chancery of Lancaster Act, 1952, I have jurisdiction at any time or at any stage to transfer the action to the Court of Chancery of the County Palatine of Lancaster, but the question is whether I ought to do so. Counsel for the plaintiff has contended that Liverpool is a more convenient forum for the action to be heard since the parties and witnesses all live at Colwyn Bay, which is only fifty miles from Liverpool. However, what weighs with me is the fact that it is clearly most desirable, after the many postponements of the hearing of the action that have already taken place, that the matter should be disposed of as soon as possible. As things stand at present the case is due to be heard on Apr. 10. I think that it is likely that, if the action were now to be transferred to Liverpool, it would not be heard so soon. I will, therefore, grant the defendant's motion and discharge the order of the district registrar.

Motion granted.

Solicitors: *T. D. Jones & Co.*, agents for *J. R. Williams, Davies & Co.*, Colwyn Bay (for the defendant); *Bell, Brodrick & Gray*, agents for *Henderson & Hallmark*, Llandudno (for the plaintiff).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

WALLER *v.* WALLER.

[COURT OF APPEAL (Jenkins and Hodson, L.JJ.), March 26, 1956.]

Divorce—Alimony—Pendente lite—Adultery of wife—Wife's petition for judicial separation—Plea of conduct conducing and condonation—Court's power to order—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 20 (1).

In connection with her petition for judicial separation on the ground of her husband's cruelty, the wife filed a discretion statement and affidavits in which she admitted acts of adultery but alleged that they had been conduced to by the cruel conduct of the husband complained of in the petition and/or had been condoned. The wife applied for alimony pendente lite under s. 20 (1)* of the Matrimonial Causes Act, 1950.

Held: the court had power to make an order for alimony pendente lite notwithstanding the wife's adultery; in considering an application for such an order the court should take into account all relevant circumstances, including the adultery, the conduct of the parties and any plea of conduct conducing or condonation.

Welton v. *Welton* ([1927] P. 162) applied.

Appeal dismissed.

[As to the court's power to make an order for alimony pendente lite, see 12 HALSBURY'S LAWS (3rd Edn.) 346, para. 733; and for cases on the subject, see 27 DIGEST (Repl.) 485-487, *4246-4255*.

For the Matrimonial Causes Act, 1950, s. 20 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 408.]

Cases referred to:

(1) *Welton* v. *Welton*, [1927] P. 162; 96 L.J.P. 75; 136 L.T. 675; 27 Digest (Repl.) 486, *4253*.

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* The terms of s. 20 (1) of the Matrimonial Causes Act, 1950, are printed at p. 236, letter C, post.

(2) *Holt* v. *Holt & Fleeming*, (1858), 28 L.J.P. & M. 12; 27 Digest (Repl.) 509, *4513*.

(3) *Whitmore* v. *Whitmore*, (1866), L.R. 1 P. & D. 96; 35 L.J.P. & M. 39, 52; 13 L.T. 723; 14 L.T. 171; 27 Digest (Repl.) 564, *5176*.

(4) *Wilson* v. *Glossop*, (1888), 20 Q.B.D. 354; 57 L.J.Q.B. 161; 58 L.T. 707; 52 J.P. 246; 27 Digest (Repl.) 193, *1527*.

(5) *Otway* v. *Otway*, (1888), 13 P.D. 141; 57 L.J.P. 81; 59 L.T. 153; 27 Digest (Repl.) 439, *3689*.

(6) *Everett* v. *Everett & McCullum*, [1919] P. 298; 88 L.J.P. 130; 121 L.T. 503; 27 Digest (Repl.) 439, *3690*.

(7) *Bullock* v. *Bullock & Vargolici*, [1942] 2 All E.R. 259; [1942] P. 134; 111 L.J.P. 84; 167 L.T. 15; 27 Digest (Repl.) 488, *4266*.

(8) *S.* (*orse. B.*) v. *S.*, [1944] 1 All E.R. 439; sub nom. *Stevenson* (*orse. Bowerbank*) v. *Stevenson*, [1944] P. 52; 113 L.J.P. 36; 170 L.T. 213; 27 Digest (Repl.) 495, *4361*.

(9) *Dunn* v. *Dunn*, (1888), 13 P.D. 91; 57 L.J.P. 58; 59 L.T. 385; 27 Digest (Repl.) 494, *4353*.

(10) *Wells* v. *Wells & Hudson*, (1864), 3 Sw. & Tr. 542; 33 L.J.P.M. & A. 151; 10 L.T. 696; 164 E.R. 1386; 27 Digest (Repl.) 494, *4352*.

Appeal.

The wife, petitioner for a decree of judicial separation on the ground of her husband's cruelty, made an application to the court for an order for alimony pendente lite. The husband opposed the application on the ground that the wife was disentitled to obtain such an order by her admitted acts of adultery. The wife submitted that the acts of adultery had been conduced to by the cruelty of the husband complained of in the petition or had been condoned. On Feb. 13, 1956, BARNARD, J., rejected the husband's submission and made an order for alimony pendente lite. The husband appealed.

F. Whitworth for the husband.
John Stephenson for the wife.

JENKINS, L.J.: The wife, respondent in the present appeal, on May 5, 1955, presented a petition praying for a decree of judicial separation from the husband on the ground of his cruelty. The wife filed a discretion statement admitting certain acts of adultery by her in respect of which she sought the discretion of the court. There have been no pleadings subsequent to the petition, but various affidavits have been filed, some of them directed to questions as to the husband's domicil, with which we are not now concerned. The upshot of the affidavit evidence is that the wife admittedly committed adultery on a number of occasions. She admitted as much in her own affidavit evidence, and there were also admissions of adultery by her, or passages which could be construed as such admissions, in a diary of hers put in evidence by the husband. She met these charges by alleging that the husband by the cruel conduct complained of in the petition had conduced to her adultery, and further she alleged that her adultery had been condoned. The matter, therefore, stands thus: the wife is claiming judicial separation. That claim has been countered by allegations of the wife's adultery. The wife, on the other hand, has said the adultery was conduced to by the husband's cruel conduct and/or was condoned by him.

In due course the wife applied for alimony pendente lite. That application was resisted by counsel for the husband on grounds to which I will shortly refer. The learned judge rejected those grounds and made the order which is the subject of the present appeal. The grounds relied on in opposition to the application for alimony pendente lite appear from this question posed by counsel for the husband at the opening of his argument. He stated the question as being whether a wife who has admittedly committed adultery and therefore normally would not be entitled to alimony pending suit can get alimony on a statement, which the husband denies, that the admitted adultery has been condoned.

That question was in effect answered adversely to the husband by the order under appeal, and the form of that order is accounted for, I think, by the course the matter took before the registrar and before the learned judge, as explained to us by counsel. The form of the order made was this: The judge decided that the fact that the petitioner had committed adultery did not in the circumstances of this case preclude her from obtaining alimony pending suit, and referred the petitioner's application back to the registrar as to quantum, and gave leave to appeal.

Consideration of the matter is best begun by a reference to the jurisdiction to award alimony pendente lite on a petition for judicial separation conferred by s. 20 (1) of the Matrimonial Causes Act, 1950, which is in these terms:

> " On any petition for judicial separation, the court may make such interim orders for the payment of alimony to the wife as the court thinks just."

I think that it is material to compare that provision with the corresponding provision regarding alimony pendente lite in the case of a petition for divorce or for nullity of marriage. That comes in s. 19 (1) and, mutatis mutandis, is in exactly the same terms:

> " On any petition for divorce or nullity of marriage, the court may make such interim orders for the payment of alimony to the wife as the court thinks just."

It will be seen, therefore, that, so far as the statute is concerned, as the law now stands, the amplest discretion is conferred on the court in the matter of alimony pendente lite whether the case be one of a petition for judicial separation or one of a petition for divorce or nullity of marriage. Nevertheless, counsel for the husband has submitted that in a case of this kind the court is bound by a hard and fast rule, which he was inclined to describe as a rule of practice rather than a rule of law, that once a wife has admitted adultery in the course of matrimonial proceedings she is precluded from an award of alimony pendente lite. He admits that an allegation by the husband of adultery by the wife would be no bar for this purpose, but he says that, if there is an admission of adultery by the wife, that is a bar and, as I understand his argument, that admission remains a bar even though the wife is seeking the discretion of the court, and even though she alleges on oath conduct conducing to the adultery which she proposes to prove, or alleges on oath and proposes to prove condonation of the adultery.

Counsel for the husband referred us to several cases dealing with this question, and he invited us to hold that on these authorities his argument was well founded. He based himself to some extent on a submission as to the onus of proof. He said that, once adultery is admitted, it is for the wife to displace its effect by some more cogent evidence than her own word on affidavit.

In my view the authorities disclose no warrant for limiting the discretion of the court in this way. The matter is one for the court to deal with as it thinks just in its unfettered discretion. If it appears at the time of an application for alimony pendente lite that the wife has committed adultery, that is no doubt a very serious matter to be taken into account. If in such a case the wife has admitted adultery but questions of conduct conducing to the adultery or condonation of the adultery are put in issue, then it seems to me that there cannot be any justification for the view that, although these matters are put in issue and although the wife, notwithstanding the admitted adultery, may nevertheless succeed in her petition, yet she must necessarily be held disqualified from claiming alimony pendente lite.

In *Welton* v. *Welton* (1) ([1927] P. 162), in the Court of Appeal, an application was brought under s. 190 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, which provided that:

> "On any petition for divorce or nullity of marriage the court shall have the same power to make interim orders for the payment of money by way of alimony or otherwise to the wife as the court has in proceedings for judicial separation."

The leading argument on behalf of the husband in that case, as I understand it, was to the effect that the form of s. 190, in conjunction with other provisions which I need not trace out, was such as to bring into applications for alimony on petitions for divorce or nullity of marriage the principles which the ecclesiastical court would apply in a like application on a petition for separation, the rule of the ecclesiastical court being, it would seem, uncompromisingly to the effect that adultery by the person seeking relief constituted an absolute bar to relief. It was argued that this strict rule was imported into the jurisdiction conferred by s. 190 (3). That argument was rejected by Lord Merrivale, P., and his decision was affirmed by the Court of Appeal in language which to my mind makes it reasonably plain that the view which counsel for the husband has invited us to take of the court's jurisdiction in this matter cannot be supported. Lord Merrivale, P., said (ibid., at p. 167):

> "The ground of the respondent's appeal against the order for alimony pendente lite is that in a previous suit wherein he was petitioner for dissolution of marriage the now petitioner was found guilty of adultery. Counsel on his behalf contended that there is no jurisdiction in the court to allot alimony pendente lite to a wife so found guilty or to a wife shown to be guilty by her own confession. This proposition is founded on authorities in divorce, such as *Holt* v. *Holt & Fleeming* (2) ((1858) 28 L.J.P. & M. 12); *Whitmore* v. *Whitmore* (3) ((1866) L.R. 1 P. & D. 96); and numerous decisions under the common law which lay down that a wife, living apart from her husband and guilty of adultery, may not pledge her husband's credit for necessaries, and that in the case of such a wife certain statutory liabilities of a husband in respect of maintenance cannot be enforced."

Then he went on to say that *Holt* v. *Holt & Fleeming* (2) and *Whitmore* v. *Whitmore* (3) were simple cases.

> "In the former alimony pendente lite was refused in a suit for divorce upon proof that in an ecclesiastical court the respondent had already been found guilty of adultery. In the latter, upon a wife's confession of adultery in the course of the proceedings on a petition for divorce, an order for alimony pendente lite which was then subsisting was, as from the date of the confession, discharged. In like cases the same course would probably be taken today. The present case is complicated, however, by the fact that the decree of the court in the husband's suit, which pronounced the guilt of the wife, found the husband guilty of conduct conducing to the wife's adultery, and therefore dismissed his petition. This state of facts was said by the wife's counsel to bring the case within the principle laid down in *Wilson* v. *Glossop* (4) ((1888) 20 Q.B.D. 354), that a husband who connives at adultery on the part of his wife remains under the same liability for the wife's maintenance as though she had remained chaste."

This important passage appears ([1927] P. at p. 169):

> "The wife in this present suit is a competent suitor, in that she sues for relief which the court is able, upon proper proof, to afford to her. Moreover the husband is not free of complicity in the misconduct on her part, as has been established in his suit by the decree of the court. Whether after such misconduct the wife could pledge the husband's credit for necessaries is not the question. The decisive inquiry, in my view of the matter, is whether the wife, on the facts before the court, is a competent suitor for relief in a matrimonial cause. She undoubtedly is. Thereupon the jurisdiction of the court to order alimony pendente lite appears to me to arise. It is that

> jurisdiction which has been exercised in the registry. Conditions are easily conceivable in which, although this jurisdiction exists, no order could properly be made. A wife who has brought cohabitation to an end by admitted misconduct for which the husband was not to blame, or a wife who, in some independent situation, is seeking divorce, and cannot be granted relief except under the discretionary power of the court, may very likely not be a proper applicant for an allotment of alimony pendente lite. That will depend upon consideration of the relevant facts."

LORD HANWORTH, M.R., said (ibid., at p. 175):

> " It is said on the authority of *Otway* v. *Otway* (5) ((1888) 13 P.D. 141) and other cases, such as *Everett* v. *Everett & McCullum* (6) ([1919] P. 298), that a judicial separation can only be granted where the petitioner comes to the court with a pure character and is free from all matrimonial misconduct. It is argued that the present petitioner comes before this court with a decision given by COLERIDGE, J., that she has been guilty of adultery, that the police magistrate revoked the order for payment of maintenance because she had been found guilty of adultery, and that therefore, if her position is to be tested by whether she would be able to get a judicial separation, she, upon proof of the decision of the High Court, would fail, because it has been established against her that she is not of pure character, but has been guilty of adultery. Those two cases are cases in which adultery was considered simpliciter without any question of disability arising on the part of the other spouse to rely upon it by reason of his conduct conducing, and may be dealt with, to use a not inconvenient phrase, as cases of adultery simpliciter. I desire, however, to observe that in *Everett* v. *Everett & McCullum* (6) it is clear that the ground on which the court refused to act in favour of the petitioner was that when he came before the court he was compelled to admit that at the time the petition was launched and at the moment when the action of the court was invited he was still living in adultery. Those two cases appear to deal with the position and rights of persons in reference to a final decree. They do not deal with the position of persons who are applying for an interim order in the course of the conduct of the case pendente lite."

Then ([1927] P. at p. 177) LORD HANWORTH, M.R., said:

> " The learned President pointed out that the wife was a competent suitor. What may be the ultimate fate of her petition we do not know, but it cannot be said that her petition could be ordered to be withdrawn from the file on the ground that she was incapable of presenting it by reason of the fact that she has been guilty of adultery; and inasmuch as she may say against her husband that the adultery was due to his conduct conducing, he cannot rely upon it as definitely preventing her from taking proceedings."

SARGANT, L.J., said (ibid., at p. 179):

> " The argument is this, that if the suit had been one for judicial separation the wife would necessarily have been barred both from ultimate relief and from an interim order for alimony by the fact of her adultery, and that therefore that must be so even in this suit, which is a suit for divorce or nullity. It appears to me that that argument is quite ill founded, because the class of cases in which a wife may get relief by way of decree for dissolution or nullity is more extensive than the class of cases in which the wife may get a judicial separation. By the language of the sub-section in question the power to grant alimony is a general power in suits for divorce or nullity and not merely in suits for divorce or nullity of the same character as, or brought in circumstances similar to suits for judicial separation."

SARGANT, L.J., considered s. 190 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, and continued ([1927] P. at p. 180):

> "In the present case, as the learned President has said, the wife has a prima facie right to bring this suit. Her petition is a maintainable petition. It is not on the face of it bad. Although she may have committed adultery, nevertheless her conduct may be excused under the relevant sections of the Act, and she may therefore succeed in getting a divorce from her husband. That being so, there is no reason for saying that the power of the court under sub-s. (3) to grant interim alimony is limited or is negatived by the fact of her having committed adultery."

In *Bullock* v. *Bullock & Vargolici* (7) ([1942] 2 All E.R. 259) the wife had written a letter (ibid.),

> ". . . which left very little doubt to anyone who read that letter that she had certainly committed adultery . . ."

but then, at a later stage in the proceedings, she denied by affidavit that she had committed adultery. The question was whether, in that state of the case, an order for alimony pendente lite ought to be made. After saying (ibid., at p. 260):

> "There are certain other circumstances in this case which I think should be taken into account",

and referring to a suggestion that the parties were living apart "upon a kind of agreement", LANGTON, J., continued (ibid.):

> "I think that is a circumstance which has to be borne in mind . . . It should be remembered that, if the husband, for example, had been guilty of conduct conducing—I agree there is no such plea at present on the file, but if he had been—the fact that the woman had admitted adultery would have been no bar to her petition for alimony pendente lite. That, of course, is assuming that one acts upon the letter as being a credible document; but there is the other alternative that the letter is mere romance, that it has no substratum of truth at all, and that the affidavit is to be preferred . . . [In *Welton* v. *Welton* (1)] LORD MERRIVALE, P., thought that it was a fit case in which to award the wife alimony pendente lite because of the whole of the circumstances of the case; and he was upheld in his decision by the Court of Appeal . . . it is very clear authority for the proposition that the mere fact that the woman has admitted adultery, important as it may be, is not always a bar to an application of this class."

In *S.* (*orse. B.*) v. *S.* (8) ([1944] 1 All E.R. 439) it was held that an order for alimony pendente lite made in nullity proceedings in favour of a wife against whom a decree nisi is made on the ground of her wilful refusal to consummate the marriage does not cease to have effect when the decree nisi is pronounced, but continues until the marriage has been annulled by the decree absolute or until the order is discharged or varied by a further order of the court. That was altogether a different case, but there was some comparison of the position in the case of wilful refusal to consummate and in the case of adultery being proved against a wife in the bearing of such findings on the question of alimony, and BUCKNILL, J., said (ibid., at p. 440):

> "However, when a wife is found guilty of adultery without any extenuating circumstances, the practice is that alimony pendente lite automatically ceases unless the court otherwise orders. Such a practice was approved by the Court of Appeal in *Dunn* v. *Dunn* (9) ((1888) 13 P.D. 91). In that case COTTON, L.J., said, at p. 93: 'Until adultery has been proved against the wife she is entitled to support, and the court gives her alimony pendente lite. But when her adultery has been proved, though she is still a wife she has lost that right'."

He went on to quote from Lindley, L.J.'s judgment in the same case, where he cited Lord Penzance in *Wells* v. *Wells & Hudson* (10) ((1864) 3 Sw. & Tr. 542 at p. 545) as having admitted the principle that, where the wife is satisfactorily proved to have been guilty of adultery, alimony ceases.

That case deals with the position at the time of decree, and not the position in cases such as the present, where the matter comes before the court on an application for alimony pendente lite. I think it is quite plain from *Welton* v. *Welton* (1) that, so far as applications pendente lite are concerned, it is not right to say that, once there is adultery, the claim to alimony pendente lite necessarily and in every case and in all circumstances ceases.

We were referred to other cases which I do not find it necessary to discuss. The conclusion of the whole matter seems to me to be that, on an application for alimony pendente lite, the court should have before it and take into consideration all relevant matters. Amongst other relevant matters would be the conduct of the parties and in particular one most important matter would be any adultery shown to have been committed by the wife. As against that relevant matter there might be other relevant matters such as the presence on the file of a plea of conduct conducing or condonation, either in the pleadings themselves, or in affidavits on the interlocutory application. These are all relevant circumstances to be taken into account, and it seems to me wholly impossible for the court to lay down any hard and fast rule, whether it be called a rule of law or a rule of practice, to the effect that in all circumstances adultery by a wife bars her claim. I think that, inasmuch as the discretion of the court can be exercised in favour of a wife who has committed adultery, it may be that in some cases even adultery not claimed to have been condoned and not claimed to have been brought about by conduct conducing on the husband's part might yet, in appropriate circumstances, be held not to be a bar; for a wife in such a case, notwithstanding the adultery in respect of which she was seeking discretion, would be, as Lord Merrivale put it in *Welton* v. *Welton* (1), a competent suitor, and, if she is a competent suitor, it must not be judged against her at an interlocutory stage that she will necessarily fail in the proceedings.

Accordingly, in my view this appeal fails and should be dismissed.

HODSON, L.J.: I agree. The argument on behalf of the husband has really been based on the common law principle that the wife, having committed adultery, is not entitled to pledge her husband's credit for necessaries, and, therefore, it is argued that she ought not to be entitled to alimony pendente lite. That argument, to my mind, is fallacious. As was shown by the judgments of Lord Merrivale, P., and of the Court of Appeal in *Welton* v. *Welton* (1) ([1927] P. 162), the jurisdiction to grant alimony pendente lite depends on statutory provisions. The relevant statutory provision is s. 20 (1) of the Matrimonial Causes Act, 1950, in so far as proceedings for judicial separation are concerned. That enactment provides:

> "On any petition for judicial separation, the court may make such interim orders for the payment of alimony to the wife as the court thinks just."

The power of the court is entirely at large and is not limited in any way as to power by the fact that the wife has committed adultery.

I thought that this question had really for ever been laid at rest by the decision of this court in *Welton* v. *Welton* (1). Lord Merrivale at first instance seemed to me to explain the matter very fully when he said ([1927] P. at p. 169):

> "The decisive inquiry, in my view of the matter, is whether the wife, on the facts before the court, is a competent suitor for relief in a matrimonial cause. She undoubtedly is. Thereupon the jurisdiction of the court to order alimony pendente lite appears to me to arise. It is that jurisdiction which has been exercised in the registry. Conditions are easily conceivable

> in which, although this jurisdiction exists, no order could properly be made. A wife who has brought cohabitation to an end by admitted misconduct for which the husband was not to blame, or a wife who, in some independent situation, is seeking divorce, and cannot be granted relief except under the discretionary power of the court, may very likely not be a proper applicant for an allotment of alimony pendente lite. That will depend upon consideration of the relevant facts."

Pausing there for a moment, the relevant facts have not yet been fully considered in this case. LORD MERRIVALE no doubt had in mind, on the one hand, the extreme case of the wife who is petitioning for divorce and asking for discretion to be exercised in her favour while living with and being supported by her paramour. Such a wife would not expect to succeed in an application for alimony pendente lite. At the other end of the scale, the wife may have committed a single act of adultery and in due course the discretion of the court might be exercised in her favour and she might obtain a decree. At the end of the passage which I have been reading, LORD MERRIVALE said (ibid., at p. 170):

> "In dealing with these [i.e., the relevant facts] regard must be had not only to the decisions in cases like *Holt* v. *Holt* (2) ((1858) 28 L.J.P. & M. 12) and *Whitmore* v. *Whitmore* (3) ((1866) L.R. 1 P. & D. 96), but to the state of the existing law of divorce, under which the court has the responsibility of deciding, not only as to innocent wives but as to guilty wives, whether provision of some sort should be made for the wife by the husband."

I think it follows, therefore, that the guilty wife is not ipso facto disentitled to alimony pendente lite, any more than she is disentitled to apply for maintenance after divorce, because, after all, even if she succeeds in obtaining a decree of divorce in her favour in the discretion of the court, she is still a guilty wife. In my view, the authorities on this matter do not in any way limit the case of the guilty wife who is entitled to apply for alimony pendente lite to the guilty wife who can excuse her guilt by alleging condonation or connivance or conduct conducing. Nothing can be said to restrict the ambit of the statute, which is quite general in its terms.

In my judgment, therefore, this appeal must be dismissed.

Something has been said about the form of the order which the learned judge made, which might, on one reading of it, I should have thought, appear to limit the jurisdiction of the registrar in considering the quantum of alimony; but I think that the order ought not to be so read, and that when the matter goes before the registrar for consideration as to the amount, if any, which the husband is to pay to the wife, he is not to be precluded from considering the conduct of the wife in addition to the means of the parties. I do not think, therefore, that the judge must be taken to have assessed the conduct of the wife as disclosed in the affidavits which were used before him as conclusive one way or the other as showing whether or not the amount of alimony ought to be influenced by what is apparently here the admitted fact that the wife has committed adultery.

JENKINS, L.J.: I agree with what has fallen from HODSON, L.J., as to the form of the order in this case, which should remain undisturbed, and the result will be that the appeal be dismissed.

Appeal dismissed.

Solicitors: *Rowe & Maw* (for the husband); *Glover & Co.* (for the wife).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

A

Re A SOLICITOR'S CLERK.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Donovan, JJ.), April 19, 20, 24, 1956.]

Solicitor's Clerk—Disciplinary jurisdiction over unadmitted clerk—Exclusion of clerk from employment without consent—Clerk party to filing of misleading B *affidavit—Solicitors Act*, 1941 (4 & 5 *Geo.* 6 *c.* 46), *s.* 16 (1) (*b*).

In the course of litigation a solicitor's clerk (who had not been admitted as a solicitor) filed an affidavit on behalf of the client which he, the clerk, knew to be misleading. At the time the clerk's principal was away from his office. Application was made to the disciplinary committee of the Law Society to strike the solicitor off the roll on the ground that he had been C guilty of conduct unbefitting a solicitor in that he (i) caused or permitted to be filed in the High Court of Justice an affidavit which he knew or ought to have known was false, or alternatively misleading, in a material respect; (ii) failed adequately to supervise his clerk. The disciplinary committee found that the allegations against the solicitor had not been substantiated because he did not know about the content of the affidavit, but held that the D solicitor was not altogether free from blame, as he was in the circumstances under a duty to exercise special care but had been absent at the time. The disciplinary committee ordered the solicitor to pay the costs of the application against him. An application was made by the Law Society for an order under the Solicitors Act, 1941, s. 16 (1)*, that the clerk be excluded from employment by a solicitor except with the consent of the E Law Society. On the question whether there was jurisdiction to make an order against the clerk when there was no finding of misconduct against the principal,

Held: the clerk had been party to an act or default, viz., the filing of the misleading affidavit, for which the solicitor, as solicitor on the record, must be regarded as responsible to third parties, and accordingly the proceedings F were maintainable under s. 16 (1) (b) against the clerk, notwithstanding that the complaint against the solicitor had failed.

Per CURIAM: failure by a principal to exercise supervision over a clerk is failure on the part of the principal alone (see p. 244, letter I, post).

Appeal dismissed.

[**Editorial Note.** This is believed to be the first case in which an order G against an unadmitted clerk under s. 16 of the Solicitors Act, 1941, has come before the court (see p. 243, letter F, post). As regards the liability of a solicitor to be ordered to pay costs although not guilty of professional misconduct, the present case may be compared with *Myers* v. *Elman*, [1939] 4 All E.R. 484.

For the Solicitors Act, 1941, s. 16 (1), see 24 HALSBURY'S STATUTES (2nd H Edn.) 103.]

Appeal.

This was an appeal by a solicitor's clerk against an order of the disciplinary committee of the Law Society constituted under the Solicitors Act, 1932, s. 4, as amended by the Solicitors (Disciplinary Committee) Act, 1939, s. 1, dated Jan. 27, 1956, whereby it was ordered that as from that date no solicitor should I in connection with his practice as a solicitor take or retain the clerk into or in his employment or remunerate the clerk without the written permission of the Law Society, and that the clerk should pay the costs of the proceedings. On Apr. 20, 1956, the Divisional Court dismissed the appeal but stated that they would put the reasons for their judgment in writing. The facts appear in the judgment.

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* The terms of the sub-section, so far as relevant, are printed at p. 243, letter H, post.

Neil Lawson, Q.C., and *J. G. Wilmers* for the solicitor's clerk, the appellant.
J. R. Cumming-Bruce for the Law Society, the respondent.

Apr. 24. **LORD GODDARD, C.J.**, read the judgment of the court: On Apr. 26, 1955, a complaint was preferred on behalf of the Law Society against a solicitor alleging that he had been guilty of professional misconduct in that he had (i) caused or permitted to be filed in the High Court of Justice an affidavit which he knew or ought to have known was false, or alternatively misleading, in a material respect, and (ii) failed adequately to supervise his clerk, S.C., the appellant in the proceedings now before this court. An inquiry was duly held by the disciplinary committee of the Law Society. The committee found that a false and misleading affidavit had been filed and used in a proceeding in which the solicitor was acting for the party on whose behalf the affidavit was prepared and filed. They also found that the solicitor did not know, and, in fact, could not have known of the contents of the affidavit. Nevertheless, by reason of the circumstances set out in their report they considered he was not altogether blameless* in that he should have exercised special care in the particular case, because there was a possibility of a conflict of interest between the client and the solicitor's clerk. He was the person who was concerned with the drafting of the affidavit, and he obtained the client's oath to it and filed it. The clerk had certain financial dealings with the client which it is unnecessary to set out, and as managing clerk to the solicitor he was undertaking the conduct of the proceedings and at the most material times the solicitor was away from his office. In the course of the inquiry before the committee facts appeared relating to the preparation of this affidavit which in the opinion of the professional conduct committee, a body which in these matters acts on behalf of the Law Society, justified them in making an application to the disciplinary committee for an order under s. 16 (1) of the Solicitors Act, 1941, that no solicitor should employ the clerk, without the written permission of the society. The disciplinary committee held an inquiry at which the clerk was represented, and on Jan. 27 this year made an order in those terms to take effect from that day and ordered him to pay the costs. It is against this order that the clerk appeals. At the close of the argument we announced that the appeal was dismissed, but as we believe this to be the first case in which an order against an unadmitted clerk under s. 16 of the Act of 1941 has come before this court on appeal, and as we are upholding the order on somewhat different grounds from those given by the committee in their report, we thought it desirable that we should put the reasons for our judgment in writing.

The material part of the sub-section is as follows:

> " . . . (b) where it appears to the society—(i) in the course or as a result of any proceedings before the disciplinary committee under the disciplinary enactments, or (ii) in the exercise of their powers under rules made under the Solicitors Act, 1933, or this Act, that a person, who is or was a clerk to a solicitor but is not himself a solicitor, has been a party to any act or default of such solicitor, in respect of which an application or complaint has been or might be made against such solicitor to the disciplinary committee under any enactment, an application may be made by or on behalf of the society to the disciplinary committee that an order be made directing that as from a date to be specified in such order, no solicitor shall in connection with his practice as a solicitor take or retain the said person into or in his employment or remunerate the said person without the written permission of the society . . ."

The main and indeed the whole objection which was made on the part of the clerk was that no order could be made against him since he could not be a party to an act or default of the solicitor as the committee had found the case not proved against the solicitor.

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* The committee ordered the solicitor to pay the costs of the proceedings.

In order to invoke these proceedings it must first appear to the society that a clerk, who is not himself a solicitor, has been a party to an act or default of a solicitor, and that such act or default is one in respect of which an application or complaint could be made against the solicitor. That no doubt means that there must be reasonable grounds for the society to take action under the sub-section. As it was admitted that the affidavit was at least misleading and that the clerk took part in its preparation and filed it, it was obvious that there were reasonable grounds for the society taking action and indeed the committee found that there was a prima facie case calling for an answer so we need not deal further with this point. Then it must be remembered that an application or complaint to the disciplinary committee by a person who is alleging an act or default must be made against a solicitor. It is only the society who can complain of the conduct of a clerk and the conduct of which the society can complain must appear in the course or as a result of proceedings before the committee against a solicitor. Accordingly we have to see whether there was a complaint with regard to an act or default on the part of the solicitor. The act complained of was the preparation and filing of this affidavit and that must be regarded as the act of the solicitor who was the solicitor on the record. It is not disputed that for any consequences which might result and cause damage to any person the solicitor would be responsible, for he was the solicitor on the record and it matters not whether he prepared and filed the affidavit personally or by the hand of his clerk. The committee find, and it is not disputed, that the clerk was a party to the preparation and filing and indeed he was the actual person who prepared and filed the affidavit and he knew that it was misleading. The solicitor escaped punishment because he neither knew nor was in a position to know the misleading character of the affidavit, and, therefore, it would not be right to make him, what may be called for this purpose, criminally liable for what was done. The sub-section does not require that the solicitor himself should be found guilty or punished before the clerk can be dealt with by the committee. He has been a party to the act. Had the solicitor known of the misleading character of the affidavit he would have been dealt with by the committee, and it is not disputed that in such a case the clerk could also be dealt with by them. It would be a strange result if because the solicitor shows that he had no knowledge of what his clerk did, that the clerk could escape the consequences of his misconduct. It would mean that a clerk who was able to conceal his misconduct from his master could escape any punishment by the disciplinary committee. As soon as it is discovered that a false affidavit has been filed in an action or proceeding, it is clear that an application can be made against the solicitor who is responsible as the solicitor on the record for the filing of the affidavit. He may be able, as in the present case, to show that he did not know that the affidavit was false. The clerk was clearly a party to the act for which the solicitor would have to accept civil liability if any resulted. In our opinion, therefore, there is no doubt that the society, who had learned of the clerk's action in the course of the inquiry against the solicitor, could take the proceedings authorised by the sub-section.

It appears from their report that the committee considered that as they had found that the solicitor could not be held blameless that was an act or default on his part to which the clerk was a party. We understand by that that the committee found that the clerk was a party to the offence alleged against the solicitor, viz., that he failed adequately to supervise the clerk, but we find it difficult to see how the clerk can be a party to the failure of his principal to exercise proper supervision over him. Failure by a principal to exercise supervision over a clerk is a failure on the part of the principal only, and the solicitor was acquitted of that charge. The result of the failure was that the clerk was able to do certain

A acts without the knowledge of his employer. The doing of the acts was the offence for which in our opinion the clerk was liable to be dealt with by the disciplinary committee. Accordingly, we uphold the order of the committee though it may be on different grounds from those which we understand the committee gave, but it is quite clear that the committee found that the clerk caused an affidavit to be filed which he knew was false or misleading. We B therefore uphold the order of the committee and dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Paisner & Co.* (for the solicitor's clerk, the appellant); *Hempsons* (for the Law Society, the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

C

R. *v.* SPARKES.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Cassels, Lynskey, Donovan and Havers, JJ.), April 12, 23, 1956.]

D *Criminal Law—Appeal—Reference by Home Secretary—Consideration of fresh evidence—Criminal Appeal Act,* 1907 (7 *Edw.* 7 *c.* 23), *s.* 19 (*a*)—*Criminal Appeal Rules,* 1908 (*S.R. & O.* 1908 *No.* 227), *r.* 48.

In 1952 the appellant was convicted on two counts, one of conspiracy between March and November, 1950, to break and enter a dwelling-house and steal, and the other of housebreaking and larceny on Nov. 4, 1950. He appealed against conviction and his appeal was dismissed in July, 1952. E Under s. 19 (a)* of the Criminal Appeal Act, 1907, the Home Secretary referred to the court a petition by the appellant, dated Aug. 27, 1955, alleging that he had been wrongly convicted. The principal prosecution witness, one M., who gave evidence at the appellant's trial, had been an accomplice. The appellant claimed that his passport, which he adduced in support of his petition, showed that he had been out of the country between F July 13 and Oct. 19, 1950, and that if his passport had been produced at his trial the jury might well have doubted the reliability of M.'s evidence, since M. had stated that the appellant had met him at a time when the appellant, as the entries in his passport showed, was out of the country. M.'s evidence at the trial had included not only evidence of meetings with the appellant at times thought by the witness to be in September or early October, 1950, G but also a statement of a meeting six days before Nov. 4, 1950, between one B., the appellant and M. at which arrangements for the theft had been made. The appellant's explanation why he did not give evidence at his trial that he was out of the country between dates in July and October, 1950, and why he did not then produce his passport, which was available, was that he forgot. The Crown objected to the appellant's passport being received now by the H court in evidence on the ground that the practice (the position of the petitioner on the reference being that of an appellant on an appeal†) was for the court not to receive fresh evidence unless it were shown that the evidence could not have been produced at the trial or that some point, which could not have been foreseen and on which the evidence would have been material, arose at the trial.

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* Section 19, so far as is relevant, provides: "Nothing in this Act shall affect the prerogative of mercy, but the Secretary of State on the consideration of any petition for the exercise of His Majesty's mercy, having reference to the conviction of a person I on indictment or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit, at any time either—(a) refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted . . . "

† The Criminal Appeal Rules, 1908, r. 48, provides:—"When the Secretary of State exercises his powers under s. 19 (a) of the [Criminal Appeal Act, 1907,] and refers the whole case to the [Court of Criminal Appeal], the petitioner whose case is so dealt with shall be deemed to be for all the purposes of the Act or these Rules a person who has obtained from the [Court of Criminal Appeal] leave to appeal, and the [Court of Criminal Appeal] may proceed to deal with his case accordingly."

Held: the court would not, on such a reference, hold itself bound by the rule of practice not to receive evidence available at the trial except in the special circumstances indicated above, if there were reason to think that to do so might lead to injustice or the appearance of injustice; each case must be decided on its merits and in the circumstances of the present case the court would look at the schedule of entries in the appellant's passport concerning his absences from the United Kingdom.

R. v. *McGrath* ([1949] 2 All E.R. 495), considered.

[As to references to the court by the Secretary of State, see 10 HALSBURY'S LAWS (3rd Edn.) 523, para. 962.

For the Criminal Appeal Act, 1907, s. 19 (a), see 5 HALSBURY'S STATUTES (2nd Edn.) 938.

For the Criminal Appeal Rules, 1908, see 6 HALSBURY'S STATUTORY INSTRUMENTS 63, 64.]

Cases referred to:

(1) *R.* v. *McGrath*, [1949] 2 All E.R. 495; 2nd Digest Supp.

(2) *R.* v. *Collins*, (1950), 34 Cr. App. Rep. 146; 2nd Digest Supp.

Reference.

This was a reference by the Home Secretary to the Court of Criminal Appeal under s. 19 (a) of the Criminal Appeal Act, 1907*, and the Criminal Appeal Rules, 1908 (S.R. & O. 1908 No. 227), r. 48†.

The appellant, Victor George Sparkes, was convicted at Surrey Quarter Sessions on Apr. 25, 1952, together with one Albert Charles Burley on an indictment containing two counts. The first count charged them with conspiring between March and November, 1950, with one McLeod and other persons unknown, to break and enter the dwelling-house of the Duke and Duchess of Sutherland and steal their jewellery. The second count charged them with breaking and entering that dwelling-house on Nov. 4, 1950, and stealing jewellery. The appellant and Burley pleaded not guilty but were convicted on both charges. Both prisoners appealed against conviction to the Court of Criminal Appeal and their appeals were heard and dismissed on July 21, 1952. The prisoner Burley died in prison. The appellant served his sentence. By petition dated Aug. 27, 1955, the appellant, shortly before his release, petitioned the Home Secretary, alleging that the appellant had been wrongly convicted solely on the evidence of one Donald McLeod and requesting a new trial. The appellant supported this petition by producing his passport, which contained entries showing that he was out of the United Kingdom between July 13, 1950, and Oct. 19, 1950, and preferred his request on the ground, among other grounds, that this absence showed that certain evidence given against him at his trial could not be true. The evidence was that of McLeod. McLeod had begun employment as butler to the Duke of Sutherland in March, 1950, and had still been his butler at the time of the robbery. The appellant had also been in the Duke's service in 1950 and earlier, as a chauffeur-valet, but had left in April, 1950. In February, 1952, McLeod made a full confession to the effect that he, the appellant and Burley, had planned the crime. He testified that at one of his meetings with the appellant after the latter had left the Duke's employ, he (McLeod) was asked by the appellant and by Burley to assist in the robbery by giving information about the house and the Duchess's movements. He described how, subsequently about a week before the robbery, he had been told by the

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* See first footnote p. 245, ante.

† See second footnote p. 245, ante.

A appellant and Burley that it was to take place on the following Saturday evening and that he had told them which room the Duchess would be using and where in the room the jewels would be, and that he had agreed to unfasten the latch of the window and subsequently did so. At the trial the jury, after being warned of the risks involved in acting on the evidence of an accomplice, accepted McLeod's confession as true and convicted the appellant and Burley. In evidence B McLeod had stated that the suggestion for the crime was made to him by the appellant at a date which he described as follows " I think it was in September [1950], if I remember rightly "; and he had also testified that the appellant had visited him at a time which he thought " would be either the latter part of September or the beginning of October." The Court of Criminal Appeal, for the purposes of this reference, assumed, on the basis of the entries in the appel- C lant's passport, that he was out of the United Kingdom between July 13, 1950, and Oct. 19, 1950. The evidence given by McLeod at the trial also included a statement about the meeting at which arrangements for the robbery were made. The date of the crime, Nov. 4, 1950, was a Saturday and this meeting was alleged by McLeod to have taken place on the previous Sunday. At the appellant's trial the appellant did not aver that he had been abroad from a date in July to a D date in October, 1950, and he did not adduce in evidence his passport which, although in the hands of the police, was available for production in evidence at the trial.

Sebag Shaw for the appellant.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), and *J. C. Phipps* for the Crown.

E

Cur. adv. vult.

Apr. 23. **DONOVAN, J.**, read the judgment of the court in which, after stating the facts and reviewing material parts of the evidence of McLeod, and pointing out that the dates of the appellant's absence from the United Kingdom were not such as to have rendered it impossible for him to have committed the F crime, and that there was nothing in McLeod's statement concerning the meeting* on the Sunday before Nov. 4, 1950, which could be criticised as faulty recollection on his part, continued:] Even, therefore, had the jury concluded that McLeod had been mistaken in his somewhat tentative recollection of earlier dates, they might well have concluded (and we think probably would) that he was telling the truth when he gave this detailed and circumstantial account of the meeting G and of other events very shortly before the robbery—a meeting which the appellant did not deny, though he put the date of it a week earlier. In the face of this evidence it is impossible to say that if McLeod had been shown to be wrong in his reference to meetings in September, the jury would or might well have acquitted the appellant.

One obvious question is why the appellant did not produce his passport at H the trial. It was in the hands of the police but was nevertheless available to him at the hearing had he called for it. He could also have given evidence himself that he was abroad during the summer of 1950. He did not do so, and his explanation is that he forgot. It is impossible to believe this. He had been abroad for substantial periods in 1947, 1949, 1950 and 1951, if his passport accurately records his movements. Questions were put to McLeod by the I appellant's own counsel to the effect that the appellant was abroad from June to August, 1951, and this information presumably came from the appellant. Could he in all the circumstances have forgotten that he was abroad during 1950 as well, when this was apparently the regular pattern of his life at that time ? One possible reason for the appellant's reticence at the trial is that he realised it would not really help him to allege and establish that he was abroad from July until Oct. 19, for this would not get rid of the damning evidence which McLeod could and did give about what happened at the meeting of the appellant with McLeod and Burley later in October. The court need not, however, speculate on the matter; it is enough to say that the appellant has given no acceptable reason why at the trial he did not mention his absence abroad from July 13, 1950, to Oct. 19, 1950, but remained silent about it.

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* This was the meeting at which arrangements for the robbery were said to have been made, see p. 246, letter I, and, supra, letters A and C.

That circumstance led the Attorney-General to object to the court receiving the appellant's passport in evidence. He relied on the well-established rule of practice that the court will not receive fresh evidence unless it is shown that the evidence could not have been produced at the trial, or that some point which could not have been foreseen arose at the trial on which the evidence would have been material. The present is admittedly not such a case; and the Attorney-General argued that since the reference from the Home Secretary is to be treated in all respects as an appeal, the rule of practice precluded the reception of fresh evidence in the shape of the passport. In *R.* v. *McGrath* (1) ([1949] 2 All E.R. 495) the court indicated that different considerations arise where a case is referred to it by the Home Secretary under s. 19 (a) of the Criminal Appeal Act, 1907; and in the circumstances of that case admitted fresh evidence. A similar course was followed in *R.* v. *Collins* (2) ((1950) 34 Cr. App. Rep. 146). No general rule applicable to all such cases is to be deduced from these precedents. On the one hand it might well be undesirable to stultify such a reference at the outset by a refusal to receive evidence which was available at the trial. On the other hand it is clearly undesirable to encourage astute criminals dishonestly to by-pass the court after conviction in the hope that fresh evidence, genuine or otherwise, might be got before the court as the result of a petition to the Home Secretary, and a reference of the matter by him to the court. Each case must, therefore, be decided on its merits, though the court will not treat itself as bound by the rule of practice if there is reason to think that to do so might lead to injustice or the appearance of injustice. In the present case the court thought it better to look at the agreed schedule of entries in the appellant's passport, lest the impression might arise that a review of his case had been refused for a reason which was merely procedural.

Appeal constituted by the reference dismissed.

Solicitors: *Irwin Shaw* (for the appellant); *Director of Public Prosecutions.*

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

PRACTICE NOTE.

Lunacy—Jurisdiction.

In para. 101 of its Second Interim Report, the Committee on Supreme Court Practice and Procedure recommended that the jurisdiction in lunacy should be transferred from the Master of the Rolls and the lords justices of appeal to the judges of the Chancery Division. This has now been done by warrant under the sign manual dated Apr. 10, 1956.

Lord Chancellor's Office
April 19, 1956.

A

PIPER *v.* MUGGLETON.

[COURT OF APPEAL (Jenkins and Hodson, L.JJ., and Lloyd-Jacob, J.), April 11, 24, 1956.]

Landlord and Tenant—New tenancy—Business premises—Parties to application B *for new tenancy—"Landlord"—Whether landlord ceased to be such on becoming a statutory tenant—Whether proceedings thereafter properly constituted without joining superior landlords—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 44 (1).

M. was the weekly contractual tenant of premises consisting of a shop and living accommodation behind and above it. He used the living accommo- C dation as his dwelling-house and part of the shop for the purposes of his own business. The other part of the shop, consisting of an area bounded by and including one of the two shop windows and a counter running from the window to a point four feet from the back wall and connected with the back wall by a low barrier and wicket gate, was in the exclusive occupation of P. for the purposes of her business. P. paid 7s. 6d. weekly, was given a rent D book and throughout was treated as a tenant. M. gave P. notice under s. 25 (1) of the Landlord and Tenant Act, 1954, to terminate her tenancy. The notice stated that he would oppose an application to the court for the grant of a new tenancy to her on the ground that he intended to occupy the whole shop for the purpose of his own business. On Dec. 14, 1955, P. applied to the county court for the grant of a new tenancy. Notice of the E application was given to the superior landlords, but they were not joined as respondents, and did not appear in the proceedings. On Jan. 21, 1956, the superior landlords gave him notice to quit expiring on Jan. 30, 1956. Thereafter M. continued in occupation as statutory tenant. On Feb. 3, 1956, P.'s application was heard and on Feb. 10, 1956, it was dismissed. The court found that P. had been tenant of M. on a weekly tenancy. On F appeal,

Held: although M. and P. had been landlord and tenant for the purposes of Part 2 of the Landlord and Tenant Act, 1954, when the application for the new tenancy was made, yet M. ceased to be a landlord within s. 44 of the Act* when he became a statutory tenant, as he did not then own an interest in the premises; thereafter the proceedings were not properly constituted G and, accordingly, the case would be remitted to the county court for a re-hearing after P. had joined the superior landlords as respondents to her application for a new tenancy.

X. L. Fisheries, Ltd. v. ***Leeds Corpn.*** ([1955] 2 All E.R. 875) applied.

[**Editorial Note.** In the present case P.'s tenancy was within Part 2 of the Landlord and Tenant Act, 1954, at the inception of the proceedings for a new H tenancy, and M.'s statutory tenancy began while the proceedings were pending. A tenancy where the property comprised therein is let under a letting to which restrictions on the landlord's obtaining possession apply by virtue of s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, as distinct from a tenancy of premises used wholly for business purposes (to which the Rent Restrictions Acts do not apply), is outside Part 2 of the Landlord and I Tenant Act, 1954 (see ibid., s. 43 (1) (c)).

For the Landlord and Tenant Act, 1954, s. 44, see 34 HALSBURY'S STATUTES (2nd Edn.) 427.]

Cases referred to:

(1) *Gidden* v. *Mills*, [1925] 2 K.B. 713; 95 L.J.K.B. 1; 134 L.T. 21; 31 Digest (Repl.) 649, *7530*.

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* The relevant terms of s. 44 of the Landlord and Tenant Act, 1954, are printed at p. 252, letters B to D, post.

(2) *Gee* v. *Hazleton*, [1932] 1 K.B. 179; 100 L.J.K.B. 644; 145 L.T. 545; 95 J.P. 176; 31 Digest (Repl.) 639, *7470*. A

(3) *X. L. Fisheries, Ltd.* v. *Leeds Corpn.*, [1955] 2 All E.R. 875; [1955] 2 Q.B. 636.

Appeal.

This was an appeal by one Helen Piper against an order of His Honour JUDGE NORRIS in the Wolverhampton County Court, made on Feb. 10, 1956, dismissing B her application for a new tenancy of the premises known as part of 94, Common Road, Wombourn, on the ground that her landlord intended to occupy the premises for his own business.

R. G. Greene and *N. C. H. Browne-Wilkinson* for the appellant.

J. G. S. Hobson for the respondent. C

Cur. adv. vult.

Apr. 24. **JENKINS, L.J.**, read the judgment of the court: In this case the appellant, Miss Helen Piper, applied to the Wolverhampton County Court under s. 24 (1) of the Landlord and Tenant Act, 1954, for a new tenancy of premises comprising a part of the shop on the ground floor of 94, Common Road, Wombourn, Staffordshire, joining as respondent to her application Mr. Bert D Muggleton, the respondent in the present appeal, who occupies the remainder of 94, Common Road, including the part of the shop not occupied by Miss Piper. No. 94 comprises in addition to the shop already mentioned living accommodation behind and above it. Mr. Muggleton occupies his part of the premises as his dwelling-house, using his part of the shop for the purposes of his business as a plumber, while Miss Piper occupies her part of the shop for the purposes of her E business as a dealer in fancy goods and the like. At the date of Miss Piper's application (Dec. 14, 1955), Mr. Muggleton was a contractual weekly tenant of the entirety of No. 94, his immediate landlords being a Mr. and Mrs. Brookes, and Miss Piper was paying Mr. Muggleton the weekly sum of 7s. 6d. in respect of the part of the shop occupied by her. On the footing that Miss Piper's occupation of her part of the shop was that of a tenant and not merely that of a licensee (a F point which has been the subject of some controversy) it seems reasonably plain that as matters then stood Miss Piper's tenancy of her part of the shop was a tenancy to which Part 2 of the Act of 1954 applied (see s. 23), and that Mr. Muggleton was in relation to that tenancy " the landlord " within the meaning of Part 2 of the Act. Miss Piper's application had been preceded by a notice to her from Mr. Muggleton to terminate her tenancy of her part of the shop pursuant G to s. 25 of the Act, to which she had duly replied pursuant to the same section notifying Mr. Muggleton that she would not be willing to give up the property comprised in her tenancy at the date of termination. At this stage, therefore, it would seem that (always assuming that she did have a tenancy of her part of the shop) Miss Piper's application joining Mr. Muggleton as respondent was a properly constituted proceeding under the Act. H

In due course Mr. Muggleton lodged an answer dated Jan. 5, 1956, opposing the grant of a new tenancy on the ground, which had been duly stated in his notice under s. 25, that on the termination of the current tenancy he intended to occupy the premises for the purposes of a business to be carried on by him in them, this being ground (g) of the grounds of objection permitted by s. 30 (1) of the Act. It is not, we think, seriously disputed that if the hearing had taken I place at this point of time, Mr. Muggleton, being " the landlord " in relation to Miss Piper's tenancy, if such it was, and not being subject to the disqualification imposed by s. 30 (2), could have made good this ground of objection, thereby defeating her claim to a new tenancy (see s. 31 (1)). But the hearing did not take place until Feb. 3, 1956, and in the meantime (viz., on Jan. 21, 1956) Mr. and Mrs. Brookes gave Mr. Muggleton notice to quit No. 94 expiring on Jan. 30, 1956. There is no dispute as to the validity of that notice, and the result of it was that, inasmuch as No. 94 was admittedly a dwelling-house to which the Rent Acts applied, Mr. Muggleton had by the date of the hearing become a mere statutory tenant, his statutory tenancy extending either to the whole of the premises or to the premises other than the part of the shop occupied by Miss Piper. The change thus brought about in the status of Mr. Muggleton meant that on the former view of the extent of his statutory tenancy Mr. Muggleton at the date of the hearing could only be " the landlord " for the purposes of Part 2 of the Act if a mere statutory tenant is capable of being " the landlord " for those purposes; while on the latter view of the extent of his statutory tenancy it seems plain that Mr. Muggleton at the date of the hearing could not be " the landlord " for those purposes, since he could not claim even Rent Act protection in respect of the relevant part of the premises, i.e., the part of the shop occupied by Miss Piper. We were told by counsel that Mr. and Mrs. Brookes were duly served with notice of the application; but, as appears from the learned county court judge's note, they did not attend, and were not represented, at the hearing.

The learned judge, with some reluctance, found himself constrained to hold that Miss Piper had a tenancy of her part of the shop, and not a mere licence to occupy it. In the circumstances, we do not see how he could well have held otherwise. We think the part of the shop of which Miss Piper had exclusive possession was sufficiently defined to make it in law a possible subject of a tenancy. As we understand the plan with which we have been supplied, it consisted of an area bounded by and including one of the two shop windows and a counter running from the window to a point four feet or so from the back wall, and connected with the back wall by a low barrier and wicket gate. The whole space between the counter and barrier and the side wall of the shop behind them was in the exclusive occupation of Miss Piper. We do not think the possibility of a tenancy is negatived by the circumstance that the area between Miss Piper's part and the counter standing on Mr. Muggleton's part was used in common by themselves and their respective customers as a means of access, and served also as a way through to Mr. Muggleton's living room at the back of the shop, nor do we think that a tenancy is necessarily negatived by the circumstance that Mr. Muggleton kept the key of the door leading into the shop from the street. As the learned judge observed, Miss Piper was given a rent book and treated as a tenant. One may amplify that by saying that throughout the correspondence leading to the present proceedings Mr. Muggleton's solicitors consistently asserted that Miss Piper was his tenant, and that it was only on the footing that she was his tenant that he could give her the notice of termination under s. 25 of the Act to which we have already referred. From that notice the subsequent proceedings under the Act resulted, and those proceedings would, of course, have been a mere nullity if in truth Miss Piper was not a tenant at all. In these circumstances we think the learned judge was right in concluding that Miss Piper must be regarded as a tenant and not as a mere licensee.

Dealing with the matter on that footing, the learned judge nevertheless dismissed Miss Piper's application for a new tenancy, and he did so apparently on the grounds (i) that Mr. Muggleton was at the date of the hearing a statutory tenant of the whole of the premises including Miss Piper's part of the shop; (ii) that by virtue of such statutory tenancy he was " the landlord " within the meaning of s. 44 of the Act; and (iii) that he had established his ground of objection under s. 30 (1) (g) of the Act, that is to say that he intended to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein. From such dismissal Miss Piper now appeals to this court, and we think it can at all events be said in her favour that if the learned judge was right in dismissing her application, the grounds on which he did so were wrong. As we have said, we think that at the outset of the proceedings Mr. Muggleton was "the landlord" within the meaning of s. 44, but when he ceased to be a contractual, and became a statutory tenant, which change of status had taken place before the hearing, we think he ceased to be " the landlord ", whether or not his statutory tenancy extended to Miss Piper's part of the shop. It is axiomatic that a so-called " statutory tenant " has no interest in the premises, but merely a personal right to be allowed to remain in occupation of them. We think it follows that a statutory tenant cannot be " the landlord " within the meaning of s. 44. In that section " the landlord " for the purposes of Part 2 of the Act is thus defined:

> " (1) Subject to the next following sub-section, in this Part of this Act the expression ' the landlord ', in relation to a tenancy (in this section referred to as ' the relevant tenancy '), means the person (whether or not he is the immediate landlord) who is the owner of that interest in the property comprised in the relevant tenancy which for the time being fulfils the following conditions, that is to say—(a) that it is an interest in reversion expectant (whether immediately or not) on the termination of the relevant tenancy, and (b) that it is either the fee simple or a tenancy which will not come to an end within fourteen months or less by effluxion of time or by virtue of a notice to quit already given by the landlord, and is not itself in reversion expectant (whether immediately or not) on an interest which fulfils those conditions.
>
> " (2) References in this Part of this Act to a notice to quit given by the landlord are references to a notice to quit given by the immediate landlord."

A statutory tenant cannot, in our view, bring himself within this definition, because he is not the owner of any interest in the property. Moreover, if Miss Piper must be held to be a tenant of her part of the shop, as, agreeing in this respect with the learned judge, we think she must be, then inasmuch as her part of the shop is used wholly for business purposes it would seem to follow that Mr. Muggleton cannot claim in relation to that part of the premises even the personal right of continuance in possession conferred on a so-called statutory tenant (see *Gidden* v. *Mills* (1), [1925] 2 K.B. 713). It would, moreover, appear that the position might well be the same if Miss Piper's interest were to be regarded as that of a licensee with an exclusive right to possession of her part of the shop (see *Gee* v. *Hazleton* (2), [1932] 1 K.B. 179). We prefer, however, to base ourselves on the more general ground that for the reason already stated a so-called " statutory tenant " cannot be " the landlord " within the meaning of s. 44.

Counsel for Mr. Muggleton urged on us what we may describe as the principle of " once the landlord always the landlord ". Counsel submitted that, as Mr. Muggleton was " the landlord " at the respective dates of his notice to terminate under s. 25, Miss Piper's counter-notice of unwillingness to give up possession, her application to the court, and his answer to that application, he remained " the landlord " at the date of and for the purposes of the hearing, even though he had in fact by that time ceased to be such. On this view, once the person then answering the description of " the landlord " has given the tenant notice to terminate under s. 25, or at latest once such a person has put in an answer to the tenant's application for a new tenancy, he continues to be " the landlord " for the purposes of proceedings under Part 2 of the Act even though he may before the hearing have died or become bankrupt or assigned his interest or suffered ejectment. We cannot accept this. We think it is necessary that at every stage of the proceedings down to final judgment the person claiming to be or joined as being " the landlord " should in fact answer that description according to the statutory definition. If at any stage there is a change of interest by virtue of which one person ceases to be and another becomes " the landlord " then we think that other person becomes " the landlord " for the purposes of all further steps. We are fortified in this view not only by the untoward results which would otherwise ensue, but also by the use of the words " for the time being " in s. 44 (1); and we think it is, if anything, supported by the reasoning in the judgment of Sir Raymond Evershed, M.R., in *X. L. Fisheries*

Ltd. v. *Leeds Corpn.* (3) ([1955] 2 All E.R. 875). The incoming "landlord" must, we think, be bound by the acts or omissions of his predecessor while answering that description (see the remark of Parker, L.J., in *X.L. Fisheries, Ltd.* v. *Leeds Corpn.* (3) cited at [1955] 2 Q.B. at p. 640), and that may well preclude any effective opposition on his part, save as regards the terms of the new tenancy. Nevertheless, it seems to us reasonably plain from the Act and rules that "the landlord" in the sense we have indicated is a necessary respondent to the tenant's application for a new tenancy, and that if the person joined as "the landlord" ceases to be such before the hearing then the proceedings cease to be properly constituted.

Counsel for Miss Piper argued that Mr. Muggleton on becoming a mere statutory tenant ceased to be "the landlord" as defined by s. 44 (1) and, therefore, had no locus standi to object to the grant of a new tenancy under s. 30 (1) (g). So far we think he was right. But he went on to submit that even so the proceedings were properly constituted, inasmuch as Mr. and Mrs. Brookes had been duly served with notice of the proceedings, though they elected not to appear or be represented, and consequently that an order for the grant of a new tenancy to Miss Piper ought to have been made, as it were, by default. We cannot agree. The proceedings were essentially proceedings between the tenant as applicant and the landlord as respondent, and once the respondent ceased to be "the landlord" then pending the substitution or addition of his successor or successors as respondent or respondents there was no properly constituted proceeding in which Mr. and Mrs. Brookes could intervene. They may well have thought that by giving notice to quit to Mr. Muggleton they had effectively defeated Miss Piper's application as against Mr. Muggleton, or, to put it the other way round, Mr. Muggleton's locus standi as respondent to Miss Piper's application, and that to make the proceedings effective they must be added or substituted as respondents. It seems to us that Mr. and Mrs. Brookes would have been right in so thinking as, so far as the information before us goes, it would seem that they became "the landlords" on the reduction of Mr. Muggleton's status to that of statutory tenant.

In the result, we do not see how we can well accede to Miss Piper's claim that we should substitute for the learned judge's order dismissing her application an order for the grant of a new tenancy. On the other hand, if we dismiss the appeal we can, in our view, only do so on the ground that Miss Piper's proceeding was at the time of the hearing not properly constituted and not on the ground that Mr. Muggleton had duly established his objection under s. 30 (1) (g), for in the view which we take he had no locus standi to object. On the whole we think we should at the option of Miss Piper either dismiss the appeal on the ground which we have stated or, on her undertaking by her counsel to take the necessary steps to join Mr. and Mrs. Brookes as respondents to her application, discharge the learned judge's order and remit the matter to him for re-hearing after such joinder has been effected. The procedure regarding applications under Part 2 of the Act is governed by the County Court Rules, 1936, Ord. 40, as substituted by S.I. 1954 No. 1394, and we find nothing to exclude the application to that order of the provisions of the County Court Rules, 1936, Ord. 5, r. 36 and r. 37, regarding change of parties. It is to be noted that in the County Court Rules "plaintiff" includes "applicant" and "defendant" includes "respondent" (see Ord. 49, r. 2), also that Ord. 5, r. 36 and r. 37 refer to "matters" as well as "actions".

Case remitted for re-hearing after joinder of landlords as respondents.

Solicitors: *Stafford Clark & Co.*, agents for *William Wright & Son*, Dudley (for the appellant); *Sharpe, Pritchard & Co.*, agents for *H. Ernest Sargent & Son*, Wolverhampton (for the respondent).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

CULLEY AND OTHERS *v.* HARRISON.

[Queen's Bench Division (Lord Goddard, C.J., Cassels and Donovan, JJ.), April 25, 1956.]

Sunday Entertainment—"Place" used for public entertainment—Part of large park inclosed for purpose of motor cycle competition—Sunday Observance Act, 1780 (21 *Geo.* 3 *c.* 49), *s.* 1.

The appellants managed and conducted a competition known as a "motor cycle scramble" in a large park on a Sunday. The course on which the competitors rode was divided off by a wire and rope barrier, and members of the public who purchased tickets were admitted, as spectators of the competition, to the parts of the park adjoining the course. The appellants were charged with an offence against s. 1* of the Sunday Observance Act, 1780, in that they had used on a Sunday a place for public entertainment to which persons were admitted by the payment of money, whereby the place was deemed to be a disorderly place. It was contended by the appellants that the words "other place" in s. 1 of the Act must be construed ejusdem generis with the words "any house, room" which preceded them, and that, therefore, the park was not a "place" within the meaning of the section.

Held: the meaning of the word "place", in s. 1 of the Act of 1780, was not restricted by the words "house" or "room" which preceded it, and the part of the park used for the motor cycle competition was a "place" within the section; accordingly, the appellants had committed an offence against the section.

Appeal dismissed.

[For the Sunday Observance Act, 1780, s. 1, see 5 Halsbury's Statutes (2nd Edn.) 560.

For the Common Informers Act, 1951, s. 1 (3), see 30 Halsbury's Statutes (2nd Edn.) 42.

For the Disorderly Houses Act, 1751, s. 2, see 25 Halsbury's Statutes (2nd Edn.) 14.]

Case Stated.

This was a Case Stated by justices for the county of Lancaster in respect of their adjudication as a magistrates' court sitting at Leyland on Oct. 31, 1955. On Oct. 14, 1955, the respondent, a police officer, preferred informations against the appellants Norman Leslie Culley, Joseph Clunan, Clifford Clegg and John Ashworth, charging, in each case, that on Aug. 7, 1955, the appellants used a certain place, namely, Cuerden Park, for public entertainment, to wit, a motor cycle scramble, to which persons were admitted by the payment of money, such day being the Lord's Day, called Sunday, whereby the said place was deemed to be a disorderly place, contrary to s. 1 of the Sunday Observance Act, 1780, and s. 1 (3) of the Common Informers Act, 1951. At the same time the respondent preferred informations against the appellants Reginald William Haley and Arthur Bentley Gaskell charging them with having aided and abetted the appellants Culley, Clunan, Clegg and Ashworth to commit the said offences.

The following facts were found. On Sunday, Aug. 7, 1955, a type of competition or race known as a "motor cycle scramble" was held at Cuerden Park. Members of the public were admitted as spectators to the motor cycle scramble, which was a public entertainment, by the payment of money or by tickets sold for money. The first-named appellants took part in managing or conducting the entertainment, and the appellants Haley and Gaskell aided and abetted them. Cuerden Park was an extensive park consisting of many acres to which, on the day of the competition, access was gained by the public by an entrance known as Stag Lodge. On that day, at intervals along the road leading from the entrance through the park, officials were stationed to stop vehicles, and, after making

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* The relevant terms of the section are set out at p. 255, letter H, post.

A the appropriate charge for parking, to direct the vehicles to the areas, consisting of many acres, used as parking places for vehicles. At a point about a quarter of a mile from the Stag Lodge entrance, the course on which the competitors rode was divided off by a wire and rope barrier, and admittance to the land adjoining the course was gained by the public by the purchase of tickets at seven places in the barrier, the charge being 1s. 6d. for each adult and 6d. for each B child. Only a small portion of the course could be seen by persons at points between the Stag Lodge entrance and the barrier without passing the barrier or purchasing a ticket. There were no buildings or structures at any material part of the park save for a temporary structure erected for use as toilets, and tents erected and used by a firm of caterers for providing refreshments. At two points in the course there were uncovered inclosures, formed by rope or wire C barriers, for use by the officials organising the competition. It was admitted by the appellants that Cuerden Park was a defined and definite area. It was contended by the appellants that the words " other place " in s. 1 of the Sunday Observance Act, 1780, must be construed ejusdem generis with the preceding words " any house, room ", and, accordingly, that Cuerden Park was not a " place " within the meaning of the Act of 1780. It was contended by the D respondent that Cuerden Park was a " place " within the meaning of the Act because (i) the ejusdem generis rule did not apply to the Act and no limitation could be placed on the meaning of the word " place ", providing that it was a defined area, and (ii) even if the ejusdem generis rule applied to the Act, the park was ejusdem generis with the preceding words " any house, room ". The justices were of the opinion that Cuerden Park was a " place " within the meaning E of the Act of 1780, and that each of the appellants was guilty of the offence charged against him and, accordingly, they imposed fines on the appellants.

N. J. Skelhorn, Q.C., and *B. H. Gerrard* for the appellants.
Richard Elwes, Q.C., and *J. G. S. Hobson* for the respondent.

LORD GODDARD, C.J.: This is a Case Stated by justices for the county F of Lancaster, before whom the appellants were summoned as principals or aiders and abettors for breaches of the Sunday Observance Act, 1780, s. 1. At a place near Preston there is a public park called Cuerden Park. On the day on which the offence is alleged to have been committed, there was an inclosure of part of Cuerden Park, for admission to which money was charged, and in that inclosure was held what is called a " motor cycle scramble ". It is unnecessary to go into G the nature of what is a motor cycle scramble because obviously it is some form of entertainment to which the public were invited, just in the same way as a football match is an entertainment. The only point here is whether or not a place such as this, inclosed in a public park, can be said to be a " place ", within the meaning of s. 1 of the Act. Section 1 commences with the words:

> H " Be it enacted that from and after the passing of this present Act any house, room or other place which shall be opened or used for public entertainment or amusement, or for [public debate] upon any part of the Lord's Day, called Sunday, and to which persons shall be admitted by the payment of money or by tickets sold for money, shall be deemed a disorderly house or place . . ."

I The justices convicted, and, in my opinion, rightly. It is contended, on appeal to us, that they were wrong because the word " place " must be construed ejusdem generis with the preceding words, " house " and " room ". The principles on which the construction generally known as that of ejusdem generis is applied are well known. They are to be found in books such as MAXWELL ON INTERPRETATION OF STATUTES, and it is unnecessary to go exhaustively into them. I do not think " house, room " can really be said to establish a genus. What Parliament is saying is that one must not do certain things in a building and one must not do them in a place. It will offend against an Act dealing with the profanation of the Lord's Day if these meetings are held in a house or room or place. The general expression, used in Acts of Parliament which make matters of this kind illegal, is " disorderly house ", and the Sunday Observance Act, 1780, and the Disorderly Houses Act, 1751, show plainly that there can be not only disorderly houses, but also disorderly places. A " disorderly house " indicates something within four walls and a roof, and a " disorderly place " means a place set aside for public entertainment, or music, or dancing, or whatever the particular Act prohibits. If we were to decide that what was done in the present case was no breach of the Act of 1780, it would follow that every racecourse could be opened on Sunday and races could take place. It is well known that races do not take place on Sunday, and I think that that is because of these Acts. If we gave a decision the other way, it would be possible for racecourses to be opened and for dog racing and motor racing to take place on a Sunday, provided that the organisers closed the buildings, the grandstands and refreshment rooms. I do not think it was intended that that sort of recreation should take place on Sunday. To my mind, it is perfectly clear that the word " place " is meant deliberately to be wider than the words " house, room ", and, therefore, the justices were justified in finding that the part of Cuerden Park used for the motor cycle scramble was a " place " within the meaning of the Act. I think that the appeal fails.

CASSELS, J.: I agree.

DONOVAN, J.: I agree that the question is one of the construction of s. 1 of the Act of 1780, and that the rule of ejusdem generis is merely an aid to construction. If the house and room comprise a genus, as suggested, it is difficult to think what species of that genus are connoted by the words " or other place " which would not itself be a house or room. Indeed, the words have to be construed bearing in mind the mischief at which the Act was aimed. The mischief here aimed at is clearly a public entertainment for money on Sunday, and that does not itself require that the word " place " shall be restricted in its meaning by reference to its predecessors in the section. In fact, I think that the reverse is the case. The Disorderly Houses Act, 1751, s. 2, contains the expression " house, room, garden, or other place ", and that has led to an argument based on the omission of the word " garden " in the present statute. I think that it is always a little risky to construe one statute by reference to another, particularly as there might have been reasons for specifically mentioning " garden " in the Act of 1751. Be that as it may, I cannot treat the argument as overriding the indications that the word " place " in the Act of 1780 should receive its full meaning.

Appeal dismissed.

Solicitors: *A. J. A. Hanhart*, agent for *A. S. Coupe, Lowe & Co.*, Rochdale (for the appellants); *Vizard, Oldham, Crowder & Cash* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

ONG BAK HIN *v.* THE GENERAL MEDICAL COUNCIL.

[Privy Council (Lord Oaksey, Lord Tucker, Lord Cohen, Lord Keith of Avonholm and Mr. L. M. D. de Silva), March 13, 14, 15, 19, April 24, 1956.]

Medical Practitioner—General Medical Council—Disciplinary committee—Erasure of name from register—Practitioner convicted in Malaya of criminal offence—Portions of record of convicting court excised before disciplinary committee—Admissibility—Medical Disciplinary Committee (Procedure) Rules, 1951 (*S.I.* 1951 *No.* 665), *r.* 63.

The appellant, a medical practitioner registered under the Medical Acts, was convicted in Malaya of unlawfully performing an operation to cause miscarriage which caused death. At an inquiry by the Medical Disciplinary Committee of the General Medical Council at which he was charged with having been guilty of infamous conduct in a professional respect, it was submitted on behalf of the appellant that witnesses who had given evidence at his trial should be called to give oral evidence before the committee and that documentary evidence, viz., a copy of the record of the hearing at his trial, though admissible, should be excluded in the interests of justice. The legal assessor having indicated that the disciplinary committee had no power to compel the attendance of witnesses from Malaya, and having advised the committee to proceed on the evidence, the copy of the record was put in by consent with certain passages deleted or covered up and the trial judge's summing-up omitted. The committee found the appellant guilty of infamous conduct in a professional respect, and directed that his name be erased from the register. On appeal to Her Majesty in Council it was contended that the proceedings at the inquiry were defective and not strictly in accordance with r. 63 of the Medical Disciplinary Committee (Procedure) Rules, 1951*.

Held: there had been no miscarriage of justice, since the copy of the record of proceedings was properly admissible, subject to the Rules of 1951, because the disciplinary committee, as a domestic forum but not a court of law, had the duty to make due inquiry whether the appellant had been guilty of infamous conduct in a professional respect (dicta of Viscount Simon, L.C., Lord Atkin and Lord Wright in *General Medical Council* v. *Spackman*, [1943] 2 All E.R. at pp. 339, 341, 345 applied), and by r. 63 of the Rules of 1951 the record, being a document within that rule, was admissible, though its admissibility was limited to statements of facts contained in it; moreover, having regard to the consent to the admission of the record, no objection could now be maintained on that ground.

Appeal dismissed.

[**Editorial Note.** The limitation of the admissibility of a record of proceedings before a criminal court to statements of fact therein involves the exclusion of, e.g., the judge's charge to the jury. The Judicial Committee intimate that the disciplinary committee cannot adequately perform their duty of making due inquiry unless they are in possession of the entire record and draw attention to the desirability of the rules of procedure being altered to permit this (see p. 261, letter G, p. 262, letter B, post).

As to inquiries by the General Medical Council, see 22 Halsbury's Laws (2nd Edn.) 301-303, paras. 565-571, and Supplement; and for cases on the subject, see 34 Digest 543-545, *22-31*.

For the Medical Disciplinary Committee (Procedure) Rules, 1951, r. 63, see 13 Halsbury's Statutory Instruments 143.]

*** Rule 63 is set out at p. 260, letter C, post.**

Cases referred to:

(1) *General Medical Council* v. *Spackman*, [1943] 2 All E.R. 337; [1943] A.C. 627; 112 L.J.K.B. 529; 169 L.T. 226; 2nd Digest Supp.

(2) *Edmonds* v. *Edmonds*, [1947] P. 67; [1947] L.J.R. 936; 176 L.T. 545; 2nd Digest Supp.

(3) *Bullock* v. *Borrett*, [1939] 1 All E.R. 505; Digest Supp.

(4) *Barkway* v. *South Wales Transport Co., Ltd.*, [1948] 2 All E.R. 460; [1949] 1 K.B. 54; [1948] L.J.R. 1921; *revsd. on other grounds* H.L., [1950] 1 All E. R. 392; [1950] A.C. 185; 2nd Digest Supp.

Appeal.

Appeal by a medical practitioner under the Medical Act, 1950, s. 20, from a determination of the Medical Disciplinary Committee on Nov. 25, 1955, that the appellant had been guilty of infamous conduct in a professional respect. The facts appear in the judgment of the Board.

J. R. Cumming-Bruce and *R. A. Barr* for the appellant.

J. G. S. Hobson for the respondents.

LORD TUCKER: In this case, the appellant, Dr. Ong Bak Hin, who had been at all material times a medical practitioner registered under the Medical Acts, appealed to Her Majesty in Council under s. 20 of the Medical Act, 1950, from a determination of the Medical Disciplinary Committee on Nov. 25, 1955, that he had been guilty of infamous conduct in a professional respect and that the registrar be directed to erase his name from the register. This determination was arrived at after an inquiry which had been held as a result of information as to the conduct of the appellant sent to the General Medical Council by the Director of Medical Services for the Federation of Malaya in accordance with r. 12 (2) (b) of the Medical Disciplinary Committee (Procedure) Rules, 1951 (S.I. 1951 No. 665).

The conduct referred to in the information supplied to the council was to the effect that the appellant had been convicted and sentenced by the Supreme Court of Malacca on Aug. 14, 1953, for performing an operation with intent to cause miscarriage which caused death, contrary to s. 314 of the Penal Code of the Federation of Malaya. The formal charge before the Disciplinary Committee alleged that, on May 18, 1953, the appellant, being registered under the Medical Acts, with intent to cause the miscarriage of Tee Bee Geok unlawfully performed an operation of abortion which caused her death and thereby committed an offence under s. 314 of the Penal Code of the Federation of Malaya of which he was convicted in the High Court of Malacca on Aug. 14, 1953, and sentenced to five years' imprisonment (reduced on appeal to two years), and concluded with the words:

> " And that in relation to the facts alleged you have been guilty of infamous conduct in a professional respect."

At the inquiry, Mr. Widgery, a solicitor, appeared to place the facts before the committee, and the appellant was represented by Mr. Taylor, of Messrs. Hempsons, solicitors. The committee had the advice of a legal assessor.

The evidence adduced in support of the charge consisted of a statutory declaration by the registrar of the Court of Appeal for the Federation of Malaya to which were exhibited:

(a) A certificate by the assistant registrar of the Supreme Court of Malacca of the conviction on Aug. 14, 1953. (b) The record of the hearing in the High Court consisting of:—(i) The charge. (ii) Notes of evidence made by the trial judge. (iii) Judge's reasons for sentence. (iv) List of exhibits at the trial. (v) Statement of deceased woman, dated May 22, 1953, being Ex. P.1 at trial. (vi) Extracts from medical text-books put in at trial. (vii) Copies of notice

A and petition of appeal to Court of Appeal of Federation of Malaya. (viii) Certified copies of order and judgment of Court of Appeal.

The copies of the record of the hearing in the High Court of Malacca provided for the members of the Disciplinary Committee had been "edited" by the deletion of certain passages in the evidence which the legal assessor considered would not have been admissible in a criminal court in England, and certain further B passages at the request of the appellant's solicitor. The summing-up of the judge at the trial was also omitted.

The appellant appeared and gave evidence and was cross-examined at the inquiry. At the conclusion, the president announced the decision of the committee to the effect that the appellant was adjudged to have been guilty of infamous conduct in a professional respect, and that the registrar had been C directed to erase his name from the register.

At the inquiry, the appellant's solicitor submitted at the outset that justice could not be done to his client unless the witnesses who had given evidence at his trial were called to give oral evidence before the committee. He agreed that the documentary evidence was admissible, but contended that the committee, in their discretion, should exclude it in the interests of justice. He D expressly stated that he did not ask for an adjournment. The legal assessor pointed out that the committee had no power to compel the attendance of witnesses from Malaya, and advised the committee to proceed on the documentary evidence. Certain passages were then deleted or covered up at the request of the appellant's solicitor and, in this form, the record of the criminal proceedings was put in. The solicitors on each side drew the attention of the committee E to such portions of the evidence as they considered relevant, but it was agreed that the committee should be at liberty to look at any parts they wished, and the desirability of the whole of the evidence of one of the witnesses, viz., Dr. Bennett, being read was stressed.

It was contended before their Lordships by counsel for the appellant that the proceedings at the inquiry outlined above were defective, and not strictly F in accordance with the Rules of Procedure to which reference will shortly be made, and that the determination of the committee should be set aside. He said that the notes of evidence given by Dr. Bennett should not have been received, unless the committee were satisfied that an attempt had been made to secure his personal attendance and that he had refused to attend. He further submitted that, if the notes of evidence were received, they should all have G been read out before the committee and that, failing this, the committee should have read the entire evidence themselves, which he said they could not have done in the time available, having regard to the length of the hearing and the short mid-day adjournment.

It will be convenient here to refer to the relevant sections of the Medical Acts and the Rules of Procedure made thereunder. Section 29 of the Medical H Act (1858), as amended by the Medical Act, 1950, reads:

> "If any registered medical practitioner shall be convicted by any court in the United Kingdom or the Republic of Ireland of any felony, misdemeanour, crime or offence, or shall after due inquiry be judged by the general council to have been guilty of infamous conduct in any professional I respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register."

By s. 14 of the Medical Act, 1950, the functions of the General Medical Council under s. 29 of the Medical Act (1858) were transferred to, and became exercisable by, the Medical Disciplinary Committee. By s. 16 of the Medical Act, 1950, the Medical Disciplinary Committee were required to make rules as to procedure and evidence to be approved by the Privy Council. The Medical Disciplinary Committee (Procedure) Rules, 1951, were approved by Order in

Council and are S.I. 1951 No. 665. Rule 28 of these rules under the heading " Cases relating to conduct—proof of charges " provides:

> " In cases relating to conduct where the practitioner appears, the following order of proceedings shall be observed as respects proof of the charge or charges:—(a) If a complainant appears, he shall open the case against the practitioner. If no complainant appears, the solicitor shall present the facts on which the complaint or information is based. (b) Next the complainant, if any appears, or, if no complainant appears, the solicitor shall adduce evidence of the facts alleged in the charge or charges or such of those facts as he is prepared to prove . . ."

Rule 63 reads:

> " The committee may receive any such oral or other evidence as would be receivable in a court of law, and in addition may, after consultation with the assessor to the committee, treat any statement of fact contained in any document as evidence of that fact."

The position of the General Medical Council in relation to its disciplinary powers under the Medical Act (1858) was considered by the House of Lords in proceedings by way of certiorari in *General Medical Council* v. *Spackman* (1) ([1943] 2 All E.R. 337). Viscount Simon, L.C., after referring to s. 29 of the Act of 1858, said (ibid., at p. 339):

> " That section draws a significant distinction between a case in which the impeached practitioner has been convicted of felony or misdemeanour, and a case in which the allegation of infamous conduct is not connected with a criminal conviction. In the former case the decision of the council is properly based on the fact of the conviction, and the practitioner cannot go behind it and endeavour to show that he was innocent of the charge and should have been acquitted. In the latter case, the decision of the council, if adverse to the practitioner, must be arrived at ' after due inquiry ', and this, of course, means after due inquiry by the council."

After referring to the refusal of the council to hear evidence tendered with a view to showing the practitioner was not guilty of the adultery of which he had been found guilty by the Divorce Court, he proceeded (ibid.):

> " It is worth observing that this problem does not arise only in connection with conclusions reached in the Divorce Court. A jury's verdict of justification in proceedings for slander, judgment for the plaintiff in an action for seduction, a bastardy order made by a bench of magistrates—all these, and many other, instances of adverse conclusions reached in a court of law might conceivably in certain circumstances lead to a charge against a medical man of infamous conduct in a professional respect. It seems obvious, in these other instances, that while the council might well treat the conclusion reached in the courts as prima facie proof of the matter alleged, it must when making ' due inquiry ' permit the doctor to challenge the correctness of the conclusion and to call evidence in support of his contention . . . This does not mean that the council has to rehear the whole case by endeavouring to get the previous witnesses to appear before it, though in special circumstances the recalling of a particular witness, in the light of what the accused or his witnesses assert, may, if feasible, be desirable. The council will primarily rely on the sworn evidence already given at the trial."

Lord Atkin (ibid., at p. 341) said:

> " It is not disputed that, where there has been a trial, at least before

A a High Court judge, the notes of the evidence at such trial and the judgment of the judge may afford prima facie evidence in support of the charge . . ."

LORD WRIGHT (ibid., at p. 345) said:

> "The council very properly have treated the decree of the Divorce judge as prima facie evidence; so it is, and very strong evidence too, B especially considering that the respondent did not appeal but paid the £1,000 damages awarded against him."

Later he said (ibid.):

> "Most of the cases before the council must involve questions of fact which they have to decide as best they can. It can only be in comparatively C rare cases that the cause of complaint is a matter which has been decided in a court of law other than by a conviction for felony or misdemeanour. The court decision should indeed ease that duty, because the proceedings and judgment of the court at least give the council prima facie evidence which may be for practical purposes unanswerable by the practitioner."

D That case concerned a finding of adultery which, at that time, was not conclusive. The law in that respect has now been altered, but the observations of the noble Lords in that case are—subject to the effect of the Rules of Procedure—in their Lordships' opinion applicable to such a case as the present where the conviction, not having taken place in the United Kingdom or the Republic of Ireland, is only prima facie evidence of the infamous conduct alleged.

E In so holding, their Lordships have not lost sight of the changes produced by the Medical Act, 1950, in the position of the Medical Disciplinary Committee, as compared with the General Medical Council under the Act of 1858, whereby they are now empowered to compel the attendance of witnesses and the production of documents, to administer oaths, and are required to make rules as to procedure and evidence which have statutory force, and by which a right of F appeal from their determination is given. They are, however, not a court of law, but a domestic forum charged in certain cases, of which the present is one, with the peculiar duty of making "due inquiry" into the circumstances attending the conviction in a distant country of a medical practitioner with a view to deciding—of which they alone are the judges—whether he has been guilty of infamous conduct in a professional respect. This duty they cannot adequately G perform unless they are in possession of the whole of the proceedings in the criminal court in which the conviction occurred. It would be unfortunate if they have precluded themselves from so functioning by the rules which they have made and, in particular, by r. 63. It is not easy to decide whether the whole of the proceedings in Malaya would have been "receivable in a court of law." No court of law in this country is charged with precisely the same H function as that entrusted to the committee, and the admissibility of documents may depend on the precise issue before the court. The record of proceedings is, in their Lordships' opinion, a "document" within the meaning of the second limb of r. 63 (see the decisions under the Evidence Act, 1938—which it may, however, be noted does not apply to Scotland—in *Edmonds* v. *Edmonds* (2) ([1947] P. 67), *Bullock* v. *Borrett* (3) ([1939] 1 All E. R. 505) and *Barkway* v. I *South Wales Transport Co., Ltd.* (4) ([1948] 2 All E.R. 460 at p. 472)). The admissibility of such documents is, however, limited to the statements of fact contained therein, and such a restriction may render the task of the committee and legal assessor extremely difficult in dealing with the record of proceedings in the criminal court, and would exclude the judge's charge to the jury and other parts of the record which it is clearly desirable the committee should see.

In the present case, the record, with certain excisions, was put in by consent as soon as the committee had quite properly decided that the attendance of the witnesses from Malaya was not practicable, and that their absence did not vitiate the proceedings. The consent to the admission of the record is fatal to A any objection on this score now being put forward before the Board, nor do their Lordships consider there is any substance in the contentions that the whole of the evidence was not read out in court, or that it was incumbent on the committee to read portions not considered by either side to have sufficient relevance to require the attention of the committee to be directed thereto.

Their Lordships desire, however, to draw the attention of those concerned B to the desirability of an alteration in the Rules of Procedure, whereby the committee can be empowered beyond all question to receive in evidence and examine the whole of the officially authenticated proceedings of the convicting court in this class of case.

For the reasons stated above, their Lordships are of opinion that there has in this case been no miscarriage of justice, and they have, accordingly, humbly C advised Her Majesty that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Hempsons* (for the appellant); *Waterhouse & Co.* (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*] D

E

Re YAHUDA (*deceased*).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), April 18, 1956.]

Probate—Will—Foreign domicil of deceased at date of death—Will relating to English estate admitted to probate by court of deceased's domicil—Probate in England of duly authenticated copy. F

On Nov. 12, 1953, the deceased made one will relating to her property in the United Kingdom and another will relating to her property in Israel. On Nov. 19, 1953, the deceased made two further wills, one relating to her property in the Union of South Africa and one relating to her property in the United States of America, and in all four wills she purported to revoke G all former wills made by her. Later she made a codicil to the will relating to the United States property. The deceased died in 1955 domiciled in the State of Connecticut leaving personal estate in England. On Mar. 21, 1955, the probate court in Connecticut admitted all four wills and the codicil to probate. The executors of the will relating to property in the United Kingdom now moved for an order admitting that will to probate H in England.

Held: the will having been admitted to probate in the country of the deceased's domicil at the date of her death, the executors were entitled to the order which they sought.

[As to probate of wills of persons dying domiciled abroad, see 14 HALSBURY'S LAWS (2nd Edn.) 202, para. 331, note (s). I

As to admission to probate of duly authenticated copy of will recognised as valid by court of deceased's domicil, see 7 HALSBURY'S LAWS (3rd Edn.) 57, para. 109, note (l); and for cases on the subject, see 11 DIGEST (Repl.) 396, *517*.]

Probate Motion.

The deceased, Ethel Rachel Yahuda, died on Mar. 6, 1955, in the county of New Haven in the State of Connecticut in the United States of America, where she was then domiciled. She left four wills and one codicil. One will dated

Nov. 12, 1953, related to property of the deceased in the United Kingdom, and in that will she appointed J.Y. and R.K.M.K. her executors. Another will dated Nov. 12, 1953, related to property of the deceased in Israel. One will dated Nov. 19, 1953, related to property of the deceased in the Union of South Africa. Another will dated Nov. 19, 1953, related to property of the deceased in the United States of America, and by codicil dated July 30, 1954, she appointed special trustees in relation to that property in the United States. Each will contained the usual clause purporting to revoke all former wills. On Mar. 21, 1955, the probate court for the district of New Haven admitted to probate the four wills and the codicil. The deceased died possessed of personal estate in England valued at about £3,650. The executors now applied for an order admitting to probate the will dated Nov. 12, 1953, relating to property in the United Kingdom, and produced a copy of that will issued by the probate court in Connecticut.

C. A. Marshall-Reynolds for the executors.

KARMINSKI, J.: I think that in the present case I must make the order asked for on motion in this case. The court of the domicil, namely, the court of the State of Connecticut, has already granted probate of all four wills made by the deceased, although those made on Nov. 19, 1953, would appear to revoke those executed on Nov. 12, 1953. I believe the law to be accurately stated in MORTIMER ON PROBATE LAW AND PRACTICE (2nd Edn.), at p. 24, as follows:

> " When a will has been recognised as valid by a court of competent jurisdiction in the country in which the testator was domiciled at the time of his death, it is the established practice of the English court to admit to probate in this country a duly authenticated copy of such will, without further evidence of its validity, as it is presumed that the foreign court has been satisfied on that point."

The inconveniences of re-examining the validity of testamentary documents which have been pronounced valid by the court of the domicil appear to be obvious and have often been commented on in this court. The executors are entitled to the prayer in the motion, and I so order.

Order accordingly.

Solicitors: *R. K. M. Kenber* (for the executors).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

SOWERBY BRIDGE URBAN DISTRICT COUNCIL *v.* STOTT. A

[COURT OF APPEAL (Jenkins and Hodson, L.JJ., and Lloyd-Jacob, J.), April 12, 13, 1956.]

Water Supply—Rates and charges—Payment by owner of small tenements under provisions of local Act—Allowance for early payment—Right to allowance—Waterworks Clauses Act, 1847 (10 *&* 11 *Vict. c.* 17), *s.* 72—*Public Health* B *Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8 *c.* 49), *s.* 129 (1), (2), *s.* 328.

The plaintiffs, a local authority, were water undertakers in their district under a local Act, the Sowerby Bridge Local Board Act, 1863, which imposed on the plaintiffs the duty of supplying water. The defendant was the owner of several houses in the district, and the local authority claimed the water rates from him instead of the occupiers. He claimed to be entitled to a C discount equal to ten per cent. of the total amount payable for water rates, by virtue of the Public Health Act, 1936*, s. 129 (2), and on the footing that the rates were demanded and recovered from him under s. 129 (1). The local authority contended that the water rate was recoverable from the defendant under s. 72 of the Waterworks Clauses Act, 1847, which allowed no discount.

By s. 3 of the local Act of 1863 the term " the Public Health Acts " was D defined as including " the Public Health Act, 1848, and the several Acts passed prior to the year 1858 amending the same, the Local Government Act, 1858, and the several Acts subsequently passed amending the same ". By s. 20 of the local Act the rates and charges for the supply of water by the plaintiffs were to be made, assessed and levied according to " the Public Health Acts relating to the supply of water ". Section 6 of the local Act E incorporated the Waterworks Clauses Act, 1847, s. 72, and by this section the owners of all dwelling-houses the annual value of which did not exceed £10 were liable to the payment of water rates instead of the occupiers. The annual values of the defendant's houses did not exceed £10. By s. 328 of the Public Health Act, 1936*, the powers and duties imposed by that Act are in addition to and not in derogation of any other powers and duties imposed F by an Act of Parliament.

Held: the defendant was not entitled to the discount because he was liable to pay the water rates by virtue of s. 72 of the Act of 1847 and not by virtue of s. 129 (1) of the Act of 1936, for, even if the Act of 1936 were within the definition of " the Public Health Acts " in s. 3 of the local Act, s. 129 of the Act of 1936 did not supersede, modify or by implication repeal G s. 72 of the Act of 1847, since the two sections differed in their scope and effect and the effect of s. 72 of the Act of 1847 as incorporated in the local Act of 1863 was preserved by s. 328 of the Act of 1936.

Appeal allowed.

Water Supply—Rates and charges—Dispute—Jurisdiction of county court and Lands Tribunal—Water Act, 1945 (8 *&* 9 *Geo.* 6 *c.* 42), *s.* 38 (3)—*Local* H *Government Act,* 1948 (11 *&* 12 *Geo.* 6 *c.* 26), *s.* 62 (1)—*Lands Tribunal Act,* 1949 (12, 13 *&* 14 *Geo.* 6 *c.* 42), *s.* 1 (3) (*e*).

County Court—Jurisdiction—Recovery of water rates—Dispute—Water Act, 1945 (8 *&* 9 *Geo.* 6 *c.* 42), *s.* 38 (3)—*Local Government Act,* 1948 (11 *&* 12 *Geo.* 6 *c.* 26), *s.* 62 (1)—*Lands Tribunal Act,* 1949 (12, 13 *&* 14 *Geo.* 6 *c.* 42), *s.* 1 (3) (*e*). I

Lands Tribunal—Jurisdiction—Water rates—Lands Tribunal Act, 1949 (12, 13 *&* 14 *Geo.* 6 *c.* 42), *s.* 1 (3) (*e*).

The effect of the Local Government Act, 1948, s. 62 (1)†, and the Lands Tribunal Act, 1949, s. 1 (3) (e)†, is to make the Lands Tribunal the proper

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* The relevant terms of s. 129 (1), (2) and s. 328 of the Public Health Act, 1936, are printed at p. 265, letter I, to p. 266, letter B, and p. 268, letter G, post.

† The terms of s. 62 (1) of the Local Government Act, 1948, and s. 1 (3) (e) of the Lands Tribunal Act, 1949, are printed at p. 270, letters C and F, post.

A tribunal to deal with disputes notified under the proviso to s. 38 (3)* of the Water Act, 1945, but the recovery of water rates under s. 38 (3) of the Act of 1945 in cases which are outside the proviso to that sub-section was not affected by s. 62 (1) of the Act of 1948 and is not transferred to the Lands Tribunal.

B [As to the repeal of enactments incorporated in subsequent Acts, see 31 HALSBURY'S LAWS (2nd Edn.) 566, para. 775.

For the Waterworks Clauses Act, 1847, s. 72, see 26 HALSBURY'S STATUTES (2nd Edn.) 759.

For the Public Health Act, 1936, s. 129, s. 328, see 19 HALSBURY'S STATUTES (2nd Edn.) 401, 488.

C For the Water Act, 1945, s. 38 (3), see 26 HALSBURY'S STATUTES (2nd Edn.) 829.

For the Local Government Act, 1948, s. 62 (1), see 20 HALSBURY'S STATUTES (2nd Edn.) 262.

For the Lands Tribunal Act, 1949, s. 1 (3), see 28 HALSBURY'S STATUTES (2nd Edn.) 318.]

Case referred to:

D (1) *Blackpool Corpn.* v. *Starr Estate Co.*, [1922] 1 A.C. 27; 91 L.J.K.B. 202; 126 L.T. 258; 86 J.P. 25; 42 Digest 770, *1974*.

Appeal.

This was an appeal by the plaintiffs, the Sowerby Bridge Urban District Council from an order of His Honour JUDGE ARCHIBALD made at Halifax County Court on Feb. 24, 1956, dismissing an action to recover £6 3s. 9d., being the E balance of water charges alleged by the plaintiffs to be due to them for water supplied to dwelling-houses owned by the defendant. The defendant contended that his liability to pay the water charges arose under the Public Health Act, 1936, s. 129 (1), and that he was entitled to an allowance under the provisions of s. 129 (2) of that Act. The facts appear in the judgment of JENKINS, L.J.

C. E. Scholefield for the plaintiffs.

F *F. A. Stockdale* for the defendant.

JENKINS, L.J.: This is an appeal by the Sowerby Bridge Urban District Council from a judgment of His Honour JUDGE ARCHIBALD given in the Halifax County Court on Feb. 24, 1956, whereby he dismissed an action brought by the council against Mr. Raymond Stott to recover from him £6 3s. 9d. for water charges allegedly owing in respect of a number of houses owned by him in the G district.

Apart from a submission made by counsel for the defendant to the effect that the county court judge had no jurisdiction in the matter (with which I will deal later in this judgment), the sole question in the case is whether the defendant is entitled to be allowed for punctual payment a discount of ten per cent. on the amount of the water rate payable by him for the year 1955-56 in respect of the H houses in question, and the disputed sum of £6 3s. 9d. may be regarded as representing the balance owing by the defendant on the footing that the ten per cent. discount was not allowable. The plaintiffs, by what authority we were not informed, appear in fact to have allowed or been prepared to allow, a discount of five per cent. only.

The defendant claims to be entitled to the ten per cent. discount by virtue of I the Public Health Act, 1936, s. 129, which provides as follows:

> "(1) Where a local authority supply water under this Act to a house, or to a part of a house occupied as a separate tenement, and the owner thereof is, under s. 11 (1) of the Rating and Valuation Act, 1925, as amended by any subsequent enactment, rated instead of the occupier, the owner instead of the occupier shall, if the authority so determine, pay the rate for the supply of water, but nevertheless the rate may be demanded and

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* The terms of s. 38 (3) of the Water Act, 1945, are printed at p. 269, letter G, post.

> recovered by them from the occupier, and, if it is so recovered, the occupier A shall, unless as between himself and the owner he is liable to pay the rate, be entitled to deduct the amount so paid from his rent . . . (2) An owner of premises to which a determination of the local authority under this section applies shall, if he pays the amount due by him in respect of a water rate before the expiration of one-half of the period in respect of which the rate is payable, or before such later date as may be specified by the authority, B be entitled to an allowance calculated at the same rate per cent. as the allowance which is made to him in respect of a general rate under s. 11 (1) (a) of the Rating and Valuation Act, 1925, as amended by any subsequent enactment."

To make those provisions intelligible it is necessary also to refer to s. 11 (1) of C the Act of 1925, which, so far as material, provides:

> "The rating authority may by resolution direct that, in the case of all hereditaments in their area (exclusive of hereditaments consisting of agricultural land) which belong to a class to be defined in the resolution by reference to rateable value and also . . . if rent is paid, by reference to the interval at which rent from time to time becomes payable or is collected, the owners D thereof shall be rated instead of the occupiers . . . Where a rating authority give any such directions as aforesaid—(a) the owners of any hereditaments in the area of that authority to which the direction applies shall, in the case of any rate made while the resolution is in force, be rated accordingly, and the rating authority shall make to any owner who being so rated pays the amount due by him in respect of the rate before the expiration of one-half E of the period in respect of which the rate is made (or, if the rate is payable by instalments one-half of the period in respect of which the instalment is payable) or such later date or dates as may be specified in the resolution an allowance equal to ten per cent. of the amount payable."

I understand that such a direction had in fact been given in terms which included F the defendant's houses. The water charges to which the dispute relates were undoubtedly claimed by the plaintiffs from the defendant as owner of the houses in question and not from the occupiers. The defendant contends that this can only have been done by virtue of a determination by the plaintiffs under s. 129 of the Act of 1936 and that he is accordingly entitled to the discount claimed by G virtue of sub-s. (2) of that section, read in conjunction with s. 11 (1) of the Act of 1925. The plaintiffs contend that s. 129 of the Act of 1936 has no application, because the water was supplied not under that Act, but under their own local Act of 1863 (to which I am about to refer) and, further, that even if s. 129 did apply there was no determination by the plaintiffs under that section.

If the plaintiffs had in truth no warrant for claiming the water rate from the H defendant other than s. 129, and if that section was indeed applicable to the case, I would be reluctant to deprive the defendant of his discount on the ground that the plaintiffs had never formally determined to apply the section to the defendant's houses, seeing that they had in fact charged him with the water rate which, on this hypothesis, they could not lawfully have done otherwise than in pursuance of such a determination. It is, however, difficult to resist I the conclusion that there was no such determination, in view of the evidence of the clerk to the council to the effect that there was none. I do not, however, find it necessary to decide what the result might have been if the matter had depended on s. 129 alone, and the plaintiffs, being entitled so to do, had purported to apply that section but without any formal determination to that effect.

The plaintiffs are water undertakers in their district, not merely in their capacity as a local authority but by virtue of their special powers and duties under a local Act, namely, the Sowerby Bridge Local Board Act, 1863. By s. 3 of that Act a number of expressions are defined, and (inter alia) the expression "the district" is defined as meaning "the present district of the local board, and shall in addition thereto include" some additional areas of land into the details of which I need not enter. Then there is this definition of "the Public Health Acts":

> "The expression 'the Public Health Acts' includes 'the Public Health Act, 1848', and the several Acts passed prior to the year 1858 amending the same, and 'the Local Government Act, 1858', and the several Acts subsequently passed amending the same."

Section 6 effects incorporation in the local Act of a number of other statutory provisions. Its materiality for the present purpose is that it incorporates the Waterworks Clauses Act, 1847, s. 72, the form of the section being to incorporate the Acts referred to with certain specified exceptions which do not include s. 72 of the Act of 1847. Then, by s. 19,

> "The local board shall, at the request of the owner or occupier of any house, or part of a house, in any street within the district in which any pipe of the local board shall be laid, or of any person who, under the provisions of this Act, shall be entitled to demand a supply of water for domestic purposes within the district, furnish to such owner or occupier or other person a sufficient supply of water for their domestic purposes at rates as hereinafter provided; provided that the local board shall not be bound to afford such supply if and when by reason of any default of the Corporation of Halifax they shall be unable to do so."

That, say the plaintiffs, is the enactment under which they are charged with the duty of supplying water. Section 20 provides:

> "The rates and charges to be made by the local board for the supply of water under this Act shall in all respects be made, assessed, and levied according to the provisions of the Public Health Acts relating to the supply of water."

I should next refer to the Waterworks Clauses Act, 1847, s. 72, which provides:

> "The owners of all dwelling-houses or parts of dwelling-houses occupied as separate tenements, the annual value of which houses or tenements shall not exceed the sum of £10, shall be liable to the payment of the rates instead of the occupiers thereof; and the powers and provisions herein or in the special Act contained for the recovery of rates from occupiers shall be construed to apply to the owners of such houses and tenements; and the person receiving the rents of any such house or tenement as aforesaid from the occupier thereof, on his own account, or as agent or receiver for any person interested therein, shall be deemed the owner of such house or tenement."

The rate referred to in that section is, of course, the water rate. All the houses here in question are within the limits of the annual value prescribed by that section.

The plaintiffs claim that the water rate now in question was charged against the defendant as owner of the houses under s. 72 of the Act of 1847, as incorporated in their local Act; and under that section no determination is necessary in order to charge the owner and no discount for punctual payment is authorised or enjoined. I see no answer to this unless s. 72, as incorporated, can be held to have been repealed. I cannot find that it has.

The plaintiffs contend that the Public Health Acts referred to in the local Act are limited to those specifically mentioned in s. 3 of the local Act. The defendant contends that the reference includes all Public Health Acts for the time being in force, whether passed before or after the local Act. I see no necessity to decide this point. The defendant contends that if he is right on it, the result is that s. 72 of the Act of 1847 has been superseded, modified or by implication repealed by s. 129 of the Public Health Act, 1936. I cannot agree. The two sections are different in their scope and effect. Section 72 is limited to houses not exceeding the annual value specified in the section itself. So far as houses falling within that limit are concerned, s. 72 enjoins that the owners shall be chargeable. Section 129 of the Act of 1936 itself imposes no limits of value, but leaves it to the local authority to determine to what houses its provisions shall be applicable, provided that the case is brought within s. 129 by the referentially incorporated provisions of s. 11 (1) of the Rating and Valuation Act, 1925. The two sections are different in scope and effect and, to my mind, they can well stand together. There is no repugnancy between them and no ground for saying that the enactment of s. 129 had the effect of repealing s. 72 of the Act of 1847, as incorporated in the plaintiffs' local Act.

Counsel for the plaintiffs relied on the maxim generalia specialibus non derogant, and he referred us to the case in the House of Lords of *Blackpool Corpn.* v. *Starr Estate Co.* (1) ([1922] 1 A.C. 27). To my mind, there is great force in counsel's submission that, applying that principle, it is wrong to hold that the effect of s. 20 of the local Act, which provides that the rates and charges under the local Act "shall in all respects be made, assessed and levied according to the provisions of the Public Health Acts relating to the supply of water", and of s. 129 of the Act of 1936, on the footing that the Public Health Acts referred to in the local Acts are Acts passed and to be passed whether before or after that Act, general as these enactments are, should be to repeal by implication the particular provisions of s. 72 of the Act of 1847 as incorporated in the local Act. There is, as I have said, to my mind great force in that contention; but I need express no concluded view on it because, as I have said, I see no reason why s. 129 of the Act of 1926 and s. 72 of the Act of 1847 as incorporated in the local Act should not exist together.

The matter does not rest there. I would call attention to s. 328 of the Public Health Act, 1936. That is a saving provision in these terms:

> "All powers and duties conferred or imposed by this Act shall be deemed to be in addition to, and not in derogation of, any other powers and duties conferred or imposed by Act of Parliament, law or custom, and, subject to any repeal effected by, or other express provision of, this Act, all such other powers and duties may be exercised and shall be performed in the same manner as if this Act had not been passed."

Now as it seems to me, s. 72 of the Act of 1847 conferred on the plaintiffs a power and imposed on them a duty to charge the appropriate rates to the owners of houses falling within s. 72, and s. 328 of the Act of 1936, which is in most general terms, is apt to include such power and duty in the saving which it effects.

I would also refer to the Water Act, 1945, s. 38, which so far as relevant provides:

> "(1) Water rates payable to statutory water undertakers, whether under the Public Health Act, 1936, or under any other enactment, shall be payable and recoverable in accordance with the provisions of this section and not otherwise. (2) Except where an owner of premises who is not himself the occupier thereof is liable by or under any enactment, or by agreement with the undertakers, to pay the water rate for a supply of water to those premises, the water rate shall be payable by the occupier of the premises."

It seems to me that sub-s. (2) of that section embodies a clear recognition of the existence in some of the enactments in force relating to the supply of water —and, I apprehend, enactments whether general or special—of provisions of the type of s. 72. That reinforces my conclusion that the Act of 1936 effected no repeal of s. 72, which was recognised as a provision of a type which could still be on foot at the time when the Water Act, 1945, was passed.

For these reasons, I am of opinion that the rates claimed against the defendant in this case were claimable and must be regarded as having been claimed by virtue of s. 72 of the Act of 1847 as incorporated in the local Act, and, being referable to that enactment, they were not the subject of the ten per cent. discount. Local authorities, I apprehend, have no power to make a gift to a ratepayer of a discount which they have no authority to make, and, in my view, the plaintiffs here, on the true construction of the relevant enactments, have no authority to allow the discount in this case. It was not a matter of determining that owners rather than occupiers should pay the rates under s. 129 of the Act of 1936. It was a case in which s. 72 of the Act of 1847 incorporated in the local Act enjoined that the owner should pay.

Some reliance was placed on the defendant's side on certain advertisements and to the form of the demand note used by the plaintiffs. It seems reasonably clear that when the notices or advertisements in question were issued, the plaintiffs were under the impression that the section under which they should proceed to recover rates from the owner in cases such as that of the defendant was s. 129 of the Act of 1936. I would add that it would seem that in respect of the year 1944-45 a ten per cent. discount was in fact allowed. But these matters, if I am right in my view of the effect of the legislation to which I have referred, merely indicate that the plaintiffs misapprehended the legal position, and could not make s. 129 of the Act of 1936 applicable to the case, if, on the true view of the law, it was inapplicable. The plaintiffs had no option but to act in accordance with law, and s. 72 enjoined them to charge the defendant, who, under that section, was liable to pay without any discount.

I now turn to the question of jurisdiction. Counsel for the defendant invites us to hold that the county court had no jurisdiction to entertain these proceedings, and that the proper forum was, curious as it might seem, the Lands Tribunal constituted under the Lands Tribunal Act, 1949. The argument begins with the Water Act, 1945, s. 38. Sub-section (3) of that section provides:

> " The water rate payable by any person may after a demand therefor be recovered from him by the undertakers either summarily as a civil debt, or as a simple contract debt in any court of competent jurisdiction, and, subject as hereinafter provided and to the provisions of the next following sub-section, where a person fails to pay within seven days after a demand therefor any instalment of a water rate payable by him in respect of any premises, the undertakers may cut off the supply of water to the premises and recover the expenses reasonably incurred by them in so doing in the same manner as the instalment due: Provided that if, before the expiration of the said seven days, notice in writing is given to them that there is a dispute as to the amount due in respect of the water rate, or as to the liability to pay the rate, they shall not cut off the supply of water until the dispute has, on the application of either party, been settled by a court of summary jurisdiction."

Counsel for the defendant says, in effect, that this section provides for the recovery of rates in plain cases of default either summarily—that means before the justices as a civil debt—or as a simple contract debt in any court of competent jurisdiction, which would, generally speaking, mean the county court. In addition to that, it provides for the recovery of the rates by those means in cases where liability may be disputed. It further makes provision for the settlement of disputes in cases where the undertakers seek to avail themselves of the power of cutting off the supply of water. Where that method of collection or of enforcing payment is resorted to, the proviso applies, so that if before the expiration of the said seven days

> " notice in writing is given to [the undertakers] that there is a dispute as to the amount due in respect of the water rate, or as to the liability to pay the rate, they shall not cut off the supply of water until the dispute has, on the application of either party, been settled by a court of summary jurisdiction."

All these, says counsel, are ways of recovering the rates and settling disputes in regard to the liability for them or the proper amount of them.

The matter standing thus, there came into operation the Local Government Act, 1948, of which s. 62 (1) provides:

> " So much of any statutory provision as authorises or requires any dispute arising in relation to water rates to be determined by a court of summary jurisdiction shall have effect as if it authorised or required that dispute to be determined by the county court for the county court district in which the property in question is situated."

Counsel for the defendant claims that the effect of that provision is that all disputes of any of the kinds he finds dealt with in s. 38 (3) shall be determined by the county court. That would mean that wherever there was a dispute as to amount or as to liability, s. 62 (1) of the Act of 1948 had the effect of ousting the jurisdiction of the justices and making the sole competent tribunal the county court.

Finally comes the Lands Tribunal Act, 1949. That Act provides, by s. 1 (1), that there shall be set up certain tribunals, the tribunal set up in respect of the United Kingdom, other than Scotland, being called " the Lands Tribunal ". By s. 1 (3) it is provided:

> " There shall be referred to and determined by the Lands Tribunal . . . (e) any question on which, but for this provision, an appeal or reference to the county court would or might be made by virtue of s. 49, s. 62 or s. 87 of the Local Government Act, 1948."

It follows, according to counsel's argument, that, the county court having become the sole repository of jurisdiction by virtue of s. 62 (1) of the Act of 1948 the whole of that jurisdiction was transferred to the Lands Tribunal. The argument would produce a curious result, for it would, as I understand it, involve the consequence that all proceedings for the recovery of water rates in which any dispute arose as to amount or liability would have to be dealt with by the Lands Tribunal, and it seems to me that that would be, to say the least, an inconvenient arrangement. Counsel for the defendant conceded that in cases of plain default, e.g., the case of a person liable for the rate having disappeared from the district, or deliberately absenting himself from the court, or not paying simply because he was without means—that in a case of that sort, where the liability was undoubted, the jurisdiction might still remain with the court of summary jurisdiction or with the county court. But as soon as a dispute as to amount or liability arose, then, in his submission, the county court would, under s. 62 (1) of the Act of 1948, have been the only competent tribunal, and, after the Lands Tribunal Act, 1949, was brought into force, the Lands Tribunal was the only competent tribunal. That would, as it seems to me, be productive of great inconvenience, because it might not appear whether there was any dispute until the proceedings had been launched, and, if a dispute did emerge in the course of proceedings launched before the justices or in the county court, the matter would, in mid-hearing, pass into the exclusive jurisdiction of the Lands Tribunal. Counsel founded himself to some extent on the words " authorises or requires " in s. 62 (1) of the Local Government Act, 1948. He said that those words could not be satisfied unless the effect of s. 62 (1) was as he submitted it to be. I cannot agree with that submission. It must be remembered that s. 62 (1) refers to " so much of *any* statutory provision as authorises or requires any dispute ", and so forth. So the appropriateness of the words " authorises or requires " cannot be judged by reference solely to the particular provisions with which we are here concerned.

The opposing view, which seems to me to be preferable and which I adopt, is that the effect of s. 62 (1) of the Act of 1948 was to leave the jurisdiction under s. 38 (3) of the Water Act, 1945, as it was in all respects except in regard to the cases of dispute dealt with in the proviso to sub-s. (3). On that view, the reference to any dispute in s. 62 (1) of the Act of 1948 must be construed as referring to a dispute such as is mentioned in the proviso. So that the change in jurisdiction is limited to those cases in which the undertakers elect to proceed by way of cutting off the water instead of taking the defaulter immediately to court. In such cases seven days' notice must be given, and, if notice is given to the undertakers that there is a dispute as to the amount due or as to the liability, then they are not to cut off the supply of water until, as the matter originally stood under s. 38 (3) of the Water Act, 1945, the dispute has been settled by a court of summary jurisdiction on the application of either party. Those are the disputes to which s. 62 (1) of the Act of 1948 refers, and that is borne out by the use of the very same word " dispute " in s. 62 (1). It seems to me to point to the disputes referred to, and to only those referred to, in the proviso to s. 38 (3) of the Act of 1945. The effect of s. 62 (1) of the Act of 1948 thus, in my judgment, was to make the county court instead of a court of summary jurisdiction the proper tribunal to deal with disputes notified under the proviso to s. 38 (3). The position was changed by s. 1 (3) (e) of the Lands Tribunal Act, 1949, in my judgment, only to the extent that the Lands Tribunal was substituted for a county court as the tribunal to deal with disputes of the same kind, i.e., disputes which might be notified under the proviso to s. 38 (3), and thus become the subject of a reference to the county court under that proviso as modified. The point is a short one, which I fear I have dealt with at somewhat undue length. But, placing the best construction I can on the relevant provisions, I find no sufficient ground for holding that the county court did not have jurisdiction in this case.

In conclusion, I should refer to the brief note of the learned judge's judgment. He said this:

> " Claim dismissed on the ground that water was supplied under the Act of 1936 as it is a more recent Act, is a consolidating statute and must be ' executed ' by all local authorities. The Public Health Act, 1936, s. 1 (2), defines ' local authority ' as the council of a borough urban district or rural district. Plaintiff council is an urban district council. Although one can understand why, in certain cases, it may be desirable to retain the old and original Act, I cannot see why it should be so in this case."

With respect to the learned judge, it seems to me that he did not give due weight to s. 328 of the Act of 1936, and did not sufficiently apply himself to the question whether, on the assumption that the reference in s. 20 of the local Act to the Public Health Acts included all Acts passed and to be passed, nevertheless the provisions of s. 72 of the Waterworks Clauses Act, 1847, as incorporated in the local Act were capable of co-existence with the provisions of s. 129 of the Act of 1936, and, therefore, should not be regarded as entirely repealed by them. For these reasons I would allow this appeal.

Finally, I would observe that as there was some discussion as to the propriety of this rate on other grounds, nothing said in this judgment is to be treated as deciding by implication or otherwise any other question that anyone may hereafter seek to raise as to the propriety of the rate. Our decision simply is to the effect that the ten per cent. discount claimed by the defendant was not A properly allowable in this case.

HODSON, L.J.: I agree, and I cannot usefully add anything.

LLOYD-JACOB, J.: I also agree.

Appeal allowed. Leave to appeal to the House of Lords refused. B

Solicitors: *Jaques & Co.*, agents for *Godfrey Rhodes & Evans*, Halifax (for the plaintiffs); *David Garsed & Sons*, Elland (for the defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

C

R. *v.* CAMPBELL.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Cassels and Donovan, JJ.), April 23, 30, 1956.]

Criminal Law—Evidence—Corroboration—Direction to jury—Sworn evidence of child of tender years given in corroboration of sworn evidence of child of D *tender years—Whether sufficient corroboration.*

Criminal Law—Evidence—Child—Evidence given by child of tender years in corroboration of evidence of another child—Whether sufficient corroboration.

Corroboration of the sworn evidence of a child is not necessary as a matter of law, but a jury should be warned that there is risk in acting on the uncorroborated evidence of young boys or girls though the jury may do so E if convinced that the witness is telling the truth; this warning should also be given where a young boy or girl is called to corroborate the evidence of another witness, and a particularly careful warning should be given where the corroboration is the unsworn evidence of a child (see p. 276, letter B, post).

The following further propositions are justified in relation to evidence of F children in criminal cases: (i) by statute, viz., the Children and Young Persons Act, 1933, s. 38*, an accused may not be convicted on the unsworn evidence of a child of tender years unless the child's evidence is corroborated, (ii) the unsworn evidence of a child cannot be corroborated by the unsworn evidence of another child (*R.* v. *Manser* (1934) 25 Cr. App. Rep. 18; see p. 274, letter F, post), (iii) the sworn evidence of a child can be corroboration G of the evidence, sworn or unsworn, of another child (see p. 275, letter A, post), (iv) the unsworn evidence of a child may be corroboration of sworn evidence on a charge against another person (see p. 275, letter I, post), and (v) evidence of a child which is capable of constituting corroboration is not rendered incapable of being corroboration by the fact that the child is also a complaining party on another charge against the same accused, though H the jury should be warned to bear that fact in mind and look with particular care on that evidence (see p. 275, letter C, post).

The appellant, a schoolmaster, was charged on an indictment containing seven counts of indecent assaults on boys under the age of sixteen each boy being in fact about ten years old. The boys were called by the prosecution and were allowed to give sworn evidence. The prosecution relied for I corroboration of the boys' evidence on, in the case of some counts, the evidence of other boys named as assaulted persons in other counts and, in other counts, on the evidence of other boys or girls who were not involved in any of the charges and who gave evidence on oath that they had seen the appellant act in a manner which was alleged to constitute an indecent assault. The jury were warned of the risk of convicting on the uncorroborated testimony of a child but were directed that they could convict if they were certain that they were right in doing so, and were warned, with regard to the evidence of children alleged to constitute corroboration, of the like risk.

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* Section 38 (1) of the Children and Young Persons Act, 1933, provides: "Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth . . . Provided that where evidence admitted by virtue of this section is given on behalf of the prosecution the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him."

Held: the sworn evidence of one child could be corroborated by the evidence of another child whether sworn or unsworn, and as the jury had been properly warned in the present case there was no ground for interfering with the conviction.

Observations on the position where, in a case of sexual assault, the evidence of a child deals only with assaults on himself (see p. 276, letters D to F, post).

Appeal dismissed.

[As to corroboration, see 10 HALSBURY'S LAWS (3rd Edn.) 458-462, paras. 843-850.

For the Children and Young Persons Act, 1933, s. 38 (1), see 12 HALSBURY'S STATUTES (2nd Edn.) 1002.]

Cases referred to:

(1) *R.* v. *Mitchell*, (1952), 36 Cr. App. Rep. 79; 3rd Digest Supp.
(2) *R.* v. *Manser*, (1934), 25 Cr. App. Rep. 18; Digest Supp.
(3) *R.* v. *Bailey*, [1924] 2 K.B. 300; 93 L.J.K.B. 989; 132 L.T. 349; 88 J.P. 72; Digest Supp.
(4) *R.* v. *Gregg*, (1932), 102 L.J.K.B. 126; 96 J.P. 511; Digest Supp.
(5) *R.* v. *Dent*, [1943] 2 All E.R. 596; 2nd Digest Supp.
(6) *R.* v. *Sims*, [1946] 1 All E.R. 697; [1946] K.B. 531; [1947] L.J.R. 160; 175 L.T. 72; 2nd Digest Supp.
(7) *Harris* v. *Public Prosecutions Director*, [1952] 1 All E.R. 1044; [1952] A.C. 694; 116 J.P. 248; 3rd Digest Supp.

Appeal against conviction.

The appellant, Forbes McArthur Campbell, was on Mar. 8, 1956, convicted at Middlesex Quarter Sessions on an indictment containing seven counts of indecent assault. The deputy chairman certified that the case was a fit case for appeal to the Court of Criminal Appeal. The facts appear in the judgment.

R. M. O. Havers for the appellant.

F. H. Lawton for the Crown.

Cur. adv. vult.

Apr. 30. **LORD GODDARD, C.J.,** read the judgment of the court: The appellant was convicted at Middlesex Quarter Sessions on an indictment containing seven counts each charging him with indecent assaults on boys under the age of sixteen, each of whom was about ten years old. The appellant was a schoolmaster and the case against him was that he on various occasions sat beside the boys while they were doing their lessons and felt their private parts. The court allowed the boys to be sworn. The deputy chairman in summing-up stressed more than once how important it was that there should be corroboration of the evidence of young boys and gave a strong warning on this subject, at the same time telling the jury that if they fully appreciated the danger of convicting on the uncorroborated evidence of a child they could convict if absolutely certain that they were right in doing so. The evidence relied on by the prosecution as corroboration was twofold; in some cases a boy named as the assaulted person in a count of the indictment gave evidence that he saw the appellant commit a similar or substantially similar act to that of which he complained on another boy named in another count. In four cases there

A was evidence* of two boys and one girl who were not involved in any of the charges that they had seen the appellant act in relation to some of the boys in a manner which was alleged to constitute an indecent assault. The jury were specifically directed that they must consider each case separately and after this direction and the warning we have already mentioned the jury convicted on all counts. The learned deputy chairman gave a certificate for appeal in these terms: B

> "The defendant having raised the question whether the evidence of other children than those with regard to whom offences were being alleged could afford corroboration of the evidence of complaining children (that question having been specifically left open in *R.* v. *Mitchell* (1) ((1952), 36 Cr. App. Rep. 79) and whether the summing-up with regard to that evidence was adequate and proper . . ." C

The main argument before us on the appeal was that as courts have always warned juries of the danger of convicting on the uncorroborated evidence of a child of tender years, the evidence of such a child could not amount to corroboration unless his or her evidence was also corroborated. From this, if accepted, it would seem to follow that a child's evidence would never corroborate, for if D the evidence of the corroborating child had in turn to be corroborated by a person of more mature years it would follow that it would be the latter's evidence that affords the corroboration. If when child A says : "I saw the defendant assault child B", A has to be corroborated, someone would have to be called to say: "I saw what A says he saw", so that there would be no point in calling A. Now in dealing with this matter it has to be remembered that for the present E purpose child witnesses must be divided into two classes, those who are too young to be sworn and those who in the opinion of the court are capable of understanding the obligation of an oath. By s. 38 of the Children and Young Persons Act, 1933, a child of tender years may give unsworn evidence in any proceedings against any person for any offence but the person accused cannot be convicted unless the unsworn evidence is corroborated by some other material F evidence in support thereof implicating him. The unsworn evidence cannot be corroborated by other unsworn evidence; see *R.* v. *Manser* (2) ((1934), 25 Cr. App. Rep. 18). It will be observed that there is no definition in the Children and Young Persons Act, 1933, of what is meant by "a child of tender years" though "child" is defined [by s. 107] as a person under the age of fourteen. Whether a child is of tender years is a matter for the good sense of the court, G and, though it may be difficult to decide whether a child understands the obligation of an oath, a court probably would have no difficulty in deciding whether he or she was of tender years. Where then such a child gives unsworn evidence, it must be corroborated by some other evidence and we can see no reason why the corroboration should not be the evidence of another child who in the opinion of the court is capable of being sworn. Why, then, if a child gives sworn evidence H which is not required by statute to be corroborated, should the corroboration not be that of another child? It is true that for very many years the courts have always warned juries that it is dangerous to convict on the uncorroborated evidence of a child, whether of tender age or not, but so also is a similar warning given in all sexual cases. In a case where the complaining party is a grown woman the jury would be advised to look for corroboration and, if the evidence I were that of a child, that is, of a child under the age of fourteen but who in the opinion of the court can be sworn, we can find no reason for saying that such evidence could not be accepted by the jury as corroboration. To hold otherwise would mean that if a mother was indecently assaulted in the presence of her son aged say twelve or thirteen his evidence could not be accepted as corroboration if the jury believed him. Whether evidence that is legally admissible does corroborate is for a jury to determine. The court points out to them what can be corroboration, and then it is for the jury to decide whether it does corroborate and it is open to them to accept it or, if they do not think it safe to act on the evidence of one so young, to reject it. It is no doubt also desirable to remind the jury that the evidence of a child, not only of one in respect of whom the charge is made but of one called to corroborate, needs to be looked at with care, but that the jury may accept it as corroboration we think is not open to doubt. Nor can we see that it makes any difference as regards admissibility that the child offered as a corroborating witness of the evidence of another is also alleged in the indictment to be an assaulted person. Each count in an indictment is equivalent to a separate indictment. Suppose then separate trials are ordered of counts in an indictment alleging in count 1 an assault on child A and in count 2 one on child B. The latter, provided he is sworn, could be tendered to corroborate the evidence of A and need not and indeed could not be asked any questions in chief as to the assault on him. In our opinion, therefore, it makes no difference whether the child called to corroborate the evidence of another is alleged to be the victim in another count of the indictment or not, though if he is, no doubt it would be wise to warn the jury that they should bear this in mind and look with particular care on that evidence.

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* These witnesses, whose ages were about ten years, also gave evidence on oath.

Perhaps we should say a word about the cases to which counsel on either side called our attention. It is agreed that there is no case directly in point and both counsel cited the same cases. In *R.* v. *Bailey* (3) ([1924] 2 K.B. 300) the actual decision was that the jury must return a verdict on each count in the indictment and should be warned against supplementing evidence on any one by evidence on any other, but the court did emphasise the desirability of warning the jury that they should regard the evidence of boys in these cases of indecency with great care. In *R.* v. *Gregg* (4) ((1932), 102 L.J.K.B. 126), the court pointed out that where unsworn evidence is given the judge ought to draw the attention of the jury to the fact that the statute requires that evidence to be corroborated because the jury ought to approach the question of corroboration more carefully if they know that it is required by an express statutory provision and not merely by the ordinary rule of common sense and fairness which makes it desirable that the evidence of young persons should be corroborated. The oft cited case of *R.* v. *Dent* (5) ([1943] 2 All E.R. 596) in fact lays down no particular principle. It was a case in which the judge had given a proper warning as to the danger of convicting without corroboration but the jury had none the less convicted. On a review of the evidence the court thought that the verdict was unreasonable and accordingly exercised the power given by the Criminal Appeal Act, 1907, of quashing the conviction. In *R.* v. *Mitchell* (1), the case referred to by the learned deputy chairman in the certificate which he granted, the question which seems to have been left open is whether the jury should always be warned of the danger of accepting the evidence of a child of tender years in the absence of corroboration although the child is not giving evidence in regard to an assault on him or her self. It will be remembered that in that case the court was not dealing with the unsworn evidence of a child, but in stating the question that was left open we think the court must have been referring to unsworn evidence as they specifically mention the evidence of a child of tender years. We, therefore, have to consider the case of a child of tender years being called to give unsworn evidence in regard to an offence committed against some other person or against property. Inasmuch as the statute which permits a child of tender years to give unsworn evidence expressly provides for such evidence being given in any proceeding against any person for any offence, it appears to us that the unsworn evidence of a child can be given to corroborate the evidence of another person given on oath. At the same time it is obvious that a jury should be warned that such evidence must be regarded with great care, but in view of the terms of the section it seems to us that the evidence is admissible though its weight is for the jury.

To sum up, the unsworn evidence of a child must be corroborated by sworn evidence; if then the only evidence implicating the accused is that of unsworn children the judge must stop the case. It makes no difference whether the child's evidence relates to an assault on him or her self or to any other charge, for example, where an unsworn child says that he saw the accused person steal an article. The sworn evidence of a child need not as a matter of law be corroborated but a jury should be warned not that they must find corroboration but that there is a risk in acting on the uncorroborated evidence of young boys or girls though they may do so if convinced the witness is telling the truth, and this warning should also be given where a young boy or girl is called to corroborate the evidence either of another child, sworn or unsworn, or of an adult. The evidence of an unsworn child can amount to corroboration of sworn evidence though a particularly careful warning should in that case be given. As proper warnings were given by the learned deputy chairman in this case there is no ground on which we can interfere with the conviction.

As we are endeavouring in this judgment to deal comprehensively with the evidence of children we may perhaps endeavour to given some guidance to courts who have from time to time to deal with cases of sexual assaults on children where the evidence of each child deals only with the assault on him or her self. In such cases it is right to tell a jury that because A says that the accused assaulted him, it is no corroboration of his evidence that B says that he also was the victim of a similar assault though both say it on oath. At the same time we think a jury may be told that a succession of these cases may help them to determine the truth of the matter provided they are satisfied that there is no collaboration between the children to put up a false story. And if the defence is one of innocent association by the accused with the children, the case of *R.* v. *Sims* (6) ([1946] 1 All E.R. 697), subsequently approved on this point by the House of Lords in *Harris* v. *Public Prosecutions Director* (7) ([1952] 1 All E.R. 1044), shows that such evidence can be given to rebut the defence.

This appeal is accordingly dismissed.

Appeal dismissed.

Solicitors: *H. R. Hodder & Son* (for the appellant); *Director of Public Prosecutions.*

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

SPIRES *v.* SMITH.

[Queen's Bench Division (Lord Goddard, C.J., Jones and McNair, JJ.), May 1, 1956.]

Street Traffic—Public service vehicle—Stage carriage—Number of standing passengers in excess of prescribed maximum—Conductor charged with permitting excess number of passengers to be carried—Whether conductor the wrong person to be charged as a principal offender—Public Service Vehicles and Trolley Vehicles (Carrying Capacity) Regulations, 1954 (*S.I.* 1954 *No.* 1612), *reg.* 3, *reg.* 4.

The Public Service Vehicles and Trolley Vehicles (Carrying Capacity) Regulations, 1954, reg. 4*, limited the number of standing passengers who might be carried in an omnibus to eight. Contravention of the regulation was, by s. 9 (2) of the Transport Charges etc. (Miscellaneous Provisions) Act, 1954*, an offence punishable on summary conviction. The appellant was an omnibus conductor employed by a bus company and on July 25, 1955, the company's bus of which he was conductor was carrying more than eight standing passengers. He was convicted on a charge that on that day he " unlawfully did fail to comply with the provisions of " reg. 4 " in that he permitted " the bus " to be used to carry passengers in excess of the maximum number " permitted by the regulation. On appeal,

Held: the appellant had been wrongly charged as the principal offender on a charge of permitting the bus to be used to carry standing passengers in excess of the prescribed maximum number because either (i) (per Lord Goddard, C.J., and Jones, J.) reg. 4 when read with reg. 3 created one offence, viz., carrying in excess of the prescribed maximum number, and, as the bus conductor was not the carrier, the appellant's offence (if any) could only have been that of aiding and abetting the carrier, or (ii) (per McNair, J.) the regulations were penal regulations and ambiguous in not stating clearly on whom the obligation to prevent the carriage of an excessive number of standing passengers rested.

Appeal allowed.

[**Editorial Note.** It seems that in such circumstances as those of the present case, should they recur, the carrier, as distinct from the conductor, would be open to a charge of using the vehicle in contravention of the regulation, since a master, whether he is an individual or a limited company, " uses " his vehicle if it is used by his servant on the master's business (see *James & Son, Ltd.*, v. *Smee, Green* v. *Burnett,* [1954] 3 All E.R. 273, letter H).

For the Transport Charges etc. (Miscellaneous Provisions) Act, 1954, s. 9, see 34 Halsbury's Statutes (2nd Edn.) 874.]

Case Stated.

Case Stated by justices for the County of Huntingdon, in respect of their adjudication as a magistrates' court sitting at Huntingdon on Oct. 21 and Nov. 18, 1955.

On Sept. 23, 1955, the respondent, William Thomas Smith, preferred an information against the appellant, Robert Spires, charging that, on July 25, 1955, at Alconbury in the County of Huntingdon, he unlawfully failed to comply with the provisions of reg. 4 of the Public Service Vehicles and Trolley Vehicles (Carrying Capacity) Regulations, 1954, in that he permitted a stage carriage to be used to carry passengers in excess of the maximum number permitted by the regulations, contrary to the Transport Charges etc. (Miscellaneous Provisions) Act, 1954, s. 9. The following facts were found. The appellant was an omnibus conductor employed by the Eastern Counties Omnibus Co., Ltd. On July 25, 1955, he was conductor of a double-decker stage carriage which was on passenger service from

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* The texts of reg. 4 and of s. 9 (2) are printed at p. 278, letter H, to p. 279, letter A, post.

Peterborough to Cambridge. At Alconbury, the stage carriage was carrying as standing passengers fifteen adults and three children.

It was contended on behalf of the appellant that the words of s. 9 of the Act and of reg. 4 of the regulations referred solely to the " carrying " of passengers, and that, whilst it was an offence to " carry " an excess number of passengers, no offence of " permitting " the use or " using " a public service vehicle for that purpose was created by the section or the regulation. Further, the offence of " carrying " an excessive number of passengers could only be committed by the carrier, i.e., the owner of the vehicle who held the necessary licence for the carriage of passengers and who received payment for that carriage. The master (here the Eastern Counties Omnibus Co., Ltd.) was responsible for the acts of its servant when the statute creating the offence did so in terms which imposed an absolute prohibition. The appellant might have aided and abetted his master in the commission of the offence, but he was not so charged. It was contended on behalf of the respondent, that, whilst reg. 4 was permissive, yet if standing passengers were carried, not more than eight standing passengers could be carried without a breach of the regulations, and, in this respect, reg. 4 must be read in conjunction with reg. 3. The regulations must be read in conjunction with s. 9 of the Act, by sub-s. (2) of which a penalty was provided for failure to comply with any regulations made by the Minister under the powers conferred on him by that Act. The appellant had permitted more than eight passengers to stand, and had thus permitted the vehicle to be used otherwise than in compliance with the regulations.

The justices convicted the appellant and the appellant now appealed.

F. H. Lawton for the appellant.
N. N. McKinnon for the respondent.

LORD GODDARD, C.J.: This case raises a very curious point, which, at first sight, appears to have no merits in it at all, but a state of affairs can arise in which it may be material. Moreover, a defendant is always entitled to take advantage of the way in which regulations are drawn, if he can, and to contend that the act which is alleged against him is no breach of the regulations. If regulations are drawn in such a form that they are difficult to understand, they must also be construed in favour of a defendant. [His Lordship stated the facts and continued:] The first thing at which to look is the statute. Section 9 (1) of the Transport Charges etc. (Miscellaneous Provisions) Act, 1954, provides:

> " The Minister may make regulations with respect to public service vehicles, tramcars and trolley vehicles providing for—(a) the determination by or under the regulations of the number of the seated passengers and standing passengers respectively whom any vehicle is constructed or adapted and fit to carry; (b) the determination by or under the regulations of the number of such passengers respectively who may be carried in any vehicle . . . "

I need not read the rest of sub-s. (1), but sub-s. (2) provides:

> " If any person contravenes or fails to comply with any such regulation he shall for each offence be liable on summary conviction to a fine not exceeding £20."

The offence which is created by the statute is failing to comply with the regulation and we, therefore, have to see who is bound by the regulation. By the Public Service Vehicles and Trolley Vehicles (Carrying Capacity) Regulations, 1954, reg. 4:

> " Subject to the provisions of reg. 7 of these regulations, during the hours of peak traffic or in circumstances in which undue hardship would be caused to such passengers if they were not so carried, there may be carried on a public service vehicle, when being used as a stage carriage, or on a

> A trolley vehicle, a number of standing passengers not exceeding one-third of the number of passengers for which the vehicle, or in the case of a double-decked vehicle the lower deck, has seating capacity, or eight, whichever number is the less."

What are the elements of an offence against that regulation ? One has to B look back to reg. 3, which is not mentioned in the information:

> "The number of seated passengers carried on any vehicle shall not exceed the number for which the vehicle has seating capacity and, except as otherwise provided by these regulations, no standing passengers may be carried on any vehicle . . . "

What is charged here is a failure to comply with reg. 4 in that the appellant C permitted certain things. Disregarding the first words of the regulation, which deal with peak traffic hours and undue hardship, what the regulation provides is that there may be carried on a public service vehicle, when being used as a stage carriage, a number of passengers not exceeding one-third of the number for which the vehicle is constructed or eight, whichever number is the less. Therefore, it can, I suppose, be said that the offence against the regulation, which is D alleged to have been committed, is the carrying of passengers exceeding that number—the number of passengers in excess of one-third of the number for which the vehicle has carrying capacity or the number in excess of eight, whichever number is the less. One finds out which number is the less, and the charge is of carrying passengers in excess of that number.

Now who carries ? It is not the conductor and it is not the driver. They are E not the owners of the vehicle; they do not run the service. It seems to me that the only person who carries is the company or the owner of the vehicle, as the case may be. A conductor of a public service vehicle is not, himself, the carrier of the passengers. Then, it may be said that he permitted it; that, if the permitting of doing something is prohibited, allowing it to be done is a substantive offence. I do not find, however, in the regulation a prohibition against the F conductor permitting a number of passengers to board the vehicle. The substantive offence is the carrying of the excess number of passengers. If, therefore, the conductor allows more people to get on the bus than its seating capacity, he is not himself committing the substantive offence. He is not failing to comply with the regulation, because he is not carrying them. What he is doing is aiding and abetting the commission of an offence by the company. It is a very fine G point, and one which, in nine cases out of ten, would not, I suppose, have any possible effect. It looks as though the regulations should be redrafted in such a way as to make it an offence on the part of the driver or the conductor. I am bound to say that, for myself, I think that the only substantive offence that is created by these regulations is the offence of carrying, and the carrier is the owner of the bus and not the conductor. Therefore, if it is sought to charge the H conductor in these circumstances he must, I think, be charged with aiding and abetting. For these reasons, I think that the appeal succeeds.

JONES, J.: I agree.

McNAIR, J.: I agree with the result proposed by my Lord, but for my part I would prefer to say that reg. 3 and reg. 4 are ambiguous. They do not make I it sufficiently clear on whom rests the obligation to prevent the carriage of excess passengers. Accordingly, these being penal regulations, it would be wrong in law to charge the conductor as a principal offender on the allegation that he has permitted the prohibited state of affairs.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Rigby, Williams & Co.*, Peterborough (for the appellant); *Treasury Solicitor.*

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

R. *v.* CAMPBELL, *Ex parte* NOMIKOS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Donovan, JJ.), April 27, 1956.]

Shipping—Safety convention—Deck cargo—Timber carried on deck—Permitted height exceeded in two places—Whether more than one offence—Timber Cargo Regulations, 1932 (*S.R. & O.* 1932 *No.* 110)*—Merchant Shipping* (*Safety and Load Line Conventions*) *Act,* 1932 (22 *&* 23 *Geo.* 5 *c.* 9), *s.* 61 (4), (6).

Certiorari—Conviction—Quashing—Plea of guilty—Discretionary remedy—Whether certiorari to quash conviction will be granted.

The applicant, the master of a cargo ship, was charged before a stipendiary magistrate, on two informations alleging contraventions of reg. 5 (b) of the Timber Cargo Regulations, 1932* in respect of timber carried on the deck of his ship. The first information dealt with timber on the fore deck and the other with timber on the quarter deck. In respect of both it was alleged that the height of the timber above the free board deck exceeded that permitted by the regulations. The applicant, who was represented by counsel before the magistrate, pleaded guilty to both charges. The magistrate imposed a fine of £500 (the maximum) in respect of the first information and £250 in respect of the other. On a motion for certiorari to quash the second conviction and fine on the grounds that the regulations created only one offence in respect of the whole timber deck cargo carried by the ship,

Held: (i) although part of the timber was on the fore deck and part was on the quarter deck and the maximum permitted height had been exceeded in both places, yet there was only one offence; but

(ii) certiorari, being a discretionary remedy, would not be granted in this case because the applicant had pleaded guilty before the magistrate who could not, therefore, be said to have acted outside her jurisdiction.

[As to discretion of court to grant certiorari, see 11 HALSBURY'S LAWS (3rd Edn.) 139 et seq.

For the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, s. 61, see 23 HALSBURY'S STATUTES (2nd Edn.) 948.

For a summary of the Timber Cargo Regulations, 1932, see 20 HALSBURY'S STATUTORY INSTRUMENTS 98.]

Case referred to:

(1) *R.* v. *Stafford JJ., Ex p. Stafford Corpn.,* [1940] 2 K.B. 33; 109 L.J.K.B. 584; 162 L.T. 393; 104 J.P. 266; 2nd Digest Supp.

Motion for certiorari.

The applicant, Loucas John Nomikos, was the master of a cargo ship, the s.s. Capetan Giannis. On Dec. 17, 1955, he appeared on a summons before the metropolitan stipendiary magistrate, Miss Sybil Campbell, at Tower Bridge Magistrates' Court, to answer two informations alleging that on or about Dec. 11, 1955, he was the master of the said ship and that the height of the timber deck cargo carried on the ship contravened reg. 5 (b) of the Timber Cargo Regulations, 1932, in respect of that part of the timber deck cargo carried on the fore deck and in respect of that part of the timber deck cargo carried on the quarter deck. He was represented by counsel and he pleaded guilty to both charges. The magistrate was not asked to construe the Timber Cargo Regulations, 1932, nor was it contended before her that the two parts of the cargo should be regarded as one cargo. In respect of the information alleging a contravention of the regulations owing to the excessive height of the cargo on the fore deck the magistrate imposed the maximum fine of £500: in respect of the cargo on the quarter deck, the second information, she imposed a fine of £250. On Feb. 14, 1956, the applicant was granted leave to move for an order of certiorari to quash the second conviction and the fine on the grounds that the maximum penalty had been imposed on the first summons. It was contended that the regulations did not provide for more than one offence in respect of the whole cargo carried by the ship.

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* Regulation 5 (b) is set out at p. 282, letter C, post.

M. B. Summerskill for the applicant.

Rodger Winn for the respondents, Miss Sybil Campbell, and the Ministry of Transport and Civil Aviation.

LORD GODDARD, C.J.: In this case counsel moves for an order of certiorari to bring up and quash a conviction for a contravention of the Timber Cargo Regulations, 1932, in that the height of a part of the timber deck cargo carried on the raised quarter deck of the ship of which the applicant was master was two feet three inches in excess of the maximum permitted height. The magistrate convicted and imposed a fine of £250, and that is the conviction which is sought to be quashed.

The facts relating to this matter are that the ship in question, which came into the Port of London, was carrying timber on the fore deck and on the quarter deck, and the timber on both of those parts of the ship exceeded the height which is permitted by the Timber Cargo Regulations, 1932, in respect of which the master was summoned. There was one summons and two informations were filed; the first:

> " for that you, on or about Dec. 11, 1955, were master of the steamship Capetan Giannis in relation to which there had been a contravention of the Timber Cargo Regulations, 1932 . . . namely, that the height of that part of the timber deck cargo carried on the fore deck of the said ship was 5.3 feet in excess of the maximum permitted height."

Then it says:

> " and a further contravention of the said regulations on that day, namely, that the height of that part of the timber deck cargo carried on the raised quarter deck of the said ship was 2.3 feet in excess of the maximum permitted height, both contraventions as aforesaid being contrary to reg. 5 (b) of the said regulations and to s. 61 (4) and (6) of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932."

On coming before the learned magistrate the master was represented by counsel instructed by a very well known firm of commercial solicitors in the City of London, and a plea of guilty was entered to both informations. Thereupon the learned magistrate imposed a fine of £500 on the first information and a fine of £250 on the second information. One can well understand why she imposed the maximum in one and half in the other. It was to ensure that a gross penalty should be imposed which would make it clear that carrying this deck cargo did not pay.

That having been done, it subsequently occurred to the applicant's advisers that the master ought not to have pleaded guilty in respect of two informations and that there was only one offence, and so they applied for certiorari. The first point that we have to decide is whether there was one offence or two offences, because if there were two offences as the informations allege, there being two informations, then it follows that there can be no ground for certiorari.

We have first of all to consider these regulations. The term " timber deck cargo " is defined by the regulations and means

> " a cargo of timber carried on an uncovered part of a freeboard or superstructure deck, but does not include a cargo of wood pulp or similar substance."

The term " freeboard deck " has the same meaning as in the Load Line Rules*. The term " superstructure deck " means the deck forming the top of a superstructure as defined in the Load Line Rules. In the Load Line Rules [Part 1] " superstructure " means

> " a decked structure on the freeboard deck extending from side to side of the ship, and includes a ' raised quarter deck '; and ' superstructure deck ' means the deck forming the top of a superstructure."

That is reasonably intelligible. When we get to " freeboard deck ", I have no doubt that it is intelligible to shipmasters, ship architects and ship builders, but it is a little difficult for a mere layman like myself in these matters to follow. I do not think that it matters because counsel for the respondents in this case contends that the fore deck and the quarter deck of the ship were both superstructure decks.

The regulation which is alleged to be infringed is reg. 5 (b):

> " In the case of a ship within any of the areas set out in the first column of the Schedule hereto, during the periods set out respectively opposite to such areas in the second column of the said Schedule, the height of the timber deck cargo above the freeboard deck shall not exceed one-third of the extreme breadth of the ship."

The simple point is that part of this deck cargo was stowed on the fore deck of the ship and part of this cargo was stowed on the quarter deck. It was a deck cargo. The question is whether or not you can say that there is more than one breach of the regulation, or whether you can say that it was one offence to overload the fore deck and another to overload the quarter deck.

We think that the matter is one of very great obscurity in the drafting of these regulations. I can see very good reasons from the safety point of view why the regulations should make it an offence to overload what I may call different decks, regarding the fore deck and the quarter deck as different decks, but I do not think that it is an offence under these regulations. I think that we must conclude that the superstructure deck is all one deck although to get from one part to another you may have to go down a ladder and up another ladder, just the same as you might have to go down a hatch and come up in different places. For my part I am not prepared to say that there were two timber cargoes. I think that there was only one timber cargo and I think that the timber cargo was stowed on a superstructure deck. Therefore I think that the only safe thing, when one is construing so obscure a regulation as this, is to construe it in favour of the applicant, and to say that there was only one offence here and that only one information should have been laid, although I can see very good reasons for the authorities taking the view that there were two offences or that there ought to be two offences.

Then there is the other point. It is now suggested that the learned magistrate's decision is to be brought up and quashed on certiorari because it is said that she never ought to have convicted on the second information. In one sense that is quite right, but in this case when the master appeared before the magistrate he pleaded guilty. What option had she got except to proceed to convict ? She convicted on both these informations. Counsel now says that the conviction on one of them must be quashed, and the conviction on which a fine of £250 was imposed is selected because the other one in which a fine of £500 was imposed came first in point of time. That may be, but there is a great distinction, which is not always sufficiently borne in mind when you are dealing with the very special remedy of certiorari, between what a magistrate or a court does in or outside jurisdiction. If the act is done within the jurisdiction, it cannot be quashed on certiorari. If the decision which is given is within the magistrate's jurisdiction and is wrong, the remedy is appeal.

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* The Load Line Rules, 1941 (S.R. & O. 1941 No. 1464) made by the Minister of War Transport in exercise of the powers conferred by ss. 42, 47, 48 and 68 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, originally on the Board of Trade and now vested in the Minister of Transport and Civil Aviation (see 7 HALSBURY'S LAWS (3rd Edn.) 423).

Now consider what happened here. If, instead of a plea of guilty being made, the master had pleaded not guilty, the magistrate would have heard the first case, and in the first case, there being no doubt about it, she would have imposed a fine. The second case would then have been called on. Then the applicant would have been able to say: "I have got a defence to this. It is not a question of jurisdiction. You, the magistrate, have jurisdiction to hear and determine this case, but you must determine it in my favour because I have a defence. My defence is that these regulations apply only to one deck. What are said to be two decks must be regarded as one deck. What are said to be two cargoes are to be regarded as one cargo. Therefore you must dismiss this case on the ground that the second information does not disclose an offence against me." It may be also that the applicant might have put in what is equivalent to a plea of autrefois convict—I believe that term ought strictly speaking to be confined to an indictment. At any rate it is quite clear that a magistrate cannot convict twice for the same offence and that a perfectly good objection could have been taken. Whether or not it is accurately called autrefois convict does not matter. Those, as I say, were matters of defence.

If the position had been as I have tried to envisage, that is to say, pleas of not guilty entered and conviction on the first information, and if the magistrate had then proceeded to convict on the second, the remedy would have been an appeal because until the magistrate had inquired into the facts and construed the regulation it would not have appeared whether or not an offence had been committed. Certiorari in these matters must depend on jurisdiction. It is sometimes forgotten why it is that certiorari will lie for bias in a magistrate. No question of bias arises here, but it is a very common ground for moving for certiorari that the magistrate has an interest in the matter and is, therefore, said to be biased. The reason why that is a ground for certiorari is that there is a well known maxim that no man can be judge in his own cause. If a magistrate is biased, he is supposed to be disqualified from sitting because he would be sitting on a matter in which he himself was interested. Therefore he has no jurisdiction to sit, and if he sits that is a fatal objection to a conviction. That again is jurisdiction. Certiorari to quash always depends on jurisdiction. Certiorari to remove is quite a different matter. It seems to me that when a prosecution is launched before a magistrate for a breach of these regulations, which is a summary offence, it follows and is abundantly clear that the magistrate has jurisdiction to hear and determine that case. In this case there was a hearing and determination. It turns out that if the master had pleaded not guilty the determination would or ought to have been the other way: the information ought to have been dismissed. I cannot see by what process of reasoning we can say that the magistrate had not got jurisdiction to hear this case, although if this point had been taken and laid before the magistrate who, one assumes, would have decided rightly, she would have dismissed the case.

Another ground for refusing certiorari in this case is that I know of no case where a plea of guilty has been entered and certiorari has been granted. No one can suggest that in this case the magistrate did anything wrong. She has filed an affidavit explaining exactly what happened. Competent counsel being before her and entering a plea of guilty for his client, she naturally proceeded to record a conviction and consider what penalty should be imposed. In my opinion it would be quite wrong to issue certiorari in this case after that has been done, and also in my view the court has no power to order certiorari in this case. Certiorari is always, it should be remembered, a discretionary remedy. Although in the history of that writ the courts were inclined at one time rather to depart from the fact of its being a discretionary remedy, *R.* v. *Stafford JJ., Ex p. Stafford*

Corpn. (1) ([1940] 2 K.B. 33), to which counsel for the applicant referred, shows that the Court of Appeal were, if I may say so, on the right lines in getting certiorari back to a matter of discretion. It may very often be that the facts are such that the discretion can be exercised in only one way, that is to say, it would not be a judicial exercise of discretion to decide against the person by whom the exercise of the discretion is sought. That is sometimes misunderstood. In this case the whole difficulty was caused by the deliberate entering of a plea of guilty on the part of the applicant. It may be that there is still a hope of the applicant getting back part of his money, but that must be done by an application for the bounty or mercy of the Crown. If it is pointed out to the responsible advisers to Her Majesty that the court has decided that there was only one offence here and not two offences and a petition is made for the return of the one penalty, it may be that the Crown will be pleased to order a return. That is not a matter for us, and we do not express any opinion whether that would be right in this particular case or not. It is true that two penalties have been inflicted. It is also true that it was entirely owing to the action of the applicant that they were.

For these reasons the application for certiorari must be refused.

CASSELS, J.: I desire only to add a few words on that part of the case which concerns the cargo which was carried on this ship as disclosed in the facts before the court. The Merchant Shipping (Safety and Load Line Conventions) Act, 1932, s. 61 (1), provides:

> " The Board of Trade shall make regulations . . . as to the conditions on which timber may be carried as cargo in any uncovered space on the deck of any load line ship."

Those regulations have been made, they have been duly published, and they are known as the Timber Cargo Regulations, 1932. It is said that there has been a contravention of reg. 5 (b) with regard to stowage, which towards the end of it reads:

> " . . . the height of the timber deck cargo above the freeboard deck shall not exceed one-third of the extreme breadth of the ship."

It does seem to me that the datum line to be taken is the line which in this regulation is called the freeboard deck, and that to exceed the permitted height above that line is what constitutes an offence against reg. 5 (b). Further, it does seem to me that you cannot go along with your yard-stick, hold it upright, put it alongside this cargo and say: " There you are four feet above the datum line. There you are ten feet above the datum line. There you are fifteen feet above the datum line. That will be three summonses ", and so on. I think that that would be wrong and not in accordance with the strict interpretation of these regulations.

I, therefore, go a little further and I find that s. 61 (4) of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, reads:

> " If any provision of the timber cargo regulations is contravened in the case of any British load line ship registered in the United Kingdom, the master of the ship shall be liable to a fine not exceeding £500."

That, by a further sub-section of the same section, is made to apply to any foreign load line ship which is found to be in breach of these regulations in British ports.

There is a further thing to be observed with regard to these regulations. It is not only the height of the cargo of timber which may bring the master of a ship into trouble. He is also expected to have due regard to the safety of his crew, and he must arrange for avenues through the cargo and protecting rails to be erected*. All that comes under the safety regulations, and I should find it difficult to understand, if in one place you found that the height for the purpose of these avenues was greater than in another and further away or further above what I venture to call the datum line, that for every position in which you could find that the height had been exceeded you could have a separate information. None the less, the situation which has arisen is entirely due to the fault of the applicant because when appearing before the learned magistrate the applicant pleaded guilty in respect of both informations, took no point on this matter, and now comes to this court in order to seek the remedy of certiorari.

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* See reg. 6 of the Timber Cargo Regulations, 1932.

I agree that he is not entitled so to do and that this application must be refused.

DONOVAN, J.: I have nothing to add on the question of whether certiorari should issue, on which matter I entirely agree with what has been said by Lord Goddard, C.J., and by Cassels, J.

On the main issue, the question at bottom is, as I see it, one of the true construction of the term " timber deck cargo " appearing in the Timber Cargo Regulations, 1932. It is there defined as meaning (reg. 1 (1)):

> "a cargo of timber carried on an uncovered part of a freeboard or superstructure deck, but does not include a cargo of wood pulp or similar substance."

Even assuming here in favour of the respondent that there were two superstructure decks, the question becomes this: when part of that cargo is carried on one superstructure deck and another part on another superstructure deck on the same ship at the same time, is that one cargo or two cargoes within the meaning of the definition ? If it is two cargoes, then there are two offences each carrying a maximum fine of £500. If it is one cargo, it is one offence only. There is obviously a good deal to be said for each interpretation, but in a case where a heavy fine can be inflicted for each offence, I think that any such ambiguity ought to be resolved in favour of the subject because it is quite easy for the authorities to put the matter beyond doubt and make it clear which interpretation is right if they wish to do so.

Application dismissed.

Solicitors: *Richards, Butler & Co.* (for the applicant); *Treasury Solicitor* (for the respondents).

[*Reported by* A. P. Pringle, Esq., *Barrister-at-Law.*]

Re KOUYOUMDJIAN (a bankrupt), *Ex parte* THE TRUSTEE OF THE PROPERTY OF THE BANKRUPT *v.* LORD AND ANOTHER.

[CHANCERY DIVISION (Upjohn, J.), April 16, 30, 1956.]

Bankruptcy—Transfer of "proceedings"—Motion pending in bankruptcy proceedings in county court—Whether there was jurisdiction to transfer to High Court—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5 *c.* 59), *s.* 100 (2).

The Bankruptcy Act, 1914, s. 100 (2), which provides that "any proceedings in bankruptcy may at any time . . . be transferred . . . from one court to another . . .", refers only to the whole bankruptcy proceedings and does not confer on the High Court jurisdiction to transfer to itself a motion pending in bankruptcy proceedings initiated and continuing in a county court.

Re Marquis of Huntly, Ex p. Goldstein ([1917] 2 K.B. 729) considered.

[As to transfer of proceedings from one court to another, see 2 HALSBURY'S LAWS (3rd Edn.) 312, para. 592; and for cases on the subject, see 4 DIGEST 149-152, *1388-1424*.

For the Bankruptcy Act, 1914, s. 100, see 2 HALSBURY'S STATUTES (2nd Edn.) 414.

For the Bankruptcy Rules, 1952, rr. 21, 26, 27, see 1 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 162, 163.]

Case referred to:

(1) *Re Huntly (Marquis), Ex p. Goldstein*, [1917] 2 K.B. 729; 87 L.J.K.B. 735; 117 L.T. 792; 4 Digest 39, *339*.

Motion.

This was an application by the trustee in bankruptcy of Haroutune Kouyoumdjian, a bankrupt, for an order that a motion in the bankruptcy proceedings in the Manchester County Court which motion was proceeding there and the notice of which was dated Dec. 14, 1955, should be transferred for hearing by the High Court of Justice in bankruptcy in London. The principal ground of the application was that the matter is of great complication involving the attendance for cross-examination of some six professional gentlemen, all of whom are resident in London, on a hearing that might last for two or three days, and it was contended that if the motion was heard in London the expense of witnesses travelling to and possibly staying in Manchester would be avoided. The application was supported by the respondents.

Proceedings in bankruptcy against the bankrupt were initiated in the Manchester County Court and on July 23, 1954, a receiving order was made against the bankrupt who was adjudicated a bankrupt in that court on Aug. 10, 1954. The notice of the motion which it was desired to transfer to be heard in the High Court was dated Dec. 14, 1955, and asked for (i) a declaration that a payment of £3,000 or thereabouts made on or about May 21, 1954, by the bankrupt to the respondent, Cyril Lord, was fraudulent and void against the applicant as trustee of the bankrupt's property as a fraudulent transfer and act of bankruptcy under the Bankruptcy Act, 1914, s. 1 (1) (b) and also, in the alternative, fraudulent and void under the Law of Property Act, 1925, s. 172, and, further in the alternative, void under the Bankruptcy Act, 1914, s. 42; (ii) further or in the alternative a declaration that a payment of £3,000 or thereabouts made on or about May 21, 1954, by the bankrupt to the respondent company, Brindles, Ltd., through their agent, the respondent Cyril Lord, was fraudulent and void on similar grounds.

An application was made informally to the registrar of the Manchester County Court asking him to request the High Court in bankruptcy in London to deal with that motion, but he regarded himself bound by the decision in *Re Marquis of Huntly, Ex p. Goldstein* (1) ([1917] 2 K.B. 729) and refused the application.

N. E. Wiggins for the applicant, the trustee in bankruptcy.
G. R. F. Morris for the respondents.

UPJOHN, J.: Before I consider the merits of this application (which is supported by the respondents), I have to consider whether there is jurisdiction under the Bankruptcy Act, 1914, to transfer such a motion to this court while the general administration of the bankrupt's affairs remains in the county court in Manchester, the court in which the order of adjudication was originally made. The application is made under the Bankruptcy Act, 1914, s. 100, which provides:

> " (1) Subject to the provisions of this Act, every court having original jurisdiction in bankruptcy shall have jurisdiction throughout England.
>
> " (2) Any proceedings in bankruptcy may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by any prescribed authority and in the prescribed manner from one court to another court, or may, by the like authority, be retained in the court in which the proceedings were commenced, although it may not be the court in which the proceedings ought to have been commenced.
>
> " (3) If any question of law arises in any bankruptcy proceeding in a county court which all the parties to the proceeding desire, or which one of them and the judge of the county court desire, to have determined in the first instance in the High Court, the judge shall state the facts in the form of a special case for the opinion of the High Court. The special case and the proceedings, or such of them as may be required, shall be transmitted to the High Court for the purposes of the determination."

The relevant rules are now to be found in the Bankruptcy Rules, 1952 (S.I. 1952 No. 2113). Rule 21 provides:

> " The judge of the High Court may order the proceedings in any matter under the Act to be transferred from a county court to the High Court, or from the High Court to a county court."

Rule 26 provides:

> " A matter transferred from one court to another shall receive a new distinctive number."

Rule 27 provides:

> " The official receiver of the court to which the proceedings are transferred shall become the official receiver of the debtor's estate in place of the official receiver of the court from which they are transferred."

Section 122 of the Act of 1914 provides:

> " The High Court, the county courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request, or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions."

I understand that an application was made informally to the registrar of the Manchester County Court asking him to request the High Court to deal with this motion pursuant to s. 122, but he felt himself bound, and in my opinion rightly, by the decision of the Divisional Court in *Re Marquis of Huntly, Ex p. Goldstein* (1) ([1917] 2 K.B. 729) to indicate that he could not make the order.

It is, I think, clear from the rules that at all events the draftsman of the rules thought that a transfer of proceedings under s. 100 would be a transfer of all the bankruptcy proceedings and not merely of some motion or other application pending in the proceedings. Again, it seems to me that s. 122 is directed to asking the assistance of courts other than that in which the bankruptcy is proceeding to assist in particular matters such as this; but there is no doubt that that section has had a judicial gloss put on it in *Re Huntly* (1) which renders its ambit somewhat circumscribed in extent. Reliance, however, is placed on that case, for HORRIDGE, J., in the course of his judgment, said ([1917] 2 K.B. at p. 732):

> " By s. 100 of the Bankruptcy Act, 1914, the matter might have been transferred to London if there was ground for the exercise of the power of transfer. The legislature has invested the county courts to whom bankruptcy jurisdiction is assigned with the same powers as I have."

It is said that HORRIDGE, J., thought that the particular application in that case could by itself have been transferred. I do not regard that authority, however, as being of assistance to me, because I do not know whether HORRIDGE, J., in referring to " the matter ", referred to the whole of the bankruptcy proceedings or merely the application pending before him, and, of course, the question of the precise jurisdiction under s. 100 was not in issue before that court.

There is one other matter which I think must affect one's approach to s. 100. If there is jurisdiction to transfer any motion or other application under s. 100 (2), it would hardly seem necessary to have inserted sub-s. (3) in s. 100. It would seem more convenient that the motion should be determined from start to finish by the High Court to which it would be transferred.

Those matters, however, only indicate the approach that I adopt to s. 100 (2). The precise jurisdiction conferred on the court must depend on the exact words used in the section. Section 100 (2) starts in the widest possible way. " Any proceedings in bankruptcy " are certainly wide words, and the question is whether those words are sufficiently wide, notwithstanding other matters that I have indicated, and particularly the relevant rules to confer on this court the jurisdiction which the applicant claims that it has.

I think that the clue to the matter is that, although the opening words of the sub-section are very wide, there is a reference to " proceedings " later in the sub-section. The exact words are:

> " Any proceedings . . . may . . . be retained in the court in which the proceedings were commenced, although it may not be the court in which the proceedings ought to have been commenced."

It is possible, although I think most unlikely, that the legislature was contemplating a case where, although the bankruptcy was proceeding in a particular county court, someone might make an application either in the High Court or in another county court in those bankruptcy proceedings. The applicant would be in grave practical difficulties in getting any other court to issue any summons; but I think it was most unlikely that the legislature had that state of affairs in mind. Indeed, if it had, it is plain that, if the motion was started in this court, it could be heard here, although wrongly issued. That has not been suggested. I think that the proceedings which the legislature had in mind in the concluding part of s. 100 (2) were the proceedings which initiated the bankruptcy. It sometimes happens that bankruptcy proceedings may be initiated in the wrong court, the commonest cause being that the petitioning creditor has mistaken the proper address of the debtor. Section 100 (2) provides that, notwithstanding that, the court shall have jurisdiction to entertain the bankruptcy proceedings.

If that be the true meaning to be placed on the word " proceedings " towards the end of s. 100 (2), it is an indication that, although the opening words are very wide, this sub-section is dealing with the case of the proceedings in bankruptcy, in the sense of transferring the proceedings initiating the bankruptcy and everything that follows thereon. No one doubts that the whole bankruptcy proceedings can at any time and at any stage be transferred from court to court. I do not think that this sub-section is dealing at all with the case of a transfer of a particular application or motion in any particular bankruptcy. It is dealing only with the transfer of the whole bankruptcy proceedings. Power to transfer part only of the bankruptcy proceedings would also, in my judgment, be productive of great administrative inconvenience.

Accordingly, in my judgment there is no jurisdiction in this court to accede to this application. I propose, therefore, only to say very few words about the merits. The principal ground on which the application was based was that the matter involved the attendance for cross-examination of some six professional gentlemen, all of whom are in London. I should not myself regard that as a sufficient reason. It has, in addition, been said that the matter is of great complication which might last two or three days. That is perhaps a slightly more convincing ground, but I must not be taken, in case this case should go further, as indicating that I am altogether satisfied that, if I had jurisdiction, I would make the transfer of this particular motion. It is a matter which, so far as I am concerned, remains open.

Application dismissed.

Solicitors: *Norton, Rose & Co.*, agents for *Blackburn, Walker & Co.*, Manchester (for the applicant); *H. H. Wells & Sons* (for the respondents).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

R. *v.* REIGATE JUSTICES, *Ex parte* HOLLAND.

[Queen's Bench Division (Lord Goddard, C.J., Jones and McNair, JJ.), April 30, 1956.]

Street Traffic—Licence—Unlicensed motor vehicle—Misuse of general trade licence—Power of county council to institute proceedings in respect of offence committed in their county—Licence issued by another county council—Vehicles (Excise) Act, 1949 (12, 13 & 14 Geo. 6 c. 89), s. 8—Road Vehicles (Registration and Licensing) Regulations, 1953 (S.I. 1953 No. 231), reg. 35.

H., an officer of the S. county council authorised for the purpose, laid informations against the respondent charging him with having committed offences against reg. 29, art. D (3)*, of the Road Vehicles (Registration and Licensing) Regulations, 1953, and s. 15 (1)† of the Vehicles (Excise) Act, 1949. The alleged offences occurred within the county of S., but the respondent's general trade licence was issued by another county council and the vehicle was usually kept within the county of the latter county council. The justices dismissed the informations on the ground that the county council who had issued the licence alone were competent to lay the informations. On motion for mandamus,

Held: a county council had power by virtue of s. 8 (2)‡ of the Vehicles (Excise) Act, 1949, to prosecute under the enforcement provisions (viz., the penal provisions for contravention of the statutory enactments) relating to the excise duties which, by s. 8 (1) of the Act, the council were under a duty to levy, and there was no limitation on the right of a county council to prosecute in respect of an offence committed in their county; therefore, the order of mandamus should issue.

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* The relevant provisions of the regulation are set out at p. 291, letter F, post.

† The sub-section is set out at p. 291, letter H, post.

‡ The section is set out at p. 291, letter B, post.

[For the Vehicles (Excise) Act, 1949, s. 8, s. 15 (1), s. 23, and s. 25, see 21 Halsbury's Statutes (2nd Edn.) 1439, 1446, 1450, and 1451.

For the Customs and Excise Act, 1952, s. 281, see 32 Halsbury's Statutes (2nd Edn.) 873.

For a summary of the Road Vehicles (Excise Duties and Licences) Order, 1953, see 22 Halsbury's Statutory Instruments 172.]

Motion for Mandamus.

The applicant, Cecil Ernest Holland, an officer of Surrey County Council who was authorised to institute and conduct proceedings on behalf of the council before any court of summary jurisdiction in respect of offences under divers statutes including the Vehicles (Excise) Act, 1949, moved for an order of mandamus directing the justices of the borough of Reigate to hear and determine two informations laid by the applicant against the respondent, Richard Latham Hampton, charging him with offences against the Vehicles (Excise) Act, 1949, and the Road Vehicles (Registration and Licensing) Regulations, 1953. The ground of the application was that the justices misdirected themselves in law in ruling that the applicant could not lay the informations. The applicant claimed that he was entitled to do so by reason of the provisions of s. 281 of the Customs and Excise Act, 1952, s. 8 of the Vehicles (Excise) Act, 1949, and the Road Vehicles (Excise Duties and Licences) Order, 1953 (S.I. 1953 No. 1560), made pursuant to s. 8 (5) of the Act of 1949.

F. H. Lawton for the applicant.
P. W. Medd for the respondent.

LORD GODDARD, C.J.: In this case counsel for the applicant, an officer of the Surrey County Council, moves for an order of mandamus directed to the justices of the borough of Reigate requiring them to hear and determine two informations preferred by the applicant against the respondent, charging him, in the first information,

> " that he used a general trade licence . . . issued in respect of general trade plate 343HO on a mechanically propelled vehicle, to wit an unregistered goods vehicle, for a purpose contrary to reg. 29, art. D (3), of the Road Vehicles (Registration and Licensing) Regulations, 1953 (S.I. 1953 No. 231), and the Vehicles (Excise) Act, 1949, s. 25*, and [in the second information] that he did unlawfully use an unregistered goods vehicle, for which a licence was not in force, on a public road, contrary to the Vehicles (Excise) Act, 1949, s. 15 (1)."

On the day in question the respondent was found in the borough of Reigate using a vehicle under trade plates and it is said that he was not entitled to drive under trade plates. The second information was laid because, if the vehicle was not being lawfully driven under trade plates, it was an unlicensed vehicle. At the hearing of the informations objection was taken to the applicant being the prosecutor. It was said, first, that Surrey County Council could not prosecute for these offences, because the Commissioners of Customs and Excise were the only persons who could do so. Secondly, it was said that, if that were not the case, only Hampshire County Council could prosecute, because the vehicle was usually kept in Hampshire, and the respondent's general trade licence was issued by Hampshire County Council. We are differing from the justices and think that this is a case in which mandamus must go; but that is no reflection on the justices for having come to a wrong decision in this case because it is not easy to find one's way through numerous Acts and regulations. Having, however, carefully considered the matter with the assistance of counsel, I do not think that there is any particular difficulty about this matter.

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* Section 25 (4) imposes a penalty not exceeding £20 for contravention of regulations.

It is, I think, well known that matters relating to the licensing of motor vehicles are in the hands of county councils, mainly by virtue of s. 8* of the Vehicles (Excise) Act, 1949, which reads:

> " (1) The duties chargeable under this Act shall be levied by county councils in accordance with provisions to be made for the purpose by Order in Council.
>
> " (2) Subject to the provisions of this Act and of any Order in Council made under this section, every county council and their officers shall have within their county for the purpose of levying the duties aforesaid the same powers, duties and liabilities as the Commissioners of Customs and Excise and their officers have with respect to duties of excise, and to the issue and cancellation of licences on which duties of excise are imposed, and other matters under the Acts relating to duties of excise and excise licences, and all enactments relating to those duties and to punishments and penalties in connection therewith shall apply accordingly."

By that section all the powers which the Commissioners of Customs and Excise had with regard to vehicle licences are to be exercised by the county councils, and I think that that applies, not only to the levying and collection of duties, but to the enforcement of the law relating to those duties, and seeing that persons who break the law with regard to those duties are prosecuted and punished.

Section 23 of the Act provides:

> " All penalties and forfeitures recovered under or in pursuance of this Act, whether by a county council or by any other person, shall be paid into the Exchequer in such manner and in accordance with such directions as may be contained in any Order in Council made under this Act."

That shows how the penalties are to be dealt with.

The Road Vehicles (Registration and Licensing) Regulations, 1953, reg. 29, deals with general trade licences. Article D of reg. 29 provides:

> " (1) A general trade licence shall not be used upon any vehicle other than a mechanically propelled vehicle which is in the possession of the holder of such licence in the course of his business as a manufacturer or repairer of or dealer in mechanically propelled vehicles or is a mechanically propelled vehicle which is for the time being laid up by its owner . . . (3) No vehicle shall be used upon a public road under a general trade licence for any purpose other than a purpose for which such vehicle is authorised by this article to be used under such licence."

That is the regulation under which the prosecution was brought.

Section 15 (1) of the Vehicles (Excise) Act, 1949, provides:

> " If any person uses on a public road any mechanically propelled vehicle for which a licence under this Act is not in force, not being a vehicle exempted from duty under s. 7 of this Act, or if any person who is the holder of a trade licence or trade licences issued under this Act uses on a public road at any one time a greater number of vehicles than he is authorised to use by virtue of that licence or those licences, he shall be liable to whichever is the greater of the following penalties, namely—(a) an excise penalty of £20; or (b) an excise penalty equal to three times the amount of the duty chargeable in respect of the vehicle or vehicles."

Regulation 35 of the Road Vehicles (Registration and Licensing) Regulations, 1953, provides:

> " The clerk of the council and any other officer authorised by the council are respectively empowered to perform any duty or exercise any power of the council for the purpose of carrying these regulations into effect."

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* The provisions of s. 8 of the Vehicles (Excise) Act, 1949, were formerly in the Roads Act, 1920, s. 1, which was repealed by s. 30 (1) of, and Sch. 7 to, the Act of 1949.

It was not suggested on behalf of the respondent that the applicant was not an officer authorised by the council. It seems to me, therefore, that, by s. 8 of the Act of 1949, the county council are given, not only the duty of levying duties, but also the duties in regard to what I may call the enforcement clauses, that is to say, the clauses which deal with the prosecution of offenders for breaches of the regulations. It is said that a county council may do these acts within their own county; therefore, if an officer of the county council finds within his county a vehicle which he believes to be offending against the regulations, he has, not only the right, but the duty to prosecute. It may be said that it is unreasonable to put on the clerk to one county the duty to prosecute in respect of a vehicle which is kept in another county, but it has to be remembered that the offence is being committed in the county where it is stopped, and, probably, has been committed in several other counties. For instance, if a vehicle is being driven by night unregistered or under trade plates when it ought not to be driven, it is committing an offence in every county through which it goes, but the offence may not be discovered until the morning, when it is light. As a general rule, any person in England can prosecute for any offence which he thinks is being committed, but, in cases of this kind, Parliament has limited the right to prosecute, taking it away from private individuals and giving it, first to the Commissioners of Customs and Excise*, and then to the county councils. I can find no limitation on the right of the county council to prosecute, provided that they can show that the offence was being committed within their county. I do not say that the officer authorised by Surrey County Council would be able to prosecute if he could merely show that the offence had been committed in another county, but here the offence was being committed at Reigate in Surrey because the car was found there. In the circumstances, I think that the matter was covered by s. 8, and, therefore, the justices were wrong in saying that they had no jurisdiction to hear and determine the informations.

JONES, J.: I agree, and have nothing to add.

McNAIR, J.: I also agree.

Order of mandamus granted.

Solicitors: *Wyatt & Co.*, agents for *Clerk to Surrey County Council* (for the applicant); *Neish, Howell & Haldane* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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* See s. 281 (1) of the Customs and Excise Act, 1952, which contains provisions formerly in s. 21 (1) of the Inland Revenue Regulation Act, 1890. Section 281 (1) provides: "No proceedings for an offence under the customs or excise Acts . . . shall be instituted except by order of the commissioners . . ."

Re TAME (*deceased*).
TYLER *v.* SWEETLOVE AND OTHERS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), May 2, 1956.]

Probate—Compromise of action—Terms of compromise not signed by party cited to see proceedings—Application that party cited should be bound by compromise—R.S.C., Ord. 16, *r.* 9A.

The parties to a probate action reached a settlement and all the parties cited to see proceedings signed the terms of compromise save one C.W.T., who wrote that he waived any rights or claims which he might have had against the deceased's estate. The compromise did not provide for its being made a rule of court. On an application by the plaintiff for an order under R.S.C., Ord. 16, r. 9A, that C.W.T. be bound by the compromise,

Held: (i) the court had power to make the order under R.S.C., Ord. 16, r. 9A, and in the circumstances it was a proper order to make.

(ii) although the court had power to direct that the compromise should be made a rule of court, that power should be exercised sparingly and in the present case no such direction would be given.

[As to effect of compromise of probate action on party cited to see proceedings, see 14 HALSBURY'S LAWS (2nd Edn.) 225, para. 381, note (m); and for a case on the subject, see 23 DIGEST 119, *1155*.

As to making a compromise of a probate action a rule of court, see 14 HALSBURY'S LAWS (2nd Edn.) 226, para. 385, note (f).]

Probate action.

The plaintiff A.J.T., a nephew of the deceased, James Tame, was the executor and sole beneficiary named in the will of the deceased dated May 12, 1953. The original of that will was believed to have been kept by the deceased in a box but neither the box nor the original will had been found after the deceased's death. The plaintiff claimed that that will as contained in the completed draft be admitted to probate. By their defence the defendants, J.T.S., F.D.T. and G.T., three of the deceased's next of kin, put the plaintiff to proof of due execution and relied on the presumption that the will was destroyed by the deceased animo revocandi. All other persons interested in the event of an intestacy were cited to see proceedings, but none of them entered an appearance. The parties compromised the action and all the parties cited to see proceedings signed the terms of compromise with the exception of one Charles Walter Tyler, who on Mar. 18, 1956, wrote to the plaintiff's solicitors:

> " I waive any rights or claims I may have had to this estate of Mr. James Tame."

The suit came on for hearing as a short cause, and having heard the evidence called on behalf of the plaintiff, KARMINSKI, J., pronounced for the will. The plaintiff now applied for an order under R.S.C., Ord. 16, r. 9A, that Charles Walter Tyler be bound by the compromise. There was no term of the compromise that it should be made a rule of court, and the defendants had made no request to that effect.

A. T. Hoolahan for the plaintiff.

The defendants did not appear.

KARMINSKI, J.: The application under R.S.C., Ord. 16, r. 9A, for an order that the compromise entered into between the parties should be binding on Mr. Charles Walter Tyler, has the merit of being novel, so far as I know, and so far as the learned registrar knows, but counsel for the plaintiff has persuaded me that the present is a proper case for it. I think that I have power, having regard to the particular circumstances of the present case and, in particular, the terms of Mr. C. W. Tyler's letter of Mar. 18, 1956, in which, amongst other things, he says: " I waive any rights or claims I may have had to this estate of Mr. James Tame ". I think I should be justified in using the powers under R.S.C., Ord. 16, r. 9A, to order that the compromise shall be binding on him, and I so order.

The terms of compromise are not expressed that the court should be asked to file and make them a rule of court. I have power to do so under a direction of Lord Merriman, P., on May 18, 1931*. I think that when the terms do not provide that the compromise should be filed and made a rule of court, discretion should be rather sparingly exercised. Quite often it is left out per incuriam.

A. T. Hoolahan: The plaintiff will carry out the terms of the compromise; to make the compromise a rule of court would be to the benefit of the defendants rather than the plaintiff.

KARMINSKI, J.: Yes. I do not think I shall direct that they be filed and made a rule of court.

Order accordingly.

Solicitors: *G. Houghton & Son* (for the plaintiff).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

KILGOLLAN *v.* WILLIAM COOKE & CO., LTD.

[Court of Appeal (Singleton, Morris and Romer, L.JJ.), April 16, 17, 18, 1956.]

Factory—Dangerous machinery—Wire rope—Manufacture of wire rope—Guard of machine insufficient—Injury to operator from particle of broken wire flying out of machinery—Whether action for breach of statutory duty sustainable—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 14 (1).

Master and Servant—Liability of master—Negligence—Foreseeability of injury—Master's knowledge of many previous accidents.

The plaintiff was employed as a strander in the defendants' wire-rope factory. She was in charge of a machine which consisted of a long barrel which revolved at eight hundred revolutions a minute and which contained some eighteen bobbins to each of which was attached a strand of wire. As the barrel revolved the strands were drawn to one end and twisted together into a wire rope by the rotation of the barrel. The machine was partially fenced in that there was a wire mesh guard over the upper part of the machine but a considerable portion of the revolving barrel was exposed below the guard. This guard was not a sufficient guard to constitute compliance with s. 14 of the Factories Act, 1937. If, as sometimes happened, one of the wires on the bobbins broke, the loose end would frequently lash out under the guard and strike the workman in charge of the machine. On Jan. 22, 1953, the plaintiff was standing in front of the machine which was in motion when a very small particle which had snapped off a broken wire struck her in the eye and blinded that eye. Over the three years prior to the accident there had been some six hundred accidents to various parts of the bodies of workpeople in the ropery, including some ten or more accidents to the face, from broken or flailing wire; these accidents, though not of a very serious character, were not trivial, and the defendants knew of the risk. Another type of guard for the machine was in existence and this, if it had been used, would have given protection against such an accident as that in this case. The plaintiff sued the defendants for damages for personal injuries alleging negligence at common law and breach of duty under s. 14 (1) of the Factories Act, 1937.

Held: (i) the plaintiff was entitled to recover damages from the defendants for negligence because they had knowledge of the risk and reason to foresee injury to their workpeople as a result of it and had failed to take reasonable care for the safety of the plaintiff (dictum of WARRINGTON, L.J., in *Re Polemis & Furness, Withy & Co., Ltd.* [1921] 3 K.B. at p. 574 applied); but

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* See Tristram and Coote's Probate Practice (20th Edn.), at p. 548, note (f).

(ii) the defendants were not liable for breach of statutory duty under s. 14 (1) of the Factories Act, 1937, since that enactment imposed an obligation to fence the machine so as to protect the body of the workman from coming into contact with dangerous machinery, not to protect a workman against particles flying out of the machine, and accordingly the plaintiff's injury was not one against which the enactment on which she sued was designed to protect her (*Nicholls* v. *Austin* (*Leyton*), *Ltd.* ([1946] 2 All E.R. 92) followed, and dictum of VISCOUNT SIMONDS in *Grant* v. *National Coal Board* ([1956] 1 All E.R. at p. 684) applied).

Appeal allowed.

[As to the absolute statutory duty to fence dangerous machinery, see 14 HALSBURY'S LAWS (2nd Edn.) 594, para. 1130; and for cases on the subject, see 24 DIGEST 908-910, *65-76*.

As to the duty of a master towards his servants for their safety, see 22 HALSBURY'S LAWS (2nd Edn.) 176, para. 296; and for cases on the subject, see 34 DIGEST 194, *1583* et seq.

For the Factories Act, 1937, s. 14, see 9 HALSBURY'S STATUTES (2nd Edn.) 1009.]

Cases referred to:

(1) *Nicholls* v. *Austin* (*Leyton*), *Ltd.*, [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 2nd Digest Supp.

(2) *Carroll* v. *Andrew Barclay & Sons, Ltd.*, [1948] 2 All E.R. 386; [1948] A.C. 477; 1948 S.C. (H.L.) 100; [1948] L.J.R. 1490; 2nd Digest Supp.

(3) *Grant* v. *National Coal Board*, [1956] 1 All E.R. 682.

(4) *Gorris* v. *Scott*, (1874), L.R. 9 Exch. 125; 43 L.J.Ex. 92; 30 L.T. 431; 41 Digest 498, *3269*.

(5) *Smith* v. *Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 36 Digest (Repl.) 154, *812*.

(6) *Re Polemis & Furness, Withy & Co., Ltd.*, [1921] 3 K.B. 560; sub nom. *Polemis* v. *Furness, Withy & Co., Ltd.*, 90 L.J.K.B. 1353; 126 L.T. 154; 41 Digest 419, *2620*.

(7) *Paris* v. *Stepney Borough Council*, [1951] 1 All E.R. 42; [1951] A.C. 367; 115 J.P. 22; 2nd Digest Supp.

(8) *Thorogood* v. *Van den Berghs & Jurgens, Ltd.*, [1951] 1 All E.R. 682; 115 J.P. 237; sub nom. *Thurogood* v. *Van den Berghs & Jurgens, Ltd.*, [1951] 2 K.B. 537; 2nd Digest Supp.

Appeal.

The plaintiff appealed from an order of PILCHER, J., at Sheffield Assizes dated Nov. 24, 1955, whereby he dismissed the action which she had brought against the defendants for damages for personal injuries alleging a breach by them of their statutory duty under s. 14 (1) of the Factories Act, 1937, and also their negligence at common law.

The facts appear in the judgment of SINGLETON, L.J.

J. F. Drabble, Q.C., and *P. Stanley-Price, Q.C.*, for the plaintiff.
G. S. Waller, Q.C., and *R. R. Rawden-Smith* for the defendants.

SINGLETON, L.J.: This is an interesting case. The difficulty is to describe the process in a factory and the accident which happened and in respect of which the action was brought. The defendants, William Cooke & Co., Ltd., are wire rope manufacturers and they have a factory at Attercliffe, in Sheffield. The plaintiff, Mrs. Nora Kilgollan, was employed by them as a strander. She was in charge of a machine of some complexity. It is a long machine, the main part of it being a barrel which revolves at considerable speed—over eight hundred revolutions a minute. Inside the barrel there were, at the material time, some eighteen bobbins, on each of which there was wire, sometimes of very thin mesh and sometimes of a slightly bigger mesh. The wire was drawn from the bobbins to the end of the machine, and all eighteen strands were bound together by the action of the rotating barrel into something in the nature of a wire rope. Sometimes when the process was going on, a wire on one of the bobbins broke. When that happened, it was the duty of the operator to switch off the machine; the handle for so doing is shown quite clearly on photograph No. 1. The broken wire was then mended, and when that had been done, the machine was switched on again and work resumed. There is no doubt that the revolving barrel was a " dangerous part of machinery " and that it ought to be fenced in accordance with s. 14 of the Factories Act, 1937. In some degree it was fenced, as there was a wire mesh guard over the upper part of it but the guard did not come down so as to cover the bottom part of the revolving barrel. It was common ground at the trial that it was not a complete guard in accordance with s. 14. When a wire broke, the loose piece flew about through the rotation of the barrel; sometimes it was heard quickly, and the machine was switched off; but it appears from the evidence that it was not known at once in every case—indeed it was not, in the case with which this court has to deal. On Jan. 22, 1953, the plaintiff was standing in front of the machine. The wire on one of the bobbins was very nearly at its end, and as the plaintiff was watching, she felt something hit her, but did not know what it was. What had happened was this: a wire had broken, and in some way a very small piece of the wire, a centimetre, came off some part of it and struck her in the eye: it went right through her eye and it lodged, and it is still lodged, in the bone behind the eye. The sight of the eye is destroyed.

I have sought to describe the machine and the accident in as few words as I can, but I do not disguise that there are complications, and it is not easy to follow exactly what takes place inside the machine. A good deal of discussion has taken place on what happens when a wire breaks inside the machine. It is clear, however, that very often when there is a break, one end of the wire swishes out under the guard, and that it sometimes strikes a workman. Let us make this clear: the guard on the machine was not put there to deal with this kind of thing at all: it was a guard provided to prevent a strander, or any other workman, coming into contact with a " dangerous part of machinery ", either accidentally or inadvertently. None the less, it was admitted by the general manager of the defendant company that if there had been the kind of guard that there should have been, for the purposes of s. 14, it would have prevented an accident such as happened in this case. Counsel on behalf of the plaintiff submitted that the accident arose through the defendants' breach of s. 14 (1) of the Act, which, so far as material, reads:

> " Every dangerous part of any machinery . . . shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced."

That is followed by a proviso to this effect:

> " Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this sub-section shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part."

The proviso appears to give support to the argument of the defendants (which indeed has been approved in the House of Lords) that the object of the guard which has to be provided under s. 14 is to prevent the operator from coming into contact " with that part "—that is, the dangerous part. The section ends with these words:

> "The Secretary of State* may, as respects any machine or any process in which a machine is used, make regulations requiring the fencing of materials or articles which are dangerous while in motion in the machine."

No such regulations have been made.

In *Nicholls* v. *Austin* (*Leyton*), *Ltd.* (1) ([1946] 2 All E.R. 92) the following circumstances had to be considered: The appellant, while operating a circular saw belonging to her employers, the respondents, was injured through a piece of wood flying out of the machine which was fenced so as to comply with the requirements of the Woodworking Machinery Regulations, 1922, which by s. 150 of the Factories Act, 1937, were deemed to have been made under that Act. It was held by the House of Lords that the respondents were not in breach of any statutory obligation, since the obligation to fence imposed by s. 14 (1) was an obligation to guard against contact with any dangerous part of a machine and not to guard against dangerous materials ejected from it, a matter depending solely on the making of regulations under the discretionary power conferred by s. 14 (3) on the Secretary of State* and not exercised by him.

LORD THANKERTON said ([1946] 2 All E.R. at p. 95):

> "My Lords, on consideration of the terms of s. 14, I am of opinion that there is a simpler answer to the contention of the appellant, namely, that the obligation to fence imposed by sub-s. (1) is an obligation to provide a guard against contact with any dangerous part of a machine, and that it does not impose any obligation to guard against dangerous materials or articles ejected from the machine in motion, that matter depending solely on the making of regulations by the Secretary of State* under the discretionary power conferred on him by the last paragraph of the section. This view appears to be amply confirmed by the language used . . . I am of opinion that there is no obligation imposed by s. 14 on the respondents as regards these flying bits of wood, and, therefore, they are not in breach of any statutory obligation, and the appellant's main contention fails."

The other law lords expressed the same view; and the law was held to be (as I have stated already) that the respondents, in those circumstances, were not in breach of any statutory obligation, since the obligation to fence imposed by s. 14 was an obligation to guard against contact with any dangerous part of a machine and not to guard against dangerous materials ejected from it. In the present case, that which came out from the machine was a part of that which was being manufactured or put together in the machine: it was material being used in the machine; and on the decision to which I have referred it is clear that this court cannot accede to the first part of the argument advanced by counsel for the plaintiff.

There has been, however, another decision which I ought to mention, in the House of Lords, namely, *Carroll* v. *Andrew Barclay & Sons, Ltd.* (2) ([1948] 2 All E.R. 386). That was a case under s. 13 of the Factories Act, 1937. The decision has been summarised as follows:

> "The requirement of s. 13 (1) of the Factories Act, 1937, that 'every part of the transmission machinery shall be securely fenced' imposes on occupiers of factories a duty to erect a barricade to prevent any employee from making contact with the machinery, and does not in ordinary cases oblige them to erect an enclosure to prevent broken machinery from flying out and injuring him; quaere whether, in the case of a machine which in working might be expected to throw off loose or broken parts, there might be an obligation to fence it for the purpose of protecting the workman against that danger."

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* The functions of the Secretary of State under the Factories Act, 1937, are now vested in the Minister of Labour and National Service; see the Defence (Functions of Ministers) Regulations, 1941 (S.R. & O. 1941 No. 2057), reg. 2, and the Transfer of Functions (Factories, etc., Acts) Order, 1946 (S.R. & O. 1946 No. 376), art. 2.

A LORD JOWITT, L.C., in his speech, reserved that question for decision; and LORD DU PARCQ said ([1948] 2 All E.R. at p. 391):

> "I wish to add, however, that, while I agree with LORD NORMAND that the words 'securely fenced' must be given the same meaning in each of the three sections (ss. 12, 13 and 14), I think that they may well mean 'so fenced as to give security from such dangers as may be reasonably expected'. B If machines exist, or are hereafter invented and used, which are dangerous because fragments or loose parts of the machinery are sometimes ejected from them, then I am not prepared to say that s. 14 does not require such machines to be fenced for the purpose of protecting workmen against that danger. If the dictum of my noble and learned friend LORD SIMONDS in *Nicholls* v. *Austin* (*Leyton*), *Ltd.* (1) ([1946] 2 All E.R. 92 at p. 98) C is to be understood as meaning that such a machine need not be fenced, I respectfully doubt its accuracy, and must reserve my opinion on it."

Counsel submitted, further, that the decision in *Nicholls* v. *Austin* (*Leyton*), *Ltd.* (1) did not cover this case, because in *Nicholls* v. *Austin* (*Leyton*), *Ltd.* (1) it was found that there was no breach of the statute, whereas in this case it was common ground that there was a breach; D further, although the breach was of a section which was intended to prevent a man from falling against or coming into contact with a dangerous part of a machine, still, if, as a result of the breach, an accident of another kind was sustained by the plaintiff, the plaintiff can recover. I do not think that that is right, in the circumstances of this case, although I have some sympathy with the argument. This court is bound by the words of VISCOUNT SIMONDS in *Grant* v. *National Coal Board* (3) ([1956] 1 All E.R. E 682 at p. 684):

> "My Lords, where damages are claimed for breach of a statutory duty without any allegation of negligence, the pursuer must establish two things, first, that the breach is intended not only to be visited by a penalty but also to be the ground of civil liability to a class of persons of whom the pursuer is one, and, secondly, that the injury was one against which the legislation F was designed to protect him. The first of these tests is undoubtedly satisfied in this case. No one questions that a civil action for damages can be founded on a breach of s. 49 [of the Coal Mines Act, 1911]. It is at the second test that, in my opinion, a real difficulty arises, in which I am not prepared to differ from your Lordships, though I have been much pressed by the cogent arguments to be found in the judgments under appeal." G

LORD SIMONDS then referred to *Gorris* v. *Scott* (4) ((1874), L.R. 9 Exch. 125) and pointed out that it was quite different from the case before the House. Counsel for the plaintiff drew attention to the words of LORD REID ([1956] 1 All E.R. at p. 687):

> "But it seems to me to be a very different thing to say that, where the H object of the enactment is to promote safety, the implication is that liability only arises if the breach causes injury in a particular way";

and he submitted that this point was open to him under those words and from certain words in the speech of LORD TUCKER. I do not think that the point is open to this court, for the reasons I have given, although I have often thought that if there is a danger from something flying from the machine, a real danger which I everyone knows, there is just as much reason to protect the workman from that danger as there is from his falling against the dangerous part of the machine. The employers knew that the machine ought to be guarded below the place to which the mesh came. From the point of view of the Factories Act, 1937, it does not matter whether they knew or not; but they knew. They had seen one other factory where a more complete guard was provided; they had been recommended before this accident took place to put on a deeper guard; they had contemplated doing it; they had not done it at the time the action was heard

—some two years later—except on one machine. If they had done it, this accident would not have happened. The form of guard which was recommended and which everyone agrees would give much greater protection to the workman from both points of view is a guard which covers all the rotating machinery and the guard which it is intended to provide on all their machines at some time is a guard of sheet metal. As the machine stands, there is a part of that which revolves below the wire mesh; so that there was, at the time this accident happened, a risk of a strander being caught by the barrel as it revolved underneath the guard. And it is a fact (so we are told by the defendants' witness) that if the guard which it is proposed to put on had been there on the day of this accident a piece of wire could not have come out in the way that this piece did.

It is necessary that I should say something as to the evidence. The only witness called on behalf of the defendants was Mr. Cockerill, who is the general manager of the defendant company, a man of great experience, who started with the company as a wire rope tester; he became assistant ropery manager, ropery manager, works manager, and finally general manager. He was asked by learned counsel for the defendants what he had to say as to the theory put forward on behalf of the plaintiff as to how the accident happened. This was the question:

> " Mr. Cockerill, I want you to assume, if you would, that a fragment of wire, something of the order of ten millimetres, came from the inside of this machine and struck the plaintiff. Will you make that assumption, which seems to be likely on the story. Now, the suggestion so far which has been put before my Lord is that the broken and running wire has lashed against some part of the machinery so that the tail end has fractured and flown in her direction, you see. A.—Yes. Q.—Is that, in your view, a reasonable explanation? Pilcher, J.: Can you think of a better one? Counsel: Yes, can you think of a better one? A.—Of a portion breaking off a piece of wire lashing in the machine? There is only one I can think off. That is, if (on photograph 2) the wire lashing round could have caught between the revolving barrel and the roller which is supporting that barrel—this roller *here*, my Lord."

Counsel could not quite see to what the witness was pointing, and some discussion took place. Pilcher, J., said to him:

> " But, you see, the thing about it is that it is quite clear that this little particle must have flown through the air six or seven feet probably with terrific velocity? A.—Yes, my Lord. Q.—Because it went right through the girl's eye and lodged in the bone at the back of the eye? A.—It did, my Lord. Q.—It must have been a pretty sudden thing to fly at speed through the air. If the kind of situation that you are envisaging there happened, would it have flown like that at that speed ? A.—It might have flown at that speed, my Lord, but I think it would have been too low. Q.—I should have thought the best opinion was that lashing round, it happened to strike—I suppose it really would not strike it more than once, would it, in exactly the same place ? A.—Oh, no. Q.—Because it is moving around ? A.—It is being continually drawn back to the front part of the machine. Q.—At any rate, about a centimetre of this wire broke off the end as it whipped up against the bar. You know much more about it than I do. You think of a better one. A.—I cannot think of a better one than that at all."

It appears to me that the witness and the judge both accepted the plaintiff's witnesses' theory as to how the accident happened. What particular piece of the machinery the lashing end struck, no one can know, nor can anyone tell precisely what happens when an accident of this kind takes place. It is, however, clear that a piece did come from the broken wire, and that that was the cause of the accident to the plaintiff.

The case put forward on behalf of the plaintiff under the common law is this, that the defendants knew of the risk of wire coming out, knew that people had been injured on many occasions through flailing or lashing wire, and that they took no steps whatever to protect their workpeople against the risk of injury. It seems to me that if there is a risk of wire lashing—even though it be only a few feet—across a room where people are working, it is a risk which ought to be prevented if it is feasible to do so. That it is feasible is clearly admitted. Counsel for the plaintiff submitted that, as the defendants had taken no steps to avoid or to minimise the risk, they were negligent and in breach of their duty at common law. The duty of an employer to his workpeople was stated by LORD HERSCHELL in *Smith* v. *Baker & Sons* (5) ([1891] A.C. 325 at p. 362) in this way:

> " It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk."

The duty, I repeat, is to take reasonable care. In *Nicholls* v. *Austin* (*Leyton*), *Ltd.* (1), LORD WRIGHT put the duty at common law in this way ([1946] 2 All E.R. at p. 97):

> " That the common law duty exists in proper cases in unquestionable. But it is limited to reasonable exercise of care and skill to guard against danger which as reasonable people, the employers ought to have anticipated."

I believe that those two citations cover every proposition which has been put forward by learned counsel in argument, although sometimes somewhat different words are used. The duty is no more than a duty to take reasonable care not to subject workpeople to unnecessary risk.

There had been, over the three years prior to this accident, a large number of accidents in this factory, and, in particular, in the ropery, where the plaintiff was working. The employers keep accident books, one being kept for the purposes of the National Insurance (Industrial Injuries) Act, 1946, and another for the purposes of the provisions of the Factories Acts, 1937 to 1948*. Those books, which the defendants have, contain particulars of accidents—perhaps I should say of some accidents. The reason I add that is that I asked counsel for the defendants this morning what report there was on the accident to a witness which occurred after the accident in this case—the witness was struck by a piece of metal on the forehead which (she said) lodged under the skin in her forehead, and she went to the ambulance room. Counsel said that there was no mention of that accident in the books although there is a record of another accident to the same witness at some other time. It may be that the book is not complete, but I do not think anything ought to be made of that. There is importance, however, in what the books disclose. There were a great number of accidents which, though not of a very serious character, were reported and of which particulars are contained in the books. Furthermore, it is clear that a good many people in the company's employ who had accidents of a minor character did not report them; so that there are many more accidents in fact, Mr. Cockerill said in evidence, than appear in the books. The witness was asked:

> " Would she get struck with wire in that position ?—[that is, the position in which she described she was at the time of her accident]—Are operators struck with wire in that position ? A.—They are, sir, yes. Q.—With wire ? A.—With wire. (PILCHER, J.): Operators do get struck ? You recognise that ?

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* See National Insurance (Industrial Injuries) (Claims and Payments) Regulations, 1948 (S.I. 1948 No. 1362), reg. 3; 15 HALSBURY'S STATUTORY INSTRUMENTS 282; and as regards the duty to enter in or attach to the general register of a factory particulars of accidents, see the Factories Act, 1937, s. 116 (1) (c), and the admissibility of entries in evidence, see ibid., s. 142 (3). Written notice of certain accidents in factories is also required to be given to the district inspector by s. 64 of the Factories Act, 1937.

> A.—They do get struck, but I have never seen an operator in the whole of my experience walking up a machine like that—walking along the length of the machine and inspecting the work . . . They are provided with seats, and they sit on a seat by the control and periodically inspect. (PILCHER, J.): Do not let us waste too much time on it, because it is quite clear they do get flicked standing in what I should say was a normal position by the ends of this wire, but they in substance do not get hurt. Counsel: We have extracted certain particulars from these books for his Lordship to see, but am I right in saying that there are scores and scores of cases of people reporting to the ambulance room, reported in the accident book, with injuries by wire to parts of the body other than the face ? A.—There are, sir. Q.—Scores of them ? A.—Yes, scores of them. (PILCHER, J.): From this room ? (Counsel): A great many of them from the ropery ? A.—From the ropery, yes, my Lord. Six hundred in those books. [That is over three years.] (PILCHER, J.): There are a great many reports in the accident book of workers being—is it scratched or cut or what ? Do not trouble to look. You have just been through it all. (Counsel): My Lord, there are punctures, incisions, lacerations. (PILCHER, J.): By wire ? (Counsel): By wire, my Lord. (PILCHER, J.): In the ropery. I thought we need worry about nothing except here (*indicating list*). Those are accidents other than to the face ? "

It appeared that certain particulars had been taken out of the books by the plaintiff's advisers, dealing with accidents to the face; and there is a page which I have before me dealing almost entirely with accidents to the face from September, 1950, to September, 1953. It was put at one time in the cross-examination that there were ten or twelve cases of accidents to the face. Mr. Cockerill, the general manager, who was the only witness called on behalf of the defendants, was asked what number of people reported to the accident room every week for injuries to any part of the body from wire in the ropery. The witness said he could not give the exact number but that it was considerable. The learned judge then pointed out that it was a great pity that some little care had not been taken to have earlier discovery and to have full information as to what the books showed. I would like to express my agreement with him. We might have had this part of the case in a much more convenient form. The witness said that if the additional guard had been there, a very considerable number of minor accidents could have been prevented; he said there would not have been the injuries through flailing. He was asked about the ten cases of accidents, apart from those in the particulars. Of eleven, said counsel in cross-examination, there were ten that affected the face, and the witness agreed. He also agreed that there were in the list accidents to the eyes and face of stranders in the ropery which may have been due to particles of wire breaking off, but he could not tell whether they were.

It was impossible to find out at the trial how any one of these accidents to the face or eyes had been caused. I do not regard that as satisfactory. The defendants have to keep records of accidents, and unless the accidents are reported to the factory inspector, or unless the factory inspector sees the book, he cannot know the cause of accidents arising in the factory. The cause must be set out in the book, or he must be told by someone in charge. There is nothing, however, to show what the cause was; and Mr. Cockerill (who, as I have said before, and I say again, was the only witness called on behalf of the defendants) said that he did not know how any of the injuries to the face were caused. A worker who gets a cut on the face or an abrasion cannot well say whether it was done by a piece or by the wire itself which was lashing out. The defendants, in a case of this kind, if they knew there were accidents, were under a duty to consider how those accidents could be lessened in number. They owed a duty to their workpeople; and it cannot be right for them to say: " Well, the injuries were mostly cuts on the hand, or cuts on the legs, or a scratch or abrasion on the body somewhere, and the people were not off work for more than three days. Therefore there was no duty on us to do anything because they were trivial injuries ". That is not the right approach. The number in the accidents book alone is sufficient to show that something should have been done, and nothing had been done. So far as I know, no consideration was given to the question of injuries, or possible injuries, through flailing wire. Consideration was given to a further guard, but that was to stop people falling under, or into, the machine. The defendants, as employers, ought not to be content to allow a state of things to continue in which there is a large number of accidents to the hands or legs of the girls working there. One would have thought that it would occur to someone that if there are all these accidents through flailing wire some day there would be a serious one, but that does not appear to have been considered. It is right to say that those who gave evidence on behalf of the plaintiff could not point to a previous accident caused through a piece breaking off the wire. One said it might have been so, but the answer may well be that they do not all know how their injuries were caused. If it is an abrasion or a cut on the face, they do not know in all cases whether it is due to the flailing of the wire itself or a piece that breaks off it. Since the accident to the plaintiff there have been other accidents, one being to Mrs. Callaghan. One piece of wire which had broken off lodged in her forehead, and another piece hurt her on the leg. Another witness found a piece in her hair. The defendants are not charged with knowledge of those incidents before the accident. But what I point out is this: if those happenings are found when people are watching more carefully afterwards, it does show how easy it is for a piece to come off the broken end and it appears that the defendants' general manager thought that was the most likely thing in this case. If consideration had been given as to how the workpeople could be protected against something of that kind, it might well have been said " Put the guard on, or bring the guard a little lower than it is, so that the flailing out cannot take place ". That, in Mr. Cockerill's view, would have prevented this accident. Counsel on behalf of the defendants submitted that, whether the defendants were under a duty to take some action to prevent this sort of thing depended in part on whether there was any reason to anticipate any serious accident. I agree with that; but it was not a very serious matter to extend the guard so as to prevent this sort of thing, if thought had been given to it.

I think that assistance is to be gained, in considering this part of the case, from the words of Warrington, L.J., in *Re Polemis & Furness, Withy & Co., Ltd.* (6) ([1921] 3 K.B. 560) which were cited by Pilcher, J., in his judgment. Warrington, L.J., said (ibid., at p. 574):

> " The result may be summarised as follows: The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act."

In the circumstances of this case, there was reason to anticipate damage—damage and injury were caused. So far as we know, it was not of a very serious character in the cases to which reference was made; but we do not know all the circumstances. We know that there were a large number of injuries over the years. If there is the cutting of a face through wire or the cutting of a hand through lashing wire or through a piece of wire, there must always be a risk of some injury to an eye, whether the workwoman is standing up or stooping down; and that is something which ought to have been anticipated. Even if one could say, however, that no one thought about the possibility or probability of an injury to an eye, it cannot be right, if there are these frequent injuries to the hands and some injuries to the face, that the employers should do nothing year after year.

In my opinion, this is a clear case of failure to take a precaution which, if taken, would result in the workpeople having less risk to undergo. I have not forgotten the evidence given by the defendants' witness that thirty-two other factories in Sheffield adopted the same method as the defendants and that only one had guards of the kind which the factory inspector recommended. I do not know what their experience was; I have no particulars on which to go: I have only the evidence in this case in regard to the defendants. If it be right to say there have been six hundred accidents caused to stranders working in the ropery—most to the hands and legs and body, but some to the face—then I am satisfied that before this accident happened there was a duty on the defendants to take some proper and necessary steps to avoid that sort of thing, and if they had done that, this accident would not have happened. In my judgment, the defendants are responsible in damages for breach of the duty which they owed under the common law. In my view, the appeal should be allowed, and the case should go back for the assessment of damages, unless the parties can agree on what is a right sum to compensate the plaintiff.

MORRIS, L.J.: I am of entirely the same opinion. It seems to me that the employers are responsible on the basis of negligence at common law, but not on the basis of a breach of statutory duty. In his speech in *Paris* v. *Stepney Borough Council* (7) ([1951] 1 All E.R. 42 at p. 50) LORD OAKSEY said that the duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case. The evidence here relating to the circumstances connected with the operation of this machine leads me to a conclusion that there was a failure to exercise reasonable care for the safety of the plaintiff. That failure consisted in not having provided a guard or protection which the defendants knew would have availed to prevent injuries of the kind which they knew were taking place. There clearly could have been some form of protection. Mr. Cockerill said in his evidence more than once that the kind of protection that he contemplated would have availed to prevent the injury which the plaintiff in fact sustained. It does appear that in the case of other similar machines in other factories in Sheffield any guard beyond the upper guard was exceptional. But whatever may have been the position in other factories, the position here, it seems to me, was truly remarkable, and, as I think, alarming.

My Lord has referred to the passages in the evidence of Mr. Cockerill, and I do not propose to repeat any citation made by my Lord. I only add one very brief one. Almost at the start of his evidence, Mr. Cockerill gave evidence as follows:

> " Q.—Let me deal, first of all, with this point which has just been raised. It has been said that in the last three years prior to the accident, 1950 to 1953, there have been eighteen eye accidents in your factory ? A.—I believe it to be true. Q.—Have you looked through the records ? A.—I have looked through the records. Q.—In the ropery, not the factory. Q.—Were those eighteen eye accidents in the ropery? A.—In the ropery, yes, they were."

My Lord has referred to the evidence showing that there were six hundred accidents recorded in the accidents book. There was further evidence that a great many people who had accidents refrained from reporting them. There was the evidence of Mr. Cockerill that some of the reported accidents may have been due to particles of wire breaking off. It seems to me that if there is an end of a wire revolving at over eight hundred revolutions a minute, and somebody is struck, it may be very difficult for the person to know whether he or she has been struck by an end of the wire or by a particle from the wire. The source of the danger, however, was the periodical existence of these lashing ends of wire revolving at over eight hundred revolutions a minute. It seems to me that it was quite immaterial whether an injury was caused by the end of a piece of lashing wire or by an end from a piece of lashing wire. In view of the accident A experience of which the defendants had knowledge, as the entries in their books showed, and as they had knowledge as referred to by Mr. Cockerill in his evidence, it seems to me that they were negligent in failing to prevent injury from those revolving loose wires. Counsel for the defendants submitted that there was no evidence of the foreseeability of an eye injury, and he submitted that there was no negligence in allowing the lashing or flailing to continue. I cannot take that B view. On the evidence as to the extent of and the number of the incidents and accidents, I cannot think that they should be regarded as trivial. I think the evidence leads irresistibly to the view that there was a reasonable anticipation of damage. I consider that it was obligatory on the defendants to have taken steps, which they failed to take, which would have prevented the injury that the plaintiff suffered. C

I only refer briefly to the other part of the case. It was accepted by counsel for the defendants that there was a breach of s. 14 in not having some fencing on the lower part of the machine. The cases to which my Lord has referred—*Nicholls* v. *Austin* (*Leyton*), *Ltd.* (1) ([1946] 2 All E.R. 92) and *Carroll* v. *Andrew Barclay & Sons, Ltd.* (2) ([1948] 2 All E.R. 386)—show the nature of the statutory obligation imposed. The obligation to fence a dangerous machine is satisfied D if the dangerous parts are so screened as to prevent the body of the operator coming into contact with them. The evidence in the present case shows that the defendants had it in mind to attach metal sheets so as to screen the lower part of the machine. Had they done so at a date before that on which the plaintiff was injured, then the injury to the plaintiff would not in fact have occurred: that is clear from the evidence of Mr. Cockerill. But it seems to me that the E defendants were not obliged, so far as their statutory obligation was concerned, to use metal sheets. They might have adopted some other form of fencing, and it may be that they could have satisfied their statutory obligation in such a way as would not have prevented the escape of some flying particle of wire. I doubt, therefore, whether it is shown that the plaintiff's injury resulted from a breach of the defendants' obligation under s. 14. Furthermore, it can in this case be F postulated that s. 14 is not designed to protect against the ejection from a machine of material or articles which have been introduced into the machine. That being so, an injury caused by such an ejection is not an injury against which the legislation was designed to protect.

My Lord has referred to *Grant* v. *National Coal Board* (3) ([1956] 1 All E.R. 682) and has quoted some of the observations made in the speeches in that case. G LORD REID said this ([1956] 1 All E.R. at p. 687):

> " If the statute is only aimed at preventing a certain kind of injury, then it seems reasonable to hold (as in *Gorris* v. *Scott* (4) ((1874), L.R. 9 Exch. 125)) that civil liability only results if that kind of injury is caused by a breach."

LORD KEITH OF AVONHOLM in his speech said this ([1956] 1 All E.R. at p. 691): H

> " Reference was made to *Gorris* v. *Scott* (4). This case might be in point if it could be postulated that s. 49 [of the Coal Mines Act, 1911] was confined to protecting workmen from injury through being hit by falling material."

Applying that passage, and other passages cited, counsel submits that it can in the present case be postulated—because it has been so laid down—that the object I of s. 14 of the Factories Act, 1937, is to prevent workmen coming into contact with the machine but not to prevent them coming into contact with materials which are being worked on in a machine. LORD SOMERVELL OF HARROW said in his speech (ibid., at p. 691) that he could not agree that the mischief of derailment by a fall from an insecure roof was not within the ambit of s. 49 of the Coal Mines Act, 1911. Counsel submits in the present case that the " ambit of the section " was to protect a workman from contact with the machine and not to protect a workman against injury caused by the ejection of some material from a machine, and accordingly that injury so caused does not form the basis of civil liability for a breach of the section. I think that counsel's submissions on those points are correct. But, for the reasons that I have earlier given, it seems to me that there was clearly, in this case, negligence at common law for which the defendants should be held liable.

ROMER, L.J.: I also think that there was evidence of negligence at common law and that the appeal should be allowed on that ground. It appears to me that if the learned judge had accepted (as I venture to think he ought to have accepted) a certain hypothesis, he would have arrived at the same conclusion on this point as we have reached. He said in the course of his judgment:

> "If the defendants fell below the standard of care required from an employer in failing to take steps to protect their employees from injuries by flailing wire—and this they could have done by guarding the machine, by putting on what I have described as the lower guard—then it seems to me that they cannot escape liability for a serious injury such as the plaintiff's, which they could not foresee, if such an injury would not have occurred but for their want of care in guarding against trivial injuries which they knew did occur."

He refused to accept the hypothesis which appears at the beginning of that statement, on the ground that the injuries to these workpeople from the flailing wires were trivial; and it is on that point that I find myself at variance with the learned judge. For the reasons which my brethren have stated and which I do not repeat, it is not possible to treat these injuries, which amounted as appears in the accident book alone to over six hundred, as trivial, having regard not only to the number of injuries but also to their nature and bearing in mind the fact that some of them occurred to the faces of the girls. Accordingly, as I say, I think that the learned judge ought to have accepted the hypothesis which he rejected, and, if so, the liability of the defendants follows, on the principle stated by WARRINGTON, L.J., in *Re Polemis & Furness, Withy & Co., Ltd.* (6) ([1921] 3 K.B. 560 at p. 574) and adopted and elaborated by ASQUITH, L.J., in the subsequent case of *Thorogood* v. *Van den Berghs & Jurgens, Ltd.* (8) ([1951] 1 All E.R. 682 at p. 690).

On the question of statutory liability, I would merely say that it is unnecessary to express a concluded view on it. As at present advised, it appears to me, having regard to the principles stated by the House of Lords in *Nicholls* v. *Austin* (*Leyton*), *Ltd.* (1) ([1946] 2 All E.R. 92), combined with the principles stated by their Lordships in *Grant* v. *National Coal Board* (3) ([1956)] 1 All E.R. 682) that it is impossible for the plaintiff to succeed in establishing a breach by the defendants of s. 14 of the Act.

Appeal allowed.

Solicitors: *Gibson & Weldon*, agents for *John Whittle, Robinson & Bailey*, Manchester (for the plaintiff); *Bell, Brodrick & Gray*, agents for *Harold Jackson & Co.*, Sheffield (for the defendants).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

POLSKIE TOWARZYSTWO HANDLU ZAGRANICZNEGO DLA ELEKTROTECHNIKI "ELECKTRIM" SPOLKA Z OGRANICZONA ODPOWIADZIOLNOSCIA *v.* ELECTRIC FURNACE CO., LTD.

[COURT OF APPEAL (Jenkins and Hodson, L.JJ.), April 23, 1956.]

Practice—Trial—Separation of issues—Action for damages for breach of contract—Trial of liability separated from questions of amount of damages—No clear division of issues on pleadings—R.S.C., Ord. 36, *r.* 7.

The plaintiffs claimed damages for breach of contract by the defendants to supply certain industrial plant. In their statement of claim the plaintiffs alleged that they were a corporation maintained by the Polish republic for the purpose of purchasing industrial plant to be used by the Polish steel board; that the defendants knew at the time the contract was made that the plaintiffs required the plant for transfer to and use by the steel board and that its annual production would be some six hundred tons. They alleged that certain parts of the plant had been shipped, that the contract had been repudiated by the defendants before completion, that the plaintiffs had elected to treat the contract as discharged and that they had suffered damage. The damage claimed was calculated either on the plaintiffs' loss of production or on the increased cost of purchasing comparable plant elsewhere; alternatively the plaintiffs alleged that the steel board had suffered the loss and damage and that they, the plaintiffs, would have to make the same good to the board. The plaintiffs further alleged that the parts of the plant which had been shipped by the defendants were valueless without shipment of the parts remaining for completion. The defendants denied all the allegations. On appeal by the defendants from an order made under R.S.C., Ord. 36, r. 7, that only the questions of the defendants' liability be determined at the trial and that the questions of the amount of damage should be referred to an official referee,

Held: in general such an order should not be made unless on the pleadings there was a clear line of demarcation between issues bearing on liability and issues bearing on quantum of damage; the present case was not one in which questions of liability and questions of quantum of damage ought to be separated at this stage.

Emma Silver Mining Co. v. *Grant* ((1879), 11 Ch.D. 918) considered; *Smith* v. *Hargrove* ((1885), 16 Q.B.D. 183) distinguished.

Appeal allowed.

[As to trial of different questions of fact by different modes, see 26 HALSBURY'S LAWS (2nd Edn.) 89, para. 163, note (1); and for cases on the subject, see DIGEST (Practice) 541, 542, *2037-2042*.]

Cases referred to:

(1) *Emma Silver Mining Co.* v. *Grant,* (1879), 11 Ch.D. 918, 926, 927, 928; 40 L.T. 804; *subsequent proceedings,* (1880), 17 Ch.D. 122; Digest (Practice) 541, *2039*.

(2) *Smith* v. *Hargrove,* (1885), 16 Q.B.D. 183; Digest (Practice) 542, *2041*.

(3) *Piercy* v. *Young,* (1880), 15 Ch.D. 475; 42 L.T. 292; Digest (Practice) 541, *2037*.

(4) *Hadley* v. *Baxendale,* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 156 E.R. 145; 17 Digest (Repl.) 91, *99*.

Interlocutory Appeal.

In this action the plaintiffs claimed damages for breach of a contract entered into by the defendants for the supply of electric furnace equipment. By their statement of claim they alleged:

"1. The plaintiffs are a corporation maintained by the Polish republic for the purpose (inter alia) of purchasing industrial plant to be used in the production of steel by the central steel board . . . of the said republic . . . 2. By the [first contract] the defendants agreed to manufacture one . . . high frequency furnace installation including one . . . high frequency induction furnace of three hundred kilograms cast steel capacity (hereinafter referred to as 'the first installation') for the total price of £10,650 and to deliver the same to the plaintiffs in August, 1950. 3. The defendants, at the time when the first contract was made, well knew that the plaintiffs required the first installation for the purpose of its transfer to and use by the board in the production of cast steel and that when the said installation was in operation the annual production of steel therefrom would be about six hundred tons. 4. In or about October, 1948, the plaintiffs paid to the defendants the sum of £2,130 being a twenty per cent. advance payment in respect of the first contract. 5. . . . the plaintiffs paid to the defendants [further sums] the total amount representing eighty per cent. of the value of a shipment of part of the first installation. 6. By the [second contract] the defendants agreed to manufacture one . . . high frequency furnace installation including one . . . high frequency induction furnace of two hundred and fifty kilograms cast steel capacity and two furnaces each of fifty kilograms capacity (hereinafter referred to as 'the second installation') for the total price of £11,550 and to deliver the same to the plaintiffs in August, 1950. 7. The defendants, at the time when the second contract was made, well knew that the plaintiffs required the second installation for the purpose of its transfer to and use by the board in the production of cast steel and that when the said installation was in operation the annual production of steel therefrom would be about four hundred and fifty tons. 8. . . . the plaintiffs paid to the defendants the sum of £2,310 being a twenty per cent. advance payment in respect of the second contract. 9. . . . the plaintiffs paid to the defendants the sum of £380 15s. being a sixty per cent. advance payment for [spares for the second installation]. 10. . . . the plaintiffs paid [further sums] the total amount representing eighty per cent. of the value of a shipment of part of the second installation. 11. . . . the defendants refused to continue to manufacture the said installations or to deliver the same in accordance with the said contracts and thereby repudiated the said contracts. 12. The plaintiffs by letter from their solicitors . . . elected to treat the said contracts as discharged by reason of such repudiation. 13. In the premises the plaintiffs have suffered damage. It has not been possible for them to obtain the said installations or either of them elsewhere and they have lost the use of the said installations for an indefinite period of time say ten years and have thereby lost the production which they would have obtained from such installations, which as aforesaid would have been about one thousand and fifty tons per annum. The value of such production at present average world prices is £48,750 and seventeen per cent of such value . . . is a reasonable estimate of the annual damage suffered by the plaintiffs. In the alternative, if it was possible for the plaintiffs to place an order for the said installations elsewhere (which is denied) the price thereof would have increased over the said contract prices, by reason of the general increase of world prices by forty per cent. Further, the delay in delivering such alternative installations would result in a delay in commencing production with the consequent loss of production for a period of three years. 14. Alternatively the board has suffered the said loss and damage and the plaintiffs will have to make the same good to the board. 15. Further, the said shipments of part of the first and second installations, without the completion of the said installations, are valueless and could not be used for the purpose of any alternative installation."

By amendment, the plaintiffs further alleged in effect that if the defendants were unable to export the installations for lack of an export licence the failure to obtain or have the requisite licence was due to the defendants' own act or default. The defendants, by their defence, denied that they had repudiated the contracts and alleged, alternatively, that the contracts were frustrated by a government order prohibiting the further export of the installations; they also alleged that the plaintiffs had repudiated the contracts.

On Nov. 26, 1952, Master CLAYTON made an order on a summons for directions. On Jan. 10, 1956, the plaintiffs issued a summons for further directions as follows:

> " That notwithstanding the order for directions made herein on Nov. 26, 1952: (i) Only the questions of the above named defendants' liability for the repayment of the several sums in the amended statement of claim herein mentioned and the damages therein claimed be determined at the trial of this action and that all questions of the amount of such damages, if any, shall after such determination be referred to the official referee in rotation or as the trial judge may order. (ii) Until after the determination of such questions of liability or further order, discovery in relation to the quantum of the said damages shall be deferred."

On Feb. 8, 1956, Master CLAYTON made no order on the summons. The plaintiffs appealed and on Feb. 22, 1956, DEVLIN, J., made the order sought by them. The defendants now appealed.

Maurice Lyell, Q.C., and *R. J. Parker* for the defendants.
D. N. Pritt, Q.C., and *L. J. Solley* for the plaintiffs.

JENKINS, L.J., referred to the pleadings and continued: It would be apparent to anyone that the calculation of damages in the event of the plaintiffs making good their case as to the contract and the defendants' repudiation of it would be a matter of considerable complication and difficulty. Counsel for the defendants, however, says that, difficult as the calculation of the quantum of damages may be, there is no justification in the present case for the order made by the learned judge. The jurisdiction to make the order in question is contained in R.S.C., Ord. 36, r. 7, which provides:

> " Subject to the provisions of the preceding rules of this order, the court or a judge may, in any cause or matter, at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the places for such trials, and in all cases may order that one or more issues of fact be tried before any other or others."

There is no doubt as to the jurisdiction of the court to make such an order. It is also clear that the question whether or not such an order should be made in any given case is a matter for the discretion of the judge. Counsel for the defendants, however, contends that, discretionary as this order was, it ought not to be allowed to stand on account of the serious embarrassment to the defendants which would ensue. He said, rightly, that the making of an order of this sort at the instance of a plaintiff was a rare occurrence. He did not dispute that it could be done, but he said that it was a kind of order which should only be made in exceptional circumstances. He referred us to a number of authorities. I do not propose to take up time by reading all of them. The first was *Emma Silver Mining Co.* v. *Grant* (1) ((1879), 11 Ch.D. 918). In that case SIR GEORGE JESSEL, M.R., said at the beginning of his judgment (ibid., at p. 926):

> " I do not intend to lay down any general rule for the proper construction of Ord. 36, r. 6, [the present Ord. 36, r. 7, is in substantially the same terms] because, first of all, I think one judge has no right to embarrass other judges

> A by laying down general rules of construction; and, in the second place, I think it is very undesirable to limit the operation of a rule expressed in general terms by stating the circumstances, or all the circumstances under which the judge thinks the discretion ought to be exercised. The discretion is general. Of course it is a judicial discretion, and there must be sufficient reason for exercising it; but what I intend to do is to state one or two cases B in which I have been asked to put the rule in force, and what I have done, and why; and then I shall state why I think I ought to put the rule in force in the present instance."

SIR GEORGE JESSEL, M.R., went on to give a number of examples in which he had allowed a preliminary point to be dealt with separately, or some particular point in the case to be dealt with separately, before the rest of the case, these C being all instances where he was satisfied that there was a real probability that the direction that that particular issue should be heard would one way or the other dispose of the action.

In that particular case, which had arisen out of an action in respect of frauds in relation to the promotion of a company, the learned Master of the Rolls, at the instance of the plaintiff, directed, as I understand it, that the issue whether D two particular persons concerned in the affairs of the company were promotors of the company be tried first; but that was only done on terms that the plaintiffs should give up any other cause of action against those two defendants that was not covered by the issue directed to be tried and also undertake to consent to the discontinuance of such portion as and when the court should direct. So that was a very different case; but it is useful as showing, first, that no general E rule ought to be laid down to define the circumstances in which orders of this sort ought to be made and, secondly, that, without attempting to lay down any general rule, the kind of case in which an order of that sort can usefully be made is a case in which the matter directed to be tried first will, when decided one way or the other, really be likely to dispose of the case.

I only intend to refer to one other of the authorities under R.S.C., Ord. 36, r. 7, F namely, *Smith* v. *Hargrove* (2) ((1885), 16 Q.B.D. 183). I propose only to read the headnote which gives a fair example of one kind of case where an order such as that made in the present case is appropriate. The headnote says:

> "Where liability and also the amount of damages are disputed in an action, and the question as to the amount of damages is one of such detail or G nature that it probably will be referred to some other tribunal than a jury, it is a proper exercise of discretion under Ord. 36, r. 8, to order the question of liability to be tried, and the question of damages to be postponed until afterwards."

There seems to have been a re-numbering of the rules, because I see it is said in argument (ibid.) that *Piercy* v. *Young* (3) ((1880), 15 Ch.D. 475) was decided on H the former Ord. 36, r. 6,

> "which is almost identical with the present Ord. 36, r. 8, under which the master's order was made."

So that what was r. 6 appears to have become r. 8 and now to be r. 7. That being an example of the type of case that can suitably be dealt with in the way in which I the learned judge thought that the present case could be dealt with, I would add this: I think that, generally speaking, an order such as the present ought not to be made unless there is on the pleadings a clear line of demarcation between issues bearing on liability and issues bearing on quantum of damages. It is on that aspect of the matter that I feel difficulty. To put it at its shortest, the action is one in which the plaintiffs claim against the defendants damages for breach of contract. The contract is alleged, repudiation is alleged and the plaintiffs' election to treat the contract as discharged by repudiation is alleged. It may be said that nearly all the other issues go to quantum of damages. Once the breach of contract is established, liability is established for the damages, whatever they may be, which have flowed from the breach, and the remaining issues may all, in a sense, be said to be directed to the question of quantum.

Looking at the present statement of claim from that point of view, one finds first an allegation in para. 1 that the plaintiffs are a corporation maintained by the Polish republic for the purpose of purchasing industrial plant to be used by the central steel board. That might or might not be said to be an allegation directed to liability; but it might well be said to affect the quantum of damages, inasmuch as if the plaintiffs purchased plant that was not for their own use, they might make no loss if the plant was not supplied. Then one has the allegations in paras. 3 and 7 which allege certain knowledge on the part of the defendants, namely, that the plaintiffs required these installations for transfer to and use by the board and that the annual production of steel therefrom was to be about six hundred tons in one case and four hundred and fifty tons in the other case. Those two paragraphs may, I suppose, be said to go to quantum of damages. The point of alleging that the defendants knew these matters would be, I take it, to seek to hold them liable for loss based on an output of six hundred tons or four hundred and fifty tons as the case may be on the principle of *Hadley* v. *Baxendale* (4) ((1854), 9 Exch. 341). Then para. 13 propounds the alternative methods of measuring damage, that is either by loss of production or by the increase of cost incurred in purchasing comparable plant; and para. 14 alleges that:

> " Alternatively the board has suffered the said loss and damage and the plaintiffs will have to make the same good to the board."

That, again, in a sense, might be said to go to liability, for it embraces the question whether the defendants are liable to the plaintiffs for damage suffered by the board. It raises also the question whether the plaintiffs themselves are under any liability to the board. Nevertheless, it could also be said to go to the quantum of damage. If the plaintiffs were under no liability to the board then the damage which the plaintiffs would have suffered under this head would perhaps be 40s. only, whereas if they were liable to the board, or at all events if they were to the knowledge of the defendants under a liability to the board, then the quantum of damages would, I suppose, be such as to include the damage suffered by the board which the plaintiffs had to make good. Then there is an allegation in para. 15 that the shipments made of parts of the first and second instalments, without completion of them, were valueless. That, I suppose, might be said to go to quantum of damage inasmuch as it is saying that no sum should be set off against the plaintiffs' loss on the strength of the value of the partial deliveries.

There are thus in this pleading several allegations which are on debatable ground as regards distinguishing between liability and quantum of damage. These same allegations, or some of them, seem to me to raise issues of fact which would more suitably and conveniently be tried by the judge at the trial in the ordinary way than made the subject of a reference. That, in my view, applies to para. 3 and para. 7 of the statement of claim, those being the paragraphs which allege that the defendants knew about the proposed transfer to and use by the board of the installations and as to the tonnage of the output of steel therefrom. It seems to me that those issues would be more suitably dealt with at the trial in the ordinary way. It seems to me also that the allegations as to the relationship between the plaintiffs and the board made in para. 1 and para. 14 of the statement of claim are likewise matters more suitable to be dealt with by the judge than by an official referee. These matters seem to me to be likely to raise questions possibly of some difficulty and complication as to the relationship under Polish law of the plaintiffs and the board. Arising out of the various allegations to which I have referred, there is a question which at some time will have to be dealt with by somebody, and that is the question raised in para. 13

as to the proper principle to be applied in assessing the damages. That, I suppose, would turn, inter alia, on whether the plaintiffs were held to have established para. 3 and para. 7 of the statement of claim. I think a question of general principle such as that is more suitable for the judge at the trial to determine than for a reference to an official referee.

I would further observe, as regards the questions of fact which I have noticed and characterised as being in a debatable area, that where there is an intricate question of fact and it is decided at the trial in the ordinary way then the dissatisfied party has the right of appeal to this court; but, as I understand the position, the decision of an official referee on questions of fact is final; there is no appeal from him to this court except on a question of law. So far as these paragraphs involve questions of law, it seems to me, again, that they would be better dealt with by the judge at the trial. The residuum, which would more conveniently and quickly be dealt with by an official referee, consists, to my mind, of the calculations and investigations into figures and matters of detail, which would have to be performed on a considerable scale in order to work out the correct figure of damages after all the facts have been ascertained and the principles to be applied have been laid down. For these reasons, which I state with diffidence, as I am differing from the view taken by Devlin, J., in the exercise of his discretion, I do not think that the present is a case in which the questions of liability and questions of quantum ought to be separated for the purposes of trial at this stage. It seems to me that the line of demarcation between these two types of issue is not sufficiently defined in the pleadings, and it may not at this stage be possible sufficiently to define it to make it practicable for a division to be effected. It would be highly inconvenient if the parties went before the court for the trial of the issues of liability and there ensued a difference, perhaps an irreconcilable difference, in their respective views as to where the learned judge's jurisdiction was to end for the purposes of that particular hearing. For these reasons, as I have said, I do not consider that the direction given in para. 1 of the order ought to have been made; and, in my judgment, the order of Master Clayton on that part of the application should be restored.

Counsel for the defendants also objected to the limitation on discovery imposed by the second paragraph of the order, and he did so mainly on the novel and interesting ground that, if discovery bearing on quantum of damage was restricted, he would be unable to avail himself effectively of the privilege of payment into court. That is an argument which on its merits would have appealed more strongly to me if the defendants had in the early stages of this action, which began on June 11, 1951, displayed a greater sense of urgency in regard to discovery. However, the point is a new and interesting one on which I find it unnecessary today to pass any opinion, for it was, I understood, agreed that, if the first part of the order was discharged, the direction as to the limitation of discovery should go with it. I understand that to have been said on the ground that a departure from the general order for discovery originally made could only be justified as a direction ancillary to another order under R.S.C., Ord. 54, r. 9. Be that as it may, the parties were agreed that the provision for discovery should go with the other part of the order if it was discharged. For these reasons I would allow the appeal.

HODSON, L.J.: I agree, and have nothing to add.

Appeal allowed.

Solicitors: *Linklaters & Paines* (for the defendants); *Harold Miller & Co.* (for the plaintiffs).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

Re WEIGALL'S WILL TRUSTS. MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. AND ANOTHER *v.* WEIGALL AND OTHERS.

[CHANCERY DIVISION (Harman, J.), April 12, 1956.]

Estate Duty—Passing—Property deemed to pass—Annuity—Continuing annuity—Annuity given to brother and in the case of his predeceasing his wife the same annual sum given to her—Whether gift of single continuing annuity or of two separate annuities—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1, *s.* 2 (1) (*b*).

Estate Duty—Incidence—Cesser of annuity—Annuity bequeathed by will—Annuity of annuitant and on his death to his wife—How burden of duty to be borne—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2 (1) (*b*), *s.* 14 (1).

By his home-drawn will dated June 11, 1930, a testator directed " my entire estate to be settled in trust for disposal of income and capital as hereafter provided—Of the income derived from same an annuity of £1,000 to be paid to my brother [A.] and an annuity of £5,000 to my brother [H.] and in the case of his predeceasing his wife [W.] the said £5,000 to be paid yearly to " her. The testator then disposed of " the remainder of the income including the above annuities as and when released " and the capital. By a codicil dated May 9, 1932, also home-drawn, indorsed on the will, the testator provided: " The annuities mentioned in this will are hereby reduced to £500 per annum in the case of [A.] and £3,500 in the case of [H.], this latter with reversion to " W. On Aug. 19, 1935, the testator died, and on May 28, 1954, H. died leaving W. surviving him. On the questions under which provision of the Finance Act, 1894, estate duty became payable in connection with H.'s death, viz., whether under s. 1 (in respect of the value of a continuing annuity for the life of W.) or under s. 2 (1) (b) (in respect of the " slice " of the testator's estate required to produce £3,500 per annum), and as to the incidence of the duty,

Held: (i) estate duty was payable under s. 2 (1) (b) of the Act of 1894, and not under s. 1, because the gifts to H. and W. were not of a single continuing annuity of £3,500 per annum constituting a separate item of property which passed on H.'s death under s. 1, but were of two separate annuities one ceasing on H.'s death and one then arising in favour of W.

Re Austin Motor Co., Ltd.'s Policies ([1951] 2 All E.R. 425) applied.

(ii) having regard especially to s. 14 (1) of the Act of 1894, the duty should be borne by the whole estate, so that the loss of income would affect rateably the annuitant and those interested in the remainder of the income.

Re Palmer ([1916] 2 Ch. 391) followed.

Re Cassel's Will Trusts ([1946] 1 All E.R. 704) not followed.

[As to the imposing of estate duty when annuities cease and arise on a death, see 13 HALSBURY'S LAWS (2nd Edn.) 236, para. 226, note (a); 15 HALSBURY'S LAWS (3rd Edn.) 13, para. 22.

As to the apportionment of estate duty where part only of property passes on death, see 13 HALSBURY'S LAWS (2nd Edn.) 294, para. 309, note (c), and 15 HALSBURY'S LAWS (3rd Edn.) 138, para. 283; and for cases on the subject, see 21 DIGEST 38-40, *249-254*, and SUPPLEMENTS.

For the Finance Act, 1894, s. 2 (1) (b), s. 14, see 9 HALSBURY'S STATUTES (2nd Edn.) 350.]

Cases referred to:

(1) *Re Cassel, Public Trustee* v. *Mountbatten*, [1927] 2 Ch. 275; 96 L.J.Ch. 483; 137 L.T. 785; Digest Supp.

(2) *Cowley (Earl)* v. *Inland Revenue Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 21 Digest 7, *27*.

(3) *Re Norfolk (Duke), Public Trustee* v. *Inland Revenue Comrs.*, [1950] 1 All E.R. 664; [1950] Ch. 467; 2nd Digest Supp.

(4) *Re Cassel's Will Trusts, Public Trustee* v. *A.-G. (No. 2)*, [1946] 1 All E.R. 704; [1947] Ch. 1, 13; 174 L.T. 368; 2nd Digest Supp.

(5) *Re Austin Motor Co., Ltd.'s Policies, Re Payton, Payton* v. *Inland Revenue Comrs.*, [1951] 2 All E.R. 425; [1951] Ch. 1081; 2nd Digest Supp.

(6) *Re Palmer, Palmer* v. *Palmer*, [1916] 1 Ch. 395; *revsd.* C.A., [1916] 2 Ch. 391; 85 L.J.Ch. 577; 115 L.T. 57; 21 Digest 35, *220*.

(7) *Re Parker-Jervis, Salt* v. *Locker*, [1898] 2 Ch. 643; 67 L.J.Ch. 682; 79 L.T. 403; 21 Digest 41, *261*.

Adjourned Summons.

The trustee of the will and codicil of Alexander Gilbert Weigall, deceased, issued this summons under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 3, for the determination of the following questions: (i) Whether on the true construction of the said will and codicil and of the Finance Act, 1894, s. 1 and s. 2, estate duty became payable on the death on May 28, 1954, of Harry Percy Weigall (a) under s. 1 of the said Act and only on the value of a continuing annuity of £3,500 per annum for the remainder of the life of the defendant Winifred Barstow Weigall or (b) under s. 2 (1) (b) of the said Act on the capital value of the proportion of the testator's residuary estate required to produce an annuity of £3,500 per annum; (ii) If question (i) should be answered in the sense of alternative (b) thereof, whether the defendant Winifred Barstow Weigall was liable to account for interest on a rateable proportion of the estate duty so payable corresponding to the proportion which the sum required to produce the said annuity bore to the whole of the said residuary estate. The testator by his will, which was dated June 11, 1930, and was home-drawn, directed his entire estate to be settled in trust for disposal of income and capital as follows:— "Of the income derived from same an annuity of £1,000 to be paid to my brother Arthur Stuart Laing Weigall and an annuity of £5,000 to my brother Harry Percy Weigall and in the case of his predeceasing his wife the said £5,000 to be paid yearly to Winifred Barstow Weigall—the remainder of the income including the above annuities, as and when released, to be paid as to two-thirds to my niece Winifred Weigall and the remaining one-third to my niece Grace Barstow Weigall during their respective lives . . . the capital of the trust to be held as to two-thirds to the surviving children of my niece Winifred in equal parts and the remaining third to the surviving children of my niece Grace Barstow in equal parts". By a codicil, which was dated May 9, 1932, was indorsed on the will and was also home-drawn, the testator provided "The annuities mentioned in this will are hereby reduced to £500 per annum in the case of Arthur Stuart Laing Weigall and £3,500 in the case of Harry Percy Weigall, this latter with reversion to Winifred Barstow Weigall". The testator died on Aug. 19, 1935, and his brother Harry Percy Weigall died on May 28, 1954, leaving his wife Winifred Barstow Weigall, the first defendant, surviving him.

Arthur Bagnall for the plaintiffs.

Raymond Walton for the first defendant, Winifred Barstow Weigall.

Lloyd Stott for the second defendant, interested in surplus income.

R. Cozens-Hardy Horne for the third, fourth and fifth defendants, interested in capital.

E. B. Stamp for the Inland Revenue Commissioners.

HARMAN, J.: This question concerns the incidence of estate duty payable on the death of an annuitant under the will and codicil of Alexander Gilbert Weigall who died in 1935, leaving to his brother Harry Percy Weigall an annuity amounting to £3,500 a year. By the will and codicil either that annuity or a like annuity became on Harry's predeceasing his wife payable to his widow, the first defendant, Winifred Barstow Weigall, and, on her death, will fall into the residue of the estate, of which the income is limited as to two-thirds to the second defendant and one-third to the third defendant. The persons at the moment appearing to be interested in the capital are the fourth and fifth defendants, who are infant children of the third defendant. This is a summons taken out under the Administration of Justice (Miscellaneous Provisions) Act, 1933, in which the Crown is interested because, apart from the incidence of the duty between the beneficiaries, its amount depends on the decision.

There are two views: one is that the annuity is a piece of property which came into existence on the death of the testator and continues in existence notwithstanding the death of Harry—in which case there is a passing of that property from Harry to his widow under s. 1 of the Finance Act, 1894; the other view is that one chose in action represented by Harry's annuity ceased on his death and that thereupon a new and what is usually called a reversionary annuity arose in the first defendant—in which case duty is exigible under s. 2 (1) (b) of the Act of 1894. If there were no authority on the matter I should not feel any doubt that nothing passed under s. 1 on the death of the first annuitant: he died, his annuity ceased, and another annuity arose in favour of his widow. It is quite true that as a matter of language the testator treats the whole as being one annuity and, though he does not appear to have had expert guidance, it is said that the question must be decided on the language which he has used; in other words, that this is a matter entirely of form and not of substance. It makes no difference, except from the duty point of view, whether this be regarded as two annuities or as one, and it seems strange that the mere chance whether a testator says " I give an annuity to my wife and on her death I give an annuity of a like sum to my daughter " or " I give an annuity to my wife which is to be paid to her daughter after her death if she survives her " will make the difference. Unless I am bound I decline to hold that the difference is a mere matter of language. The actual words used in the will are:

> " an annuity of £1,000 to be paid to my brother Arthur . . . and an annuity of £5,000 to my brother Harry . . . and in the case of his predeceasing his wife the said £5,000 to be paid yearly to Winifred . . ."

It is true that the testator treats the two latter as one, but, as has been pointed out, when he says that the said £5,000 is to be paid to Winifred, he does not mean what he says; it is not the same sum which is to be paid to her, it is a like sum. It is a new annuity in my view. By the codicil dated May 9, 1932, the £5,000 is reduced to £3,500:

> " £3,500 in the case of Harry . . . this latter with reversion to Winifred . . ."

Again looking at the language only, without treating it as using any terms of art, the testator, as a layman may, treats the annuities to his brother and his brother's wife as one annuity for their joint lives and the life of the survivor of them. In my view, however, it is not that at all: it is one annuity to the brother and an annuity of like amount to the brother's wife if she is the survivor, and the question is whether I am bound by law to hold any differently.

I begin with *Re Cassel, Public Trustee* v. *Mountbatten* (1) ([1927] 2 Ch. 275) where the question was as to the expenditure by trustees on the upkeep of Brook House under the testator's will. Brook House was devised to trustees on trust to allow Mrs. C. to have the use and enjoyment for life and, after her death, on the like trust for the benefit of Lady L. for her life, and during the whole of that period or those two periods (whichever way you look at them) the property was to be kept in repair and the rent paid out of the income of the residuary personal estate. The question on the death of the first life tenant of Brook House was what passed as regards the right to have the place kept up out of the residuary personal estate. RUSSELL, J., held that the property which passed was the right to enjoy the benefit of the annual sum and that that right passed on the death within s. 1. He so held contrary to his own opinion as he felt himself bound to do by *Earl Cowley* v. *Inland Revenue Comrs.* (2) ([1899] A.C. 198) in the House of Lords. His own opinion appeals to me as it did to him and without authority I should never have thought that the right to enjoy the benefit of having the house kept up at the expense of residue was a piece of property which passed on the death. Nevertheless he felt bound so to hold because, I think, the obligation to keep up the property was independent of the beneficial interests from time to time subsisting in it and, if any one of the life tenants had renounced, it would have made no difference to the trustees' obligation to maintain, so that there was something independent there of the rights of the beneficially interested parties.

I must look next at *Re Duke of Norfolk, Public Trustee* v. *Inland Revenue Comrs.* (3) ([1950] 1 All E.R. 664), where real property was devised to trustees for a term of one thousand years to support the annuities given by the Duke and there was a gift to the trustees of an annuity of £3,000 starting at the death and to continue payable during the life of the survivor of two persons. It was there conceded by the Crown that that was to be treated as a single annuity. JENKINS, L.J., said ([1950] 1 All E.R. at p. 672):

> "It is not in dispute that, on the true construction of the relevant provisions of the will and codicils, the interest in question is, in truth, one continuing annuity (charged on the estates comprised in the one thousand years term) for the longer of the lives of the two annuitants, and cannot be regarded as comprising two successive annuities, the first ceasing, and the second commencing, on the death of the late viscount."

There was, therefore, no argument on that subject, and I think it may be a pity that there was not. It may be that the concession was well made, having regard to the term of one thousand years limited to the trustees to uphold the annuity. Those trustees, as termors, had a duty to set aside out of the rents and profits of the realty an annual sum, that is to say, £3,000 a year during the life of the survivor of two named persons. That was treated as a piece of property, having, so to speak, an existence independent of the lives of the persons enjoying the benefit of it. Whether rightly or wrongly that was the concession made and the Crown claimed that nevertheless, even on that view, they were entitled to duty on a section 1 footing. It was held that they were wrong. The case is, therefore, no authority for the proposition that an annuity given for two lives is necessarily one annuity. In *Re Cassel's Will Trusts, Public Trustee* v. *A.-G.* (*No. 2*) (4) ([1946] 1 All E.R. 704), ROMER, J., treating the question as one of construction, said that the annuities there—which were an annuity of so much a year to a mother and, after her death, an annuity of like amount to her two daughters and the survivor of them—were separate annuities. It is true that he treated that as a question of construction, but the Crown submits here that it is not altogether a question of construing the language, but a question of substance rather than of form: Is there, asks the Crown, any thing which has an existence independent of the beneficial interests from time to time subsisting in it ? Unless there is such a thing, there is nothing to pass, because under s. 1 something must pass, and if there is no item of property to pass, s. 1 is not the charging clause applicable. It is said that here there is no property independent of the rights of the two annuitants and that *Re Cassel* (1) is distinguishable because there was something having existence independently of the rights of the beneficiaries. The Crown argues that one cannot in the present case find one piece of property—there are two several rights in two several persons. That is supported by *Re Austin Motor Co., Ltd.'s Policies, Re Payton, Payton* v. *Inland Revenue Comrs.* (5) ([1951] 2 All E.R. 425), a case very different from the present in that it arose under a pension scheme not under a will, and under covenant and not under benefaction; the Court of Appeal did, however, lay down a general proposition in these terms ([1951] 2 All E.R. at p. 427):

> " . . . that if s. 1 [of the Finance Act, 1894] is to be applicable there must . . . be property passing . . . there must be some property identifiable and persisting independently of the beneficial interests therein."

It was held that in that particular case the only right of property which emerged from the policies was a chose in action and that a mere chose in action could not be considered or apprehended apart and separately from the right to enjoy the benefit contracted to be given. *Re Duke of Norfolk* (3) and *Re Cassel* (1) were distinguished in the judgment of the court and it was said that in neither of those cases was there a mere chose in action but something more which was a piece of property. It is easy to see that this was so in *Re Cassel* (1) but it is not so easy in *Re Duke of Norfolk* (3) where, however, as I have pointed out, it was conceded that there was a single annuity.

In the present case I cannot see that there is anything but mere choses in action arising in favour of the two beneficiaries, one on the death of the testator and the other on the death of the first taker, Harry, and, as it seems to me that nothing passed, I do not find that I am bound by authority to hold that anything did pass. I feel at liberty, particularly having regard to *Re Payton* (5) to follow my own view and to hold that nothing passed, but that a new beneficial interest arose on the death of the testator's brother Harry, which is now vested in the first defendant, and that the consequences which follow from that are that the charging section is s. 2 (1) (b) and not s. 1.

The second question, ancillary to the first, concerns the incidence of the duty exigible on the slice of the estate notionally (and not in reality) necessary to support the fallen annuity. There has been no appropriation here; nothing falls into residue by reason of the death. The duty must be paid by the trustees of the will having regard to the provisions of s. 8 (4) of the Finance Act, 1894, they having the fund charged with the annuity in their hands. The question is whether the whole of the diminution of income which will be brought about by the payment has to be borne by those taking (in the words of the will) " the remainder of the income ", or whether the loss ought to be spread rateably between them and the new annuitant. She says she should be exonerated; they say she should not.

This case bears a very strong resemblance to *Re Palmer, Palmer* v. *Palmer* (6) ([1916] 2 Ch. 391) where there was an annuity of £3,000 to A. charged on the general residue and, on his death, there sprang up another annuity of a like amount to B., and, it being agreed there that it was a s. 2 (1) (b) case, the question was how the duty ought to be borne. It was not even suggested that the £3,000 to the second annuitant should be exonerated. Before YOUNGER, J., at first instance the whole burden had been put on the second annuitant and against that he appealed. The Court of Appeal held that a rateable apportionment over the whole estate was the right way to deal with the matter and, in effect, the taker of the £3,000 a year was treated as taking an aliquot part of the settled estate and had to bear an aliquot part of the burden accordingly. In that case the residue of the income was being accumulated, the period of accumulation not having then run out. That appeals to me as being a just way of dealing with the matter on general equitable principles because, in fact, no benefit accrued to the takers of the residuary income by reason of the falling in of the first of the annuities because an exactly similar one sprang up in its stead. If that were the only case, therefore, there would not seem to be any great difficulty in concluding that *Re Parker-Jervis, Salt* v. *Locker* (7) ([1898] 2 Ch. 643) was the right guide to dealing with the question. It seems also to be in accord with s. 14 (1) of the Finance Act, 1894, whereby it is provided that in the case of property which does not pass to the executor as such—that is undoubtedly the case here—an amount equal to the proper rateable part of the estate duty may be recovered by the person authorised or required to pay the estate duty in respect of any property and having paid such duty. Here the trustees will have paid such duty. From whom may they recover it ? From the person entitled to any sum charged on such property whether as capital or as an annuity or otherwise under a disposition not containing any express provisions to the contrary. There is here no express provision to the contrary, so that it would seem, under that section, that the trustees may recover a rateable part of the duty from the annuitant. It is said, however, that is not the right conclusion, having regard to the decision of ROMER, J., in *Re Cassel's Will Trusts* (4). There two annuities sprang up in favour of the daughters of a first annuitant and one of the questions was: how ought the burden to be borne? ROMER, J., in a reserved judgment, held that the annuities had priority to residue and that no part of the burden ought to be thrown on them, and, when he came to *Re Palmer* (6) he distinguished it from his case by saying ([1946] 1 All E.R. at p. 710):

> ". . . the new . . . annuity was payable solely out of the fund which benefited by the cesser of the old annuity, namely, the 'settled residue'."

So it was in this case: the new annuity is payable solely out of the fund which, in a sense, benefited from the cesser of the old one. It is payable out of the same fund. Then he said (ibid.): "That is not, in my opinion, the position here." He suggested that the annuity there was payable out of what was called the settled fund and not out of the residue and, therefore, the residue must bear the duty just as it would have done, said he, had there been an appropriation. That leaves me, I confess, in some embarrassment: I do not follow the ground on which the learned judge decided that point. I feel the force of this: that the third, fourth and fifth defendants only get the remainder of the income, and it may be said, therefore, that the annuity must in all cases have priority; that, however, was not the way the matter was dealt with in *Re Palmer* (6), and it does seem to me that where there is, as here, a slice being taken of the whole of the fund which is answerable for both the annuity and the other income payments, and where the residue gets no benefit by the cesser of the old annuity, because a new one springs up exactly in the same terms, equity demands that the various sums charged on the entirety should bear the duty rateably between them. That is what was done in *Re Palmer* (6) by the Court of Appeal, and, notwithstanding the different view taken by ROMER, J., in *Re Cassel's Will Trusts* (4) I feel that is the right view to follow. It seems to me that this is a proper instance of a *Re Parker-Jervis* (7) distribution and, notwithstanding *Re Cassel's Will Trusts* (4), it would not be right that the new annuitant should not bear some part of the burden of the duty which has become exigible by the reason of the benefit which has accrued to her on the death of her husband. I propose to declare accordingly.

Declaration accordingly.

Solicitors: *Kerly, Sons & Karuth* (for the plaintiffs); *Child & Child* (for the first defendant); *Clarkson, Wright & Jakes* (for the second defendant); *J. L. Freedman & Co.* (for the third, fourth and fifth defendants); *Solicitor of Inland Revenue* (for the Inland Revenue Commissioners).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

WARD *v.* BYHAM.

[Court of Appeal (Denning, Morris and Parker, L.JJ.), January 16, 1956.]

Contract—Consideration—Performance of statutory duty—Undertaking by father of illegitimate child to pay towards maintenance by mother—Condition that child should be well looked after and happy—Condition fulfilled by mother.

After the unmarried parents of a child had separated, the mother became housekeeper to a man who was ready to let the child live with them, and she wrote asking the father to let her have the child and to pay her the £1 a week he was paying a neighbour to maintain it. She received a letter from the father in reply saying " I am prepared to let you have [the child] and pay you up to £1 a week allowance for her providing you can prove that she will be well looked after and happy and also that she is allowed to decide for herself whether or not she wishes to come and live with you ". It was agreed that she should have the child who went to live with her. She received the £1 a week until seven months later when she married the man for whom she was acting as housekeeper, when the father stopped the payments. In an action brought by the mother for the £1 a week based on the father's undertaking,

Held: notwithstanding the mother's statutory duty to maintain the child the mother's looking after the child in accordance with the agreement with the father was sufficient consideration for his promise to pay, and the father was liable to make the payments under the agreement.

Hicks v. *Gregory* ((1849), 8 C.B. 378) applied; dictum of Parke, B., in *Crowhurst* v. *Laverack* ((1852), 8 Exch. at p. 213) not followed.

Appeal dismissed.

[As to promises which do not amount to consideration in law, see 8 Halsbury's Laws (3rd Edn.) 117, para. 203; and for cases on the subject, see 12 Digest (Repl.) 235-237, *1762-1777*.]

Cases referred to:

(1) *Crowhurst* v. *Laverack*, (1852), 8 Exch. 208; 22 L.J.Ex. 57; 20 L.T.O.S. 102; 17 J.P. 249; 155 E.R. 1322; 3 Digest 386, *247*.

(2) *Hicks* v. *Gregory*, (1849), 8 C.B. 378; 19 L.J.C.P. 81; 14 L.T.O.S. 202; 137 E.R. 556; 3 Digest 386, *245*.

Appeal.

The father appealed against an order made by His Honour Judge Shove sitting at Lincoln and Horncastle County Court on Nov. 15, 1955, for the payment of a sum of £30 damages in respect of a breach of an agreement to pay £1 weekly towards the maintenance by the mother of his illegitimate child. The father contended that there was no consideration for his promise to pay the weekly sum.

G. D. Lane for the father.
H. A. Skinner for the mother.

DENNING, L.J.: This is a claim for the sum of £1 a week in respect of the maintenance of a bastard child. The father and mother lived together unmarried for four or five years, from 1949 until May, 1954, and a little girl was born of that union on Oct. 28, 1950. Whilst the father and mother were living together, the father went out to work and maintained the household; but in May, 1954, the father turned the mother out. He put the child into the care of a neighbour and paid the neighbour £1 a week. The mother meanwhile found work as a housekeeper to a man who was ready to let the child come too. The mother wanted the child with her, and she wrote a letter to the father asking for the child, and £1 a week for her maintenance, which was the sum which the father had been paying the neighbour. We have not got a copy of the letter which the mother wrote, but we have the father's reply, which is the basis of this action. It is dated July 27, 1954, and says:

> "Mildred, I am prepared to let you have [the child] and pay you up to £1 per week allowance for her providing you can prove that she will be well looked after and happy and also that she is allowed to decide for herself whether or not she wishes to come and live with you. She is well and happy and looking much stronger than ever before. If you decide what to do let me know as soon as possible."

On receiving that letter the mother went to see the father, and it was agreed that she could have the child. She took the child with her, and the child has lived with the mother ever since.

In February, 1955, some seven months later, the mother married the man to whom she had been acting as housekeeper, and a few weeks later the father himself married. The father kept up the payments of £1 a week until the mother married, but after that he stopped.

I look on the father's letter as dealing with two things. One is the handing over of the child to the mother. The father agrees to let the mother have the child, provided the child herself wishes to come and provided also the mother satisfies the father that she will be well looked after and happy. The other thing is the future maintenance of the child. The father promises to pay the mother up to £1 per week so long as the mother looks after the child.

The mother now brings this action, claiming that the father should pay her £1 per week, even though she herself has married. The only point taken before us in answer to the claim is that it is said that there was no consideration for the promise by the father to pay £1 a week, because, when she looked after the child, the mother was only doing that which she was legally bound to do, and that is no consideration in law. In support of this proposition, reliance was placed on a statement by PARKE, B., in the course of argument in *Crowhurst* v. *Laverack* (1) ((1852), 8 Exch. 208 at p. 213).

By statute the mother of an illegitimate child is bound to maintain it, whereas the father is under no such obligation (see s. 42 of the National Assistance Act, 1948). If she is a single woman the mother can apply to the magistrates for an affiliation order against the father, and it might be thought that consideration could be found in this case by holding that the mother must be taken to have agreed not to bring affiliation proceedings against the father. In her evidence the mother said, however, that she never at any time had any intention of bringing affiliation proceedings. It is now too late for her to bring them, because she has married and is no longer a single woman*.

I approach the case, therefore, on the footing that, in looking after the child, the mother is only doing what she is legally bound to do. Even so, I think that there was sufficient consideration to support the promise. I have always thought that a promise to perform an existing duty, or the performance of it, should be regarded as good consideration, because it is a benefit to the person to whom it is given. Take this very case. It is as much a benefit for the father to have the child looked after by the mother as by a neighbour. If he gets the benefit for which he stipulated, he ought to honour his promise, and he ought not to avoid it by saying that the mother was herself under a duty to maintain the child.

I regard the father's promise in this case as what is sometimes called a unilateral contract, a promise in return for an act, a promise by the father to pay £1 a week in return for the mother's looking after the child. Once the mother embarked on the task of looking after the child, there was a binding contract. So long as she looked after the child, she would be entitled to £1 a week. The case seems to me to be within the decision of *Hicks* v. *Gregory* (2) ((1849), 8 C.B. 378) on which the judge relied. I would dismiss the appeal.

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* See *Stacey* v. *Lintell*, (1879), 4 Q.B.D. 291.

MORRIS, L.J.: I agree. I think that the letter of July 27, 1954, shows A
that there was consideration for the agreement and promise of the father. After the mother was made to leave the home in May, 1954, the child in fact stayed with the father until July. The terms of the father's letter of July 27 suggest that he was animated by a concern for the well-being of the child. The phrases that he uses are evidence of that. When the mother asked for the child, the answer was in the terms of the letter. Counsel for the father submits that there B
was a duty on the mother to support the child, that no affiliation proceedings were in prospect or were contemplated, and that the effect of the arrangement that followed the letter was that the father was merely agreeing to pay a bounty to the mother.

It seems to me that the terms of the letter negative those submissions, for the father says: C

> " providing you can prove that [the child] will be well looked after and happy and also that she is allowed to decide for herself whether or not she wishes to come and live with you."

The father goes on to say that the child is then well and happy and looking much stronger than ever before. " If you decide what to do let me know as soon as D
possible ". It seems to me, therefore, that the father was saying, in effect: Irrespective of what may be the strict legal position, what I am asking is that you shall prove that the child will be well looked after and happy, and also that you must agree that the child is to be allowed to decide for herself whether or not she wishes to come and live with you. If those conditions were fulfilled the father was agreeable to pay. On those terms, which in fact became operative, the E
father agreed to pay £1 a week. In my judgment, there was ample consideration there to be found for his promise, which I think was binding.

PARKER, L.J.: I have come to the same conclusion. I think that the letter of July 27, 1954, clearly expresses good consideration for the bargain, and for myself I am content to adopt the very careful judgment of the learned county court judge. F

Appeal dismissed.

Solicitors: *Henry Gover & Son*, agents for *Anthony T. Clarke*, Lincoln (for the father); *Waterhouse & Co.*, agents for *Andrew, Race, Hill & Mason*, Lincoln (for the wife).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Re EVE (*deceased*).
NATIONAL PROVINCIAL BANK, LTD. *v.* EVE AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), April 20, 24, 25, 1956.]

Administration of Estates—Order of application of assets—Bequest of option to purchase shares under market value—Whether specific bequest—Application of assets the subject of the option—Administration of Estates Act, 1925 (15 *Geo.* 5 *c.* 23), *s.* 34 (3), *Sch.* 1, *Part* 2, *para.* 6.

Will—Option to purchase shares under market value—Whether specific bequest.

By his will a testator gave to one B. an option to purchase at par one thousand of the testator's ordinary shares in E. Co., Ltd. The shares were worth more than their par value and the option was subject to no incumbrance or condition imposing an obligation. The testator's estate was solvent, in the sense that the purchase price for the shares together with other assets of the testator available for payment of debts were sufficient to pay them. The testator's residuary estate was insufficient to pay his debts and testamentary and administration expenses. On the question where the benefit of the option stood in the order of assets applicable for payment of debts established by s. 34 of and Part 2 of Sch. 1 to the Administration of Estates Act, 1925,

Held: the beneficial interest represented by the difference between the option purchase price of the shares and their market value, not being distinguished as a bequest by the testator, was not property specifically bequeathed and had no place among assets applicable for payment of debts by virtue of Part 2 of Sch. 1 to the Act of 1925, and the shares subject to the option were the last property available for payment of debts.

Dictum of SIR GEORGE JESSEL, M.R., in *Bothamley* v. *Sherson* ((1875), L.R. 20 Eq. at p. 309) considered.

[As to the nature and definition of a specific legacy, see 14 HALSBURY'S LAWS (2nd Edn.) 337, 338, para. 629; and for cases on the subject, see 23 DIGEST 385-388, *4554-4584*.

For the Administration of Estates Act, 1925, s. 34 (3), and Sch. 1, Part 2, see 9 HALSBURY'S STATUTES (2nd Edn.) 737, 767.]

Case referred to:

(1) *Bothamley* v. *Sherson*, (1875), L.R. 20 Eq. 304; 44 L.J.Ch. 589; 33 L.T. 150; 23 Digest 386, *4568*.

Adjourned Summons.

National Provincial Bank, Ltd., the plaintiff, as one of the executors of the will of John Leonard Eve, deceased, applied to the court by originating summons for the determination of the question (among others) whether on the true construction of the will and the Administration of Estates Act, 1925, s. 34, the option, when exercised, conferred on Robert Chandler Brown, the second defendant, by cl. 8 of the will to acquire one thousand ordinary shares in J. L. Eve (Construction), Ltd., ought to be transferred by the trustee (a) free from any, or (b) subject to a rateable proportion, of the debts, funeral and testamentary expenses of the estate.

The will of the testator, dated Feb. 8, 1951, provided by cl. 8:

> "I bequeath to . . . Robert Chandler Brown an option to acquire from my trustees at par value one thousand of my ordinary shares of £1 each fully paid in the company J. L. Eve (Construction), Ltd., provided that notice of his intention to exercise such option shall be given in writing to my trustees within one year of my death and subject only to any requisite consent being obtained from the holders of the preference shares in the

> said company for the transfer of such shares to him and I express the hope that he may be appointed a director of the said company."

The testator died on June 25, 1954, and the second defendant Robert Chandler Brown gave notice by letter dated Jan. 19, 1955, of his intention to exercise the option given to him by cl. 8 of the will. The value of twelve thousand ordinary shares of £1 each in J. L. Eve (Construction), Ltd. was agreed with the revenue at £60,000. The testator's residuary estate was insufficient to meet all the funeral, testamentary and administration expenses and debts, but his estate was solvent.

A. A. B. Fuller for the plaintiff, one of the executors.

M. J. Fox for the first defendant, the testator's widow, one of the persons beneficially interested in the estate.

G. A. Rink, Q.C., for the second defendant, the donee of the option to purchase.

M. G. Johnston for the third, fifth and sixth defendants, persons beneficially interested in the estate.

Peter Foster for the fourth defendant, who was also beneficially interested in the estate.

ROXBURGH, J.: By cl. 8 of his will the testator bequeathed to Robert Chandler Brown an option to acquire from his trustees at par value one thousand of his ordinary shares of £1 each, fully paid, in J. L. Eve (Construction), Ltd., provided that notice of his intention to exercise such option was given in writing to the trustees within one year of his death and

> "subject only to any requisite consent being obtained from the holders of the preference shares in the said company for the transfer of such shares to him."

The question is where the benefit of the option stands in the hierarchy of assets for the payment of debts in a solvent estate. The option is a right to purchase one thousand shares at par value, i.e., at a price below their true value. Once exercised, it involves a contract between the trustees as vendors to sell and the purchaser to buy the shares at the stated price, free from incumbrances, and this is so notwithstanding that there is a strong element of bounty in the transaction. The shares are not bequeathed subject to a charge or condition. An option to purchase cannot be a specific bequest of shares. If there is a specific bequest at all it must be of the difference between the price stated in the will and the market value of the shares.

Such a benefit has never yet been held to be a specific bequest: nor does it fit in with any reported definition of a specific bequest. SIR GEORGE JESSEL, M.R., attempted such a definition with some trepidation in *Bothamley* v. *Sherson* (1) ((1875), L.R. 20 Eq. 304 at p. 309) where he says:

> "But if it satisfy both conditions, that it is a part of the testator's property itself, and is a part as distinguished, as I said before, from the whole, or from the whole of the residue, then it appears to me to satisfy everything that is required to treat it as a specific legacy."

I understand the word "distinguished" to mean distinguished by the testator, not by some analysis in a court of equity. Further passages in *Bothamley* v. *Sherson* (1) show quite plainly that this is so. I am not considering whether there is a specific bequest of shares. I am considering whether there is a specific bequest of the beneficial interest represented by the difference between the stated price and the market value. That ingredient has, quite clearly, not been distinguished by the testator himself. In my judgment that beneficial interest is not a specific bequest.

It is said that if that is so, it has no place in Part 2 of Sch. 1 to the Administration of Estates Act, 1925, and that that is surprising. I do not find it surprising if, as I think, the property subject to an option is the last to be available for the payment of debts. For, indeed, in so far as the property subject to the option is required for the payment of debts, the option over that property cannot be exercised at all and the benefit of it is totally destroyed by the operation of law. So long as the purchase price stated in the will is, with the other available assets, sufficient for the payment of debts, it, and not the shares, constitutes the fund available for that purpose.

Order accordingly.

Solicitors: *Sowman, Wells & Potter* (for all parties other than the second and fourth defendants); *Eland, Hore, Pattisson, Nettleship & Butt* (for the second defendant); *Hopwood, Mote & Leedham-Green* (for the fourth defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

FRANK W. CLIFFORD, LTD. *v.* GARTH AND ANOTHER.

[COURT OF APPEAL (Denning, Birkett and Parker, L.JJ.), April 26, 27, 1956.]

Building Control—Permitted cost of work exceeded—Work in excess of limit without licence—Contract for work of unascertainable cost—Only excess cost irrecoverable—Defence (General) Regulations, 1939 (*S.R. & O.* 1939 *No.* 927, *as amended*), *reg.* 56A.

The price of building work under a contract for the conversion of the ground floor of premises into a coffee bar was to be on a " cost-plus " basis, the amount of work being ascertainable only as the alterations proceeded. After the work had started, the building owner decided to make the basement into a restaurant and additional work was found to be necessary to make the building safe and stable. The cost of the work (including that done by other contractors) ultimately exceeded the £1,000 maximum then permitted for such work without a licence under the Defence (General) Regulations, 1939, reg. 56A, which had not been obtained. In an action by the builders for recovery of the cost of the work, the building owner claimed that the whole of the cost was irrecoverable on the ground that the contract was illegal.

Held: the price of the work being left unstated in the contract, it was lawful for the builders to carry it out up to the full extent of the cost permitted without a licence and they could recover the sum due up to the point at which that figure was exceeded, any excess only being irrecoverable.

Per DENNING, L.J.: I would be disposed to agree that, if the builder had carried out a single and indivisible work under an entire contract for a lump sum of say £1,500 or £2,000 without a licence, it would all have been illegal and the whole would have been irrecoverable (see p. 325, letter A, post).

Appeal dismissed.

[**Editorial Note.** Regulation 56A of the Defence (General) Regulations, 1939, was revoked as from Nov. 10, 1954, by the Defence Regulations (No. 7) Order, 1954 (S.I. 1954 No. 1478).

As to the contravention of building licensing provisions, see 3 HALSBURY'S LAWS (3rd Edn.) 414.

For the Defence (General) Regulations, 1939, reg. 56A, see 4 HALSBURY'S STATUTORY INSTRUMENTS 6.]

Appeal.

The respondent builders brought an action for the recovery of £1,685 3s., the balance claimed to be due under a contract with the appellant building owner for structural work on premises and other work at 31 and 33, Shepherd Market, London, W.1, carried out in 1954. The building owner contended that the whole sum in respect of the building work was irrecoverable on the ground that the cost of such work was in excess of the £1,000 permitted without a licence under para. (1), proviso (c) of the Defence (General) Regulations, 1939, reg. 56A, as substituted for the original reg. 56A by S.R. & O. 1941 No. 1596 and the Control of Building Operations (No. 19) Order, 1953, reg. 2. On Feb. 16, 1956, HARMAN, J., sitting as a judge of the Queen's Bench Division, gave judgment for the builders, holding that only the excess of the sum claimed in respect of building work over the £1,000 then permitted (less £146 in respect of the work of other contractors previously carried out) was irrecoverable on the ground of illegality. The building owner appealed.

J. T. Molony, Q.C., and *L. J. Belcourt* for the building owner.

J. C. Lawrence for the builders.

DENNING, L.J.: In 1954 the limit of cost of building work that could be done without licence was £1,000*. If a builder, householder or architect did building work in excess of the free limit of £1,000, without a licence, he was guilty of an offence.

We are here concerned with premises Nos. 31 and 33, Shepherd Market, in the West End. Miss Susan Garth, the building owner, had the idea of turning the ground floor into a coffee bar. She met an architect, Mr. Sanderson, who thought it was a good idea, and he acted for her in the work. It was not a work which could be designed and planned beforehand; the amount of work could only be ascertained from time to time as the alterations were made. After the builders, Clifford, Ltd., had started work on the coffee bar, the building owner decided that it would be a good thing to make a restaurant below, and, when they got below into the basement, it was found that even more work had to be done to make the structure safe and stable. All those works would have to be done within the free limit or else within a licence. In addition, a large amount of other work had to be done, such as laying linoleum and putting in shelves and tables, which did not need a licence at all.

In the upshot the total bill of the builders came to £1,911 1s. A certain amount was paid on account, but, when the builders sued for the balance, the building owner raised the defence of illegality, saying that the free limit was £1,000 and the builders had acted unlawfully in doing the work.

Two items of work on the premises previously carried out by other contractors —plumbing work and electrical work—together amounting to £146, used up part of the free limit. The only free amount remaining available for these premises for the builders was £854. The question is whether that £854 can be recovered. The building owner says that, if the builders break the law and exceed the free limit, they cannot recover anything, not even the free amount, because the whole is unlawful.

In the many cases in these courts where work has been licensed it has been held that, if work is done in excess of the licence, it is only the excess which is unlawful. The builder can recover payment for the licensed figure, but not for the excess. Further, the builder cannot in a single contract add on the free limit to the licence, so as indirectly to increase the licensed figure. In this case there is no licence, but only a free limit.

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* See Defence (General) Regulations, 1939, reg. 56A (1), proviso (c) and the Control of Building Operations (No. 19) Order, 1953 (S.I. 1953 No. 1793), art. 2.

A I would be disposed to agree that, if the builders had carried out a single and indivisible work, under an entire contract for a lump sum of, say, £1,500 or £2,000, without a licence, it would all have been illegal and the whole would have been irrecoverable. But that is not this case. Here the price could not be ascertained beforehand and the work was put in hand without anyone knowing what it would cost. It was a contract for work to be done as required. The B price was not stipulated and that could not be fixed. The work was done on a "cost-plus" basis, sometimes called a cost-of-works basis. In a contract of that kind, when no one knows what the final figure will be, I think it is perfectly lawful for the builder to go on with the work, using the full extent of the free limit. It does not become unlawful unless and until he exceeds the free limit. C So in this case the work was perfectly lawful right up to the time when the £1,000 was reached. It only became unlawful in respect of the excess. For the excess, therefore, the builder cannot recover, but for every amount that comes properly within the free limit he can recover. That is what the learned judge held. I find myself in entire agreement with him.

Counsel for the building owner referred us to reg. 56A of the Defence (General) D Regulations, 1939, and in particular to para. (6E), seeking to show that, on the true construction of the regulations, the whole was unlawful if the free limit was exceeded. I do not agree with that contention. The position when there is a free limit is the same as when there is a licence. It is only the excess that is unlawful.

E I, therefore, would be in favour of dismissing the appeal.

BIRKETT, L.J.: I agree for the reasons which my Lord has given that this appeal ought to be dismissed.

PARKER, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Wilkinsons* (for the building owner); *Beach & Beach* (for the builders).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Re PELLY (*deceased*).
RANSOME AND OTHERS *v.* PELLY AND ANOTHER.

[COURT OF APPEAL (Lord Evershed, M.R., Jenkins and Hodson, L.JJ.), April 25, 26, 27, 1956.]

Settled Land—Repairs—Expenditure by tenant for life—Recoupment out of capital money—Improvements—Maintenance claim in respect of improvements under Income Tax Acts—Allowances received by tenant for life—Whether tenant for life accountable to settlement trustees for allowances—Settled Land Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 18), *s.* 73 (1), *para.* (iii), *para.* (iv), *s.* 75 (2), *s.* 107 (1).

At the direction of a tenant, on whom land was settled on trust for him during his life with remainders over, capital moneys were applied by the trustees of the settlement in recouping to him the cost of authorised improvements which he had executed and for which he had paid. The improvements were such that the trustees were not bound and had no discretion to require that part of the cost should be borne by income of the settled property. The tenant for life became entitled to certain income tax allowances or reliefs* in respect of improvements. The trustees claimed that he was accountable to them for these allowances and reliefs on the ground that, in exercising his powers under s. 75 (2)† of the Settled Land Act, 1925, to direct the investment of capital moneys pursuant to s. 73 (1), para. (iii) and para. (iv) in payment for the improvements he was, by virtue of s. 107 (1)‡ of the Act, acting as trustee for all the beneficiaries under the settlement.

Held: since the tenant for life was entitled under the settlement to the whole income and enjoyment of the settled property during his life, and not merely to the income less the amount of certain tax allowances or reliefs, he was under no obligation to account to the trustees for sums recovered by him by way of income tax allowance or relief referable to his expenditure on improvements to the settled land, notwithstanding that the expenditure had been recouped to him by the trustees of the settlement at his direction.

Principle of such cases as *Re Pettit, Le Fevre* v. *Pettit* ([1922] 2 Ch. 765) distinguished (see p. 331, letter I, to p. 332, letter A, post).

Decision of WYNN-PARRY, J. ([1955] 3 All E.R. 483) reversed.

[**Editorial Note.** In the present case the improvements were within Part 1 of Sch. 3 to the Settled Land Act, 1925, and no part of the cost was repayable out of income where capital moneys were invested in paying for the improvements. The decision leaves open not only what the position may be where trustees have a discretion to require or are bound to require the cost of improvements to be repaid out of income, but also what the position would be if the trustees themselves paid direct for the improvements, instead of the payment being made initially by the tenant for life and recouped to him by the trustees (see p. 328, letter B, and p. 332, letter E, post).

As to the application of capital money in payment for improvements under the Settled Land Act, 1925, see 19 HALSBURY'S LAWS (2nd Edn.) 389, para. 798.

For the Settled Land Act, 1925, s. 73 (1), s. 75 (2), s. 83, s. 84, s. 107 (1), and Sch. 3, Part 1, see 23 HALSBURY'S STATUTES (2nd Edn.) 161, 173, 186, 188, 229 and 272.

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* Under the Income Tax Act, 1952, s. 101, s. 313, s. 314; 31 HALSBURY'S STATUTES (2nd Edn.) 95, 302, 303.

† The terms of the sub-section, so far as relevant, are printed at p. 329, letter B, post.

‡ The terms of the sub-section are printed at p. 329, letter C, post.

For the Agricultural Holdings Act, 1948, s. 81 (1), and s. 96 (1), see 28 HALSBURY'S STATUTES (2nd Edn.) 86, 96.

For the Income Tax Act, 1952, s. 101, s. 313, and s. 314, see 31 HALSBURY'S STATUTES (2nd Edn.) 95, 302, 303.]

Cases referred to:

(1) *Keech* v. *Sandford*, (1726), Sel. Cas. Ch. 61; 2 Eq. Cas. Abr. 741; Cas. *temp.* King, 61; 25 E.R. 223; 43 Digest 633, *720*.

(2) *Re Northumberland* (*Duke*), *Halifax* v. *Northumberland*, [1950] 2 All E.R. 1181; [1951] Ch. 202; 2nd Digest Supp.

(3) *Re Sutherland Settlement Trusts*, [1953] 2 All E.R. 27; [1953] Ch. 792; 3rd Digest Supp.

(4) *Re Biss, Biss* v. *Biss*, [1903] 2 Ch. 40; 72 L.J.Ch. 473; 88 L.T. 403; 40 Digest 790, *3190*.

(5) *Williams* v. *Barton*, [1927] 2 Ch. 9; 96 L.J.Ch. 355; 137 L.T. 294; 43 Digest 866, *3117*.

(6) *Re Pettit, Le Fevre* v. *Pettit*, [1922] 2 Ch. 765; 91 L.J.Ch. 732; 127 L.T. 491; 39 Digest 167, *587*.

(7) *Re Batley* (*No. 2*), *Public Trustee* v. *Hert*, [1952] 2 All E.R. 562; [1952] Ch. 781; 3rd Digest Supp.

Appeal.

The first defendant, Sir Harold Alwyne Pelly, who was the tenant for life of the Preshaw Estate under a settlement constituted by the will of the testator, Frederick Raymond Pelly, appealed from a judgment of WYNN-PARRY, J., dated Oct. 25, 1955, and reported [1955] 3 All E.R. 483, in so far as, on the assumption that capital money applied in payment for an improvement authorised by the Settled Land Act, 1925, to be paid out of capital did not fall to be regarded, for the purposes of the Income Tax Acts, either as income for the tenant for life or as a receipt of the trade of farming carried on by him, it was thereby declared (i) that, on the true construction of the Act of 1925, and, in particular, of s. 73 and s. 75 thereof, the first defendant ought to pay to the trustees of the settlement, or to account to them, for the amount of so much of any relief from income tax recovered or recoverable by him from time to time as was referable (a) to any sums paid by the trustees out of capital money of the settlement, under s. 73 (i), para. (iii) or para. (iv), of the Act of 1925, which should not be repayable out of the income of the settled land comprised in the settlement, or (b) to any expenditure by him which should be recouped to him by the trustees under the said paragraphs; and (ii) that the first defendant, as the tenant for life, ought, at the request of the trustees, to make the necessary claims to enable him to recover all such reliefs as aforesaid.

Charles Russell, Q.C., *D. H. McMullen* and *H. B. Magnus* for the first defendant, the tenant for life.

A. W. L. Franklin for the second defendant, the tenant for life in remainder.

Raymond Jennings, Q.C., and *Denys B. Buckley* for the plaintiffs, the trustees of the settlement.

LORD EVERSHED, M.R.: The question raised on this appeal is whether the principle sometimes expressed by the formula " A trustee cannot make a profit out of his trust ", and enshrined in the leading case of *Keech* v. *Sandford* (1) ((1726), Sel. Cas. Ch. 61), is applicable in respect of reliefs or allowances for income tax purposes which the first defendant obtained in respect of improvements executed by him on the Preshaw Estate, of which he is the tenant for life, by reason of the fact that the amounts expended on those improvements were refunded to him from capital moneys under the settlement, pursuant to the powers under the Settled Land Act, 1925, on a direction given, pursuant to the Act, to the trustees by the first defendant (referred to hereinafter as " the tenant for life ").

It is said, and it is the fact, that important questions of principle are involved, and we were asked to treat the matter as one of principle, without too strict a regard to its particular facts. Although I shall make a brief reference to the relevant provisions of the Income Tax Act, 1952, we have not seen any of the tenant for life's assessments to income tax, and do not, therefore, know what exactly were the reliefs or allowances which he obtained, or under what sections of the Income Tax Act, 1952, they were granted. On the other hand, from the affidavit of the plaintiff, Mr. Plummer, it appears that all the improvements with which we are concerned were paid for, in the first instance, by the tenant for life, and the cost was then refunded to him by the trustees. I confine my judgment to my view of the result on that basis of fact, and I say nothing of what might be the position both as to tax relief or otherwise if, for example, the cost of improvements were paid for by the trustees of the settlement direct to the contractors or others who did the work. The question was also raised by counsel for the trustees whether, as regards improvements falling within Part 1 of Sch. 3 to the Settled Land Act, 1925 (as all the improvements here in question did or are to be deemed to have done by virtue of s. 81 (1) of the Agricultural Holdings Act, 1948, or otherwise), the trustees had any discretion in responding to the direction given to them by the tenant for life under s. 75 (2) of the Act of 1925, a question considered by VAISEY, J., and by HARMAN, J., in *Re Duke of Northumberland, Halifax* v. *Northumberland* (2) ([1950] 2 All E.R. 1181) and *Re Sutherland Settlement Trusts* (3) ([1953] 2 All E.R. 27), respectively. I do not propose to express any view on that matter. In the present case, if there was a discretion, it was exercised by the trustees in favour of the tenant for life; for the trustees paid over to the tenant for life the full amount of the cost or expenses which he had incurred.

The tenant for life, Sir Harold Alwyne Pelly, is tenant for life in possession of the Preshaw Estate under the terms of the will of Frederick Raymond Pelly, dated Feb. 22, 1940. Frederick Raymond Pelly died on Oct. 16, 1940. The relevant terms of the will are that the trustees should hold the Preshaw Estate

> " upon trust for [the tenant for life] . . . the son of Sir Harold Pelly baronet . . . during his life without impeachment of waste with remainder from and after his decease to the use that the several persons who are or shall be in the line of the heirs male of the body of the said Sir Harold Pelly baronet may take successfully the following estates and in the following order and manner that is to say that each of such several persons born previously to the date of my death shall take an estate for his life without impeachment of waste with remainder immediately after his death to the use of his first and other sons not being persons who would also take estates for life successively according to seniority in tail male and so that each of the several persons shall take their estates successively in the order in which as heirs male of the body of the said Sir Harold Pelly baronet they would succeed to the Pelly baronetcy with remainder to the use of myself and my heirs."

The second defendant is tenant for life in remainder expectant on the death of the tenant for life and on this occasion he supports the tenant for life, having (as he was well entitled to do) changed his inclination and his alliance since the case was before the court below. There is no one in esse now beneficially interested in the corpus of the estate, and the argument on behalf of corpus has been presented to us by the plaintiff trustees.

I do not need to read many sections of the Settled Land Act, 1925. It is sufficient, by way of reminder, to state that the application of capital moneys, as in the present case, under s. 73 (1), is treated as investment of those capital moneys. I observe, therefore, that, in so far as they are so applied, capital moneys are provided, in effect, jointly by the remaindermen and the tenant for life according to their respective interests in those moneys. The conception of the Act may be stated as being that, where capital moneys are so applied, both the remaindermen and the tenant for life get the benefit, in accordance with their respective interests in the settled land, of the improvements to which the capital moneys are applied. I should, however, refer to s. 75 and s. 107 of the Act, since the argument here turns largely, in effect, on those sections. Section 75 (2) provides:

> "The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof according to the discretion of the trustees . . ."

The rest of the sub-section is related to the latter alternative. Section 107 (1) provides:

> "A tenant for life or statutory owner shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

It is said on behalf of the trustees of the settlement (and this argument appealed to WYNN-PARRY, J.) that one who is a trustee should never put himself in a position where his duty and his interest conflict, and that, if a tenant for life exercises his power of direction under s. 75 (2) (which he must do as a trustee by virtue of s. 107 (1)), then any adventitious profit (and I use the phrase of counsel) which comes to him as a result of that exercise he must hold as a trustee for all the persons interested under the settlement. It is further said that, if, as a result of doing these improvements, which are in fact paid for ultimately by the trustees of the settlement out of capital money, the tenant for life gets, or is entitled to get, certain personal benefits in the way of tax benefits, then those benefits or rights are adventitious profits which the tenant for life must hold as a trustee for all those interested in the settlement. On the other hand, it is said that the benefits or rights in the matter of taxation are personal rights which are conferred on the tenant for life as a taxpayer by Parliament as a consequence, not of the application of capital moneys by his direction, but of his having, qua the person in occupation of the land, done the improvements to the land. It is said, moreover, that, as tenant for life, he is entitled under the will to all the income of the settled property and this right is not affected or qualified by tax liability or by any reduction in tax liability to which he may be entitled as the result of improvements done to the land, even though these improvements are ultimately paid for out of capital moneys.

At this stage I will fulfil my promise to make a brief reference to the effect of the relevant provisions of the Income Tax Act, 1952. The tenant for life's liability to income tax (and his consequential liability to surtax) may arise under Sch. A or Sch. D, as they are called.* In the former case, the tenant for life is charged with the tax in his capacity as the occupier of the land, and he is assessed in respect of the land occupied by him for every twenty shillings of the annual value of it. He is also liable to be charged under Sch. D in respect of the profits or gains arising or accruing to him from the business of farming which he may carry on on the land; and he is or may be liable also to be charged in respect of rents which he may receive from any unit of land which are in excess of the annual value of that unit. It is to be noted that the capacities which render him liable to be charged to tax either as an occupant or as a trader are capacities which he owes exclusively to his position as tenant for life in possession under the settlement. A

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* See s. 1, s. 82 and s. 122 of the Income Tax Act, 1952; 31 HALSBURY'S STATUTES (2nd Edn.) 17, 80, 112.

As regards reliefs or allowances, these may (as I understand it) be of two kinds, so far as relevant to the present case: (i) in respect of expenses of a revenue character by way of maintenance, by virtue of s. 101 and s. 313 of the Act; and (ii) in respect of capital expenditure by way of improvements, etc., under s. 314 of the Act. In the latter case, however, the reliefs or allowances, expressed to be B by way of discharge or repayment, are spread over a period of ten years, and so that, by s. 314 (4), in the event of a transfer of the taxpayer's interest in the land during the ten-year period, the benefit of the reliefs or allowances will pass, as regards the years subsequent to the transfer, to the transferee. This last point is, as will later appear, not without significance.

I have now referred sufficiently to the facts and to the provisions of the relevant C statutes with which we are concerned. The question remains: Which of the arguments which I have earlier formulated ought to be accepted? So that I may state my conclusion at once, I have come to a different conclusion from that entertained by WYNN-PARRY, J., for, in my judgment, the contention of counsel for the tenant for life ought to be preferred to that of counsel for the trustees.

The question in the end is a short one, and not capable of great elaboration. D Although I see the force of the point taken by counsel for the tenant for life that the tax benefits, on the facts of this case, are, strictly speaking, derived from the doing of improvements rather than from the direction by the tenant for life to the trustees to invest capital moneys in refunding the cost of doing them to him, I prefer to base my conclusion on the essential fact that, by the terms of the will, the tenant for life is entitled to the whole income and enjoyment of the E settled property for the term of his life. That enjoyment imposes on the tenant for life, in his capacity as occupant of the land or trader thereon, the obligation for payment of income tax with which, in those capacities, he is liable to be charged. True it is that the amount of that charge is, by virtue of the Income Tax Act, 1952, reduced as a result of the improvements which he has done and for the cost of which he has been recouped (at his direction) out of capital moneys. F That circumstance, however, does not affect or qualify, in my judgment, his right to receipt of the whole income of the settled property. It is clear (as counsel for the trustees conceded) that, if the tenant for life is liable to account to the trustees for a sum equivalent to the reliefs or allowances to which he becomes entitled, he must so account by payment back to the trustees of the sum in G question out of the settlement income. To the extent, therefore, that he does so, he is no longer in receipt of the whole income of the settled property. If the relevant test is by reference to what he is given by the settlement (as I think that it is, in accordance with the language of SIR RICHARD HENN COLLINS, M.R., in *Re Biss*, *Biss* v. *Biss* (4) ([1903] 2 Ch. 40 at p. 56), then the scope of the gift is the entire income of the settled property, not that income less some part of it H calculated by reference to the allowances for income tax purposes to which he may become entitled on being assessed for income tax purposes as the person so entitled for his life to full enjoyment of the settlement property and its income for the time being. The case is different, therefore, from the type of case (of which *Williams* v. *Barton* (5) ([1927] 2 Ch. 9), is an example) where, as the result of the exercise of some power vested in a donee of the power as trustee the donee I becomes entitled to the receipt of some payment distinct from, and additional to, the income or other sums to the enjoyment of which the donee is entitled by the terms of the trust instrument.

The contention of junior counsel for the trustees rested on the premise that the powers and duties of trustees under s. 73 and s. 75 of the Settled Land Act, 1925, do not extend beyond indemnifying the tenant for life to the extent that he was, or would be, in fact out of pocket in respect of improvements undertaken by him.

A I cannot agree, as a matter of construction of those sections. What the trustees may be called on to do by way of investment, and what, in fact, they have done in this case, is to refund the actual and total cost of the improvements. No doubt, at first sight, it may seem wrong that the tenant for life in this case has, in the end, provided no part of the cost of the improvements and yet has been enriched to the extent that he has been granted reliefs or allowances in respect of B his income tax liability on the footing that, and as though, he had personally provided the cost of the improvements out of his own pocket. The ultimate question, however, is: To what is the tenant for life entitled under the settlement? To that question the answer seems undoubtedly: the whole income of the settled property.

Instances were cited showing, prima facie, the anomalous results that would C ensue if the view of the trustees were to prevail. Thus, in the case of improvements falling within Part 3 of Sch. 3 to the Settled Land Act, 1925, and where, therefore, capital moneys provided by the settlement trustees would have to be recouped (prima facie out of income) by the tenant for life to the settlement trustees, the question was asked: Would the tenant for life still have to account D for a sum equivalent to his income tax reliefs, although ultimately he would himself have provided the whole cost of the improvements? To this question leading counsel and junior counsel for the trustees appeared to give different answers. Another question put, arising out of the case where the reliefs and allowances under s. 314 of the Income Tax Act, 1952, are spread over a ten-year period, was this: In the case where the original tenant for life who had done the E improvements died during the ten-year period, or transferred his interest to some other person, would the succeeding life beneficiary or the transferee be under an obligation to account for the amount of the reliefs which he would obtain during the remainder of the ten-year period? I understood the learned counsel for the trustees to give an affirmative answer to this question, although it is quite plain that the successor or transferee had never, in any relevant respect, been clothed F with the garb of a trustee. Leading counsel for the trustees said that these problems and others like them were mere matters of accounting; but, in my judgment, that answer is not satisfactory. In my judgment, the problem which underlies these questions goes deeper and indicates that the question of tax liability for present purposes is distinct from the beneficial right to the receipt of G the income under the trust instrument.

It is plain that the gift of income without qualification to a tenant for life imposes in any case some limit to the application of the strict *Keech* v. *Sandford* (1) doctrine. Thus, a direction by a tenant for life to re-invest in a form which would result in increased income to him (for example, where, being himself a foreign resident, he directs re-investment in investments the income of which is not H liable to deduction of income tax in the trustees' hands) will not, if otherwise justifiable, impose any liability on the tenant for life to account for added income benefit which he receives. This conclusion follows inevitably from the fact that the tenant for life is, by the benefaction of the testator or settlor, entitled to the whole income; and it is that circumstance which, in my judgment, provides the answer to the present case, since, to my mind, the trustees' view necessarily I involves a qualification on the extent of that benefaction.

I add, in conclusion, that no assistance, in my view, is obtained in the present case from the principle underlying the decisions in cases such as *Re Pettit, Le Fevre* v. *Pettit* (6) ([1922] 2 Ch. 765). As was pointed out by this court in *Re Batley* (*No. 2*), *Public Trustee* v. *Hert* (7) ([1952] 2 All E.R. 562), the ratio decidendi of those decisions is that, by the express terms of the gift, the right of the annuitant is limited to such sum (no more and no less) as is calculated by reference to the actual tax liability of the annuitant. The rejection of the argument in those cases that tax liability of the annuitant is nihil ad rem by no means involves the rejection of a similar argument in the present case. In the *Re Pettit* (6) type of case, the argument was held to be untenable because the extent of the relevant benefaction was expressed by reference to the tax liability. In the present case, the right of the tenant for life to the full enjoyment of the settled property and its income during his life is not, by the terms of the settlement, made subject to, or by reference to, any such limitation. In the result, I think, with all respect to the contrary view of WYNN-PARRY, J., that this appeal ought to be allowed.

JENKINS, L.J.: I agree, and there is very little I can usefully add. The first defendant, the tenant for life under the settlement of the Preshaw Estate, made certain improvements on the settled lands of kinds which, by the joint effect of the Settled Land Act, 1925, s. 73 (1), paras. (iii) and (iv), s. 83, s. 84, and Sch. 3, Part 1, and of the Agricultural Holdings Act, 1948, s. 81 (1) and s. 96 (1), were proper to be paid for out of capital money subject to the settlement, without any replacement of the costs out of income; and, pursuant to directions given by the tenant for life under s. 75 (2) of the Settled Land Act, 1925, the costs of such improvements were duly paid out of capital money by the trustees of the settlement. The costs of the improvements in question were, in the first instance, paid by the tenant for life, and the payment out of capital money thus took the form of repayment to him of the amount which he had expended. It was accepted on both sides before us that, for the purpose of computing the tenant for life's liability for income tax, the improvements fall to be treated as having been made at his expense. I do not know whether the position would have been the same if the costs had been paid directly by the trustees, instead of being paid by way of recoupment to the tenant for life of the amounts expended by him. This aspect of the matter was not investigated before us, but it was not suggested that, as between the tenant for life and the Revenue, he would not be correctly treated for income tax purposes as the person at whose expense the improvements with which we are now concerned were made. I, therefore, proceed on the assumption that he would be rightly so treated.

On this assumption, the tenant for life became entitled to certain income tax allowances or reliefs in respect of the improvements for which the trustees had paid out of capital money, the effect of which would be to make the total amount of tax payable by him less than it would have been if the improvements had not been carried out. The trustees claim that the tenant for life must account to them for this saving of tax, or, in other words, for such part of his income as, but for the allowances or reliefs in respect of the improvements, would have been absorbed in tax, but which, in consequence of such allowances or reliefs, has not or will not be so absorbed; and this claim was upheld by WYNN-PARRY, J., in the judgment under appeal.

The reasoning on which the trustees base their claim is to this effect. First, they point out that the improvements were paid for out of capital money pursuant to directions given by the tenant for life under s. 75 (2) of the Act of 1925. Next, they refer to s. 107 (1) of the same Act, which provides:

> " A tenant for life or statutory owner shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

The trustees then go on to argue that, in giving his directions that capital money should be applied in payment for the improvements, the tenant for life was exercising a power under the Act which, by virtue of s. 107 (1), was a fiduciary power; that, by means of his exercise of that power, he has secured a benefit for himself in the shape of the amount of income tax which he has saved, or will save, through allowances or reliefs granted or to be granted in respect of the improvements; that a trustee cannot profit from his trust (see, for example, *Keech* v. *Sandford* (1) ((1726), Sel. Cas. Ch. 61); and, consequently, that the tenant for life is liable to account as claimed.

This deceptively simple line of reasoning appears to me to be misconceived. It is, no doubt, true that a tenant for life is a trustee of his statutory powers, but he is also a beneficiary under the settlement, entitled to the whole of the income of the trust property, whether in the form of land or of capital money. A direction by him by which he gains some benefit involves no breach of trust, provided that the benefit which he gets does not go beyond what he is entitled to, in right of his beneficial interest. An example was given in the course of the hearing of a change of investment by direction of the tenant for life, and consisting of the substitution of an authorised investment yielding six per cent. for an authorised investment yielding only four per cent. In such a case, the tenant for life would have benefited himself by the direction which he gave, but obviously would have committed no breach of trust, and would not be accountable to the remaindermen for the increase of two per cent. in the income derived from the capital money which was the subject of the change of investment.

The transactions now in question, namely, the execution of the improvements and the payment of the costs of making them out of capital money, were perfectly regular and proper transactions, and, if the tenant for life's income was thereby increased, he was getting no more than he was entitled to get in right of his beneficial interest. Therefore, he cannot be held accountable, as on a breach of trust, for any resulting increase in his income, on the ground that the improvements were carried out under his directions pursuant to s. 75 (2) of the Act of 1925. I see no distinction, for the present purpose, between improvements, properly paid for out of capital money, which result in an increase in the income enjoyed by the tenant for life in right of his beneficial interest, and improvements, properly so paid for, which have the effect of reducing the amount of tax exigible on the income enjoyed by the tenant for life in right of his beneficial interest. If agricultural land were wholly exempt from income tax, the tenant for life would be entitled to enjoy the whole income of the settled land tax free. Why should he not equally be entitled to enjoy such qualified exemption from tax as the law affords? His right under the settlement is to receive the whole income subject to such income tax thereon as may be properly exigible under the fiscal legislation for the time being in force.

The tenant for life, being entitled to possession or receipt of the rents and profits of the settled land, including the improvements, is liable to pay income tax thereon, either in respect of the annual value imputed to the property in respect of his own occupation—that is, under Sch. A—or on the rents which he derives from it—that, I think, is under Sch. D, Case VI—or on the profits of any farming business which he may carry on on it, under Sch. D, Case I. This is an incident attached by income tax law to his beneficial interest as tenant for life in possession. The amount of tax which he has to pay depends on the principles governing assessment, reliefs, and allowances under the income tax law for the time being in force. If, according to the income tax law for the time being in force, regularly applied, he is entitled to and obtains some allowance or relief in respect of an improvement paid for out of capital money, I cannot see that this gives the persons interested in remainder any legitimate cause for complaint, or for claiming that the tenant for life has received something more than that to which he is properly entitled in right of his beneficial interest as tenant for life. The liability to income tax attaching to his beneficial interest is his, and his alone; and I should have thought that the benefit of any reduction he can properly secure in the amount of tax payable by him is likewise his and his alone. There may or may not be room for two opinions on the question whether a tenant for life should be allowed a reduction of tax in respect of improvements paid for out of capital money. If, however, he is by law so entitled, his liability to tax must be measured on that footing, and, so measured, must be taken as representing his proper tax liability.

To sum up the matter, a tenant for life makes improvements proper to be paid for out of capital money; directs, as he is entitled to do, that those improvements shall be paid for out of capital money; receives, as he is entitled to do, the whole income of the settled property including the improvements; and pays, as he is bound to do, the tax properly exigible on his income, in the computation of which an allowance is properly, according to the law of income tax for the time being in force, made in respect of the improvements. How, then, can he be said to have received anything more than he was entitled to receive in right of his beneficial interest, or secured by way of exemption from tax anything more than he ought to have secured on the income properly belonging to him, or to have benefited himself at the expense of those interested in remainder? I fail to see how he can rightly be said to have done any of these things.

The trustees do not say that the tenant for life ought to pay, or ought to have paid, more tax. That could clearly be no concern of theirs. They contend, however, that the reduction in tax obtained or obtainable by the tenant for life in respect of the improvements was bought with capital money, because the improvements to which the reduction is attributable were paid for out of capital money. This enables them to present the tenant for life as a trustee who has bought an advantage for himself out of trust money, and who must clearly account for such advantage; but there is, to my mind, a fatal flaw in this argument. What was paid for out of capital money was the proper cost of improvements properly so paid for. The tax advantage gained by the tenant for life is merely a product of the application to the tenant for life's income of the principles according to which, under the income tax law for the time being in force, his liability to income tax falls to be measured. I would allow this appeal.

HODSON, L.J.: I agree. I have nothing to add.

LORD EVERSHED, M.R.: Mr. Russell, the form of declaration is expressed in somewhat broad terms, and I have been rather careful, for my part, to confine myself to the facts of this case.

Charles Russell, Q.C.: I was proposing to suggest a shorter form of order which I think would cover what your Lordship wishes to cover, and no more. What I would suggest is this:

> "Declare that the defendant Sir H. A. Pelly, as tenant for life under the settlement, is under no obligation to pay to the trustees of the settlement or to account to them for the amount of any relief from income tax recovered or recoverable by him from time to time which is referable to any expenditure by him recouped to him by the trustees out of capital moneys under the Settled Land Act, 1925, s. 73 (1), paras. (iii) or (iv)."

LORD EVERSHED, M.R.: I should have thought that was right.

JENKINS, L.J.: That limits it to the recoupment case. One leaves open the case where there was a direct payment of the costs of improvements.

LORD EVERSHED, M.R.: Mr. Jennings, would that be right?

Raymond Jennings, Q.C.: If I may say so, I think that is right. I think it covers the case, and no more than the case, that your Lordships have decided.

It leaves open the question where the trustees pay capital directly to the contractor or builder.

LORD EVERSHED, M.R.: Very well. We make the order in that form. Do you want the further declaration about being under an obligation to put in claims?

Charles Russell, Q.C.: No. If there is no obligation to pay, I am content it should follow that there is no obligation to claim.

Appeal allowed.

Solicitors: *Fairfoot & Co.* (for the first and second defendants); *Ashley, Tee & Sons* (for the plaintiffs).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

REGIS PROPERTY CO., LTD. *v.* REDMAN AND ANOTHER.

[COURT OF APPEAL (Lord Evershed, M.R., Jenkins and Hodson, L.JJ.), April 16, 17, 18, 27, 1956.]

Rent Restriction—Permitted increase—Transfer to landlord of liability to repair previously borne by tenant—Covenant to provide services previously supplied voluntarily—Assessment of increase—Successive tenancies—Increase on successive tenancies in respect of same transfer—Date of assessment—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5 *c.* 17), *s.* 2 (3).

Rent Restriction—Permitted increase—Inclusive rent—Transfer of liability for rates to tenant—" Corresponding reduction "—Intervening reduction of valuation for rates operating retrospectively from before 1939*—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5 *c.* 17), *s.* 2 (1) (*b*), (3), *proviso—Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6 *c.* 71), *s.* 3 (1), *Sch.* 1.

Sale of Land—Lease—General words implied—Flats supplied with hot water and central heating by landlords—No covenant to supply—Whether right conferred on tenant by general words—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 62.

On Apr. 8, 1936, the landlords of a new block of flats let one of them (which was within the Rent Restrictions Acts) for the first time at £115 per annum inclusive of general and water rates, which the landlord covenanted to pay, and the tenant covenanted to keep the flat in good tenantable condition and in the last month of the tenancy to redecorate it. The landlords in fact supplied hot water and central heating, but did not covenant to do so. The tenancy continued after Sept. 1, 1939. In 1936 the flat was added to the then current valuation list at the rateable value of £41 and stood at that figure until March, 1941, when, by an amendment to the valuation list operating retrospectively from 1935, by virtue of the Rating and Valuation Act, 1925, s. 37 (10), its rateable value was reduced to £34. It appeared from the evidence that the rates actually paid for the period which included Sept. 1, 1939, were calculated under the revised valuation. On Nov. 26, 1943, the flat was let to C. at £117 17s. 1d. per annum, the increase being due to an increase in the rates. The only relevant difference in the terms of the new tenancy from those of the former tenancy was that the landlords covenanted to use their best endeavours to maintain at all times an adequate supply of hot water for domestic purposes and to keep the radiators in the flat adequately heated during the "cold season" between dates to be determined by the landlords. In 1946 there was an increase of general rates in respect of which, on Apr. 20, 1946, the landlords served a notice of increase. By a notice dated Feb. 20, 1947, the liability to pay general rates was transferred by the landlords to the tenant, and a "corresponding reduction" was made in the rent in accordance with the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (1) (b) and (3)*, based on the amended rateable value of £34. On June 9, 1949, the flat was let to N. under an agreement which differed from the earlier tenancy agreements in that the tenant's covenant to repair was limited to the repair of the interior of the flat with an exception of fair wear and tear. The rent was increased by £14 per annum on account of the transfer to the landlords of the liability for external repairs and the exception of fair wear and tear from the tenant's covenant to repair. N. covenanted to pay the general rates and any increase in the water rates, the landlords covenanting to pay the water rates and to use their best endeavours to supply hot water and central heating as in earlier agreements. On Feb. 12, 1953, the landlords let the flat to the defendants under a new agreement in similar terms (except as regards rent) to those of the agreement made between the landlords and N. The defendants' rent included a further £11 in respect of the restriction to the interior of the flat of the tenant's covenant to repair and the exception of fair wear and tear, i.e., in respect of a like departure from the terms of the letting in 1936 as had been made the subject of the increase of £14 on the letting to N.

A dispute arose between the landlords and the defendants as to the proper amount of rent payable by the latter having regard to the Rent Restrictions Acts, and the differences were in respect of (a) the amount which ought to have been allowed as a "corresponding reduction" from the rent on the transfer to the tenant in 1947 of the liability to pay the rates, and the amount properly chargeable to the tenant in respect of the increase of rates in 1946, (b) the amount of the increase in rent chargeable by the landlords when, on the letting to N. in 1949, the landlords assumed part of the burden to repair previously borne by the tenant and the further increase made in that connection on the letting to the defendants, and (c) the amount of the increase in rent properly chargeable to the defendants in respect of the assumption by the landlords of the burden of supplying hot water and central heating, which they first undertook on the letting in 1943 to C.

Held: (i) the amount of the "corresponding reduction" to be made in the rent by virtue of the proviso to s. 2 (3) of the Act of 1920 on the transfer to the tenant of the liability to bear general rates should be calculated on the rateable value of £34 and not on the rateable value of £41 at which the flat was originally included in the valuation list, because the "corresponding reduction" to be made in the rent was the amount of the rates payable at the date of the transfer.

Woodside House (*Wimbledon*), *Ltd.* v. *Hutchinson* ([1949] 2 All E.R. 709) applied.

(ii) the amount properly chargeable in respect of the increase of rates in 1946 was correctly calculated as being equal to the difference between the increased rates and the rates payable in respect of the relevant earlier period on the amended rateable value of £34 because it appeared that the " corresponding amount paid in respect of the . . . period which included Sept. 1, 1939 " within s. 2 (1) (b) of the Act of 1920 (as amended) was, in fact, the amount payable under the revised valuation; but even if the rates in respect of the period including Sept. 1, 1939, had in fact been paid on the original rateable value of £41, the retrospective operation of the amendment by virtue of s. 37 (10) of the Act of 1925 required that the rates paid in respect of that period should be treated as having been paid on the amended rateable value of £34.

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* For the text of these enactments so far as relevant, see p. 339, letter I, to p. 340, letter C, and p. 342, letter E, post.

(iii) the increase in the rent made on the letting to N. was justified because there was then a " transfer to the landlord of [a] burden or liability previously borne by the tenant " within s. 2 (3) of the Act of 1920, viz., the obligation to repair the exterior of the flat and to do repairs attributable to fair wear and tear, even though the plaintiffs entered into no covenant to do those repairs; and the amount of the increase was properly calculated by reference to the cost of performing the transferred obligations at the date of the letting to N. in 1949.

(iv) (LORD EVERSHED, M.R., dissenting) the further increase in respect of the liability to repair made on the letting to the defendants was justified because there was a transfer of a burden or liability within s. 2 (3) whenever a given letting placed on the landlord a burden or liability which vested on the tenant under the terms of the tenancy by reference to which the standard rent was fixed (in this case the letting in 1936), notwithstanding the terms of any letting or lettings between the letting by reference to which the standard rent was fixed and the letting immediately in question; and (LORD EVERSHED, M.R., dissenting) the amount of the increase was properly based on the cost of repairs at the date of the letting to the defendants (due allowance being made for the addition of £14 to the rent charged to N.).

Winchester Court, Ltd. v. *Miller* ([1944] 2 All E.R. 106) and *Asher* v. *Seaford Court Estates, Ltd.* ([1950] 1 All E.R. 1018) applied.

(v) (LORD EVERSHED, M.R., dissenting) the increase in respect of hot water and central heating was justified because, as in respect of the liability to repair, there was on the letting to the defendants a transfer of a burden on account of the supply of hot water and central heating within s. 2 (3) as compared with the letting in 1936, notwithstanding that those services were in fact supplied by the landlords to the original tenant in 1936.

(vi) the landlords were not at all times under an obligation to supply hot water and central heating by virtue of the Law of Property Act, 1925, s. 62, because that obligation involved the performance of services and was essentially a matter of personal contract as distinct from a right, easement or privilege capable of being granted by lease or conveyance so as to pass under the general words implied by s. 62.

Appeal dismissed.

[As to increases in rent consequent upon increase in rates, and as to transfer of burdens, see 20 HALSBURY'S LAWS (2nd Edn.) 323, 326, paras. 384, 387; and for cases on these subjects, see 31 DIGEST (Repl.) 678-680, 681, *7713-7719*, *7724-7732*.

For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (1) (b), (3), see 13 HALSBURY'S STATUTES (2nd Edn.) 984, 987.

As to the general words in conveyances, see 11 HALSBURY'S LAWS (3rd Edn.) 431.

For the Law of Property Act, 1925, s. 62, see 20 HALSBURY'S STATUTES (2nd Edn.) 559.]

Cases referred to: A

(1) *Woodside House (Wimbledon), Ltd.* v. *Hutchinson*, [1949] 2 All E.R. 709; [1950] 1 K.B. 182; 31 Digest (Repl.) 680, *7732*.

(2) *Winchester Court, Ltd.* v. *Miller*, [1944] 2 All E.R. 106; [1944] K.B. 734; 114 L.J.K.B. 152; 171 L.T. 150; 31 Digest (Repl.) 679, *7723*.

(3) *Seaford Court Estates, Ltd.* v. *Asher*, [1949] 2 All E.R. 155; [1949] 2 K.B. 481; *affd.* H.L. sub nom. *Asher* v. *Seaford Court Estates, Ltd.*, [1950] 1 All E.R. 1018; [1950] A.C. 508; 31 Digest (Repl.) 679, *7719*. B

(4) *Property Holding Co., Ltd.* v. *Clark*, [1948] 1 All E.R. 165; [1948] 1 K.B. 630; [1948] L.J.R. 1066; 31 Digest (Repl.) 671, *7682*.

Appeal.

This was an appeal by the defendants from a decision of His Honour JUDGE CLARK, on Feb. 14, 1956, at Clerkenwell County Court, giving judgment for the plaintiffs for £19 7s. 6d., arrears of rent and declaring that the recoverable rent of the flat in question was £138 9s. 4d. per annum. C

G. Cohen and *J. W. Borders* for the defendants, the tenants.

Neil Lawson, Q.C., and *Brian Galpin* for the plaintiffs, the landlords. D

Cur. adv. vult.

Apr. 27. The following judgments were read.

JENKINS, L.J.: The plaintiffs (now respondents) are the owners of a block of flats known as Northwood Hall, Hornsey Lane, Highgate, N.6. By a tenancy agreement dated Feb. 12, 1953, the plaintiffs (therein called " the landlord ") let one of these flats (No. 0/16), which is admittedly a dwelling-house to which the Rent Restrictions Acts apply, to the defendants (now appellants, and therein called " the tenant ") on a monthly tenancy at the yearly rent of £123 6s. 3d. payable monthly in advance. Under this tenancy agreement the tenant covenanted to pay the general rates in respect of the flat and also to reimburse to the landlord any increase in the water rates beyond the amount payable on Apr. 1, 1952, the landlord on its part covenanting to pay the water rate. It also contained the following covenant by the tenant as to repairs: E F

> " The tenant hereby agrees with the landlord . . . (C) To keep the interior of the flat together with all fixtures and fittings now or hereafter therein or appertaining thereto (including the doors windows sanitary and water apparatus thereof) in good and substantial repair and clean sanitary condition (fair wear and tear and damage by accidental fire excepted), and so to deliver up at the end or sooner determination of the tenancy hereby created "; G

and the following covenant by the landlord as to the supply of constant hot water and central heating: H

> " The landlord hereby agrees with the tenant . . . (C) To use its best endeavours throughout the term to maintain at all times a reasonable and adequate supply of hot water for domestic purposes to the flat through the central installation (if any such installation is installed in the building) and to keep the radiators (if any) in the flat sufficiently and adequately heated through the central heating installation (if any such heating installation is installed in the building). Provided that the landlord shall not be liable to supply hot water for the central heating installation (if any) except during the cold season between dates to be determined at the landlord's discretion and Provided also that the landlord shall not be liable in damages in the event of any interruption of such services." I

By their particulars of claim in the action to which this appeal relates, dated June 30, 1955, the plaintiffs alleged that by the aforesaid tenancy agreement flat No. 0/16 was let to the defendants at a rent then standing at £140 14s. 4d. by virtue of certain increases permitted by the Housing Repairs and Rents Act, 1954; and that the defendants had failed to pay £19 7s. 6d of the said rent which had been due to the plaintiffs for more than the period of fourteen days specified in the proviso for re-entry; and they claimed possession of the flat, £19 7s. 6d. arrears of rent, and a declaration that the rent recoverable from the defendants in respect of the flat was £140 14s. 4d.

By their defence the defendants alleged, and it is not in dispute, that the standard rent of the premises was £115 per annum including water and general rates. They alleged further that the general rates at the date of the fixing of the standard rent were at least £21 17s. 4d.; that the present rent included water rates, which had increased by not more than 19s. 2d. per annum, but did not include general rates. They therefore contended that the recoverable rent was no more than £94 1s. 10d., and that, so far from rent being in arrear, the defendants had made over-payments amounting to £188 3s. 8d.; and they accordingly counterclaimed for the amount of the alleged over-payment.

The pleadings do not disclose the true issues. The plaintiffs in fact sought to justify the difference between the standard rent of £115 and the allegedly recoverable rent of £140 14s. 4d. on grounds which did not involve reliance on any increases permitted by the Housing Repairs and Rents Act, 1954, though there had apparently been at one stage an agreement that the increases so permitted should be taken as £17 9s. 9d. which, with a figure for the contractual rent of £123 4s. 7d., as compared with the rent in fact reserved by the tenancy agreement of £123 6s. 3d., would in fact give a recoverable rent of £140 14s. 4d. as alleged in the particulars of claim. It was agreed in the course of the hearing before us that, notwithstanding any agreement there may have been as to the amount of the increases permitted under the Act of 1954, that question should be considered as wholly at large so as to protect the tenants from a duplication of any increase which might be justifiable both under the Act of 1954 and on one of the other grounds on which the plaintiffs rely. The question of increases under the Act of 1954 can therefore be regarded as having passed from the case so far as the present appeal is concerned.

The true issues between the parties, as they emerged in the course of the hearing, may conveniently be dealt with under the three headings of (i) rates, (ii) repairs, and (iii) constant hot water and central heating.

(i) Rates. It appears that Northwood Hall was built in 1936 soon after the current valuation list had been settled. This flat was added to the list by amendment at the rateable value of £41 and stood in the list at this figure on Apr. 8, 1936 (the date of the original letting by which the standard rent was fixed) and thereafter down to March, 1941, when by an amendment of the list operating retrospectively as from Apr. 1, 1935, its rateable value was reduced to £34, the retrospective operation of the amendment being attributable to the Rating and Valuation Act, 1925, s. 37 (10). The liability for general rates was transferred to the tenant by notice dated Feb. 20, 1947. In 1946 there was an increase of general rates, in respect of which a notice of increase was served on Apr. 20 in that year.

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (1), para. (b), is in these terms:

> " The amount by which the increased rent of a dwelling-house to which this Act applies may exceed the standard rent shall, subject to the provisions of this Act, be as follows, that is to say . . . (b) An amount not exceeding any increase in the amount for the time being payable by the landlord in

> respect of rates over the corresponding amount paid in respect of the yearly, half-yearly or other period which included "

—then, as originally framed, the sub-section had " Aug. 3, 1914 ", for which there has been substituted by amendment* " Sept. 1, 1939 "—

> " or in the case of a dwelling-house for which no rates were payable in respect of any period which included the said date, the period which included the date on which the rates first became payable thereafter."

Section 2 (3) contains this proviso:

> " Provided that, for the purposes of this section, the rent shall not be deemed to be increased where the liability for rates is transferred from the landlord to the tenant, if a corresponding reduction is made in the rent."

On these statutory provisions, in their application to the facts above summarised, counsel for the defendants made these submissions: (a) He contended that when the liability for general rates was transferred to the tenant by the notice of Feb. 20, 1947, the " corresponding reduction " in the rent referred to in the proviso to s. 2 (3) should have been calculated on the rateable value of £41 at which the flat was originally included in the valuation list and not (as was in fact done) on the amended rateable value of £34. This I think is clearly wrong. I entirely agree with the learned judge that the " corresponding reduction " to be made in the rent is the amount of the rates payable at the date of the transfer: see *Woodside House* (*Wimbledon*), *Ltd.* v. *Hutchinson* (1) ([1949] 2 All E.R. 709). The relevant date here is Feb. 20, 1947, and the proper reduction is the amount of the rates payable at that date calculated on the amended rateable value of £34 at which the flat stood at that date in the valuation list. (b) Counsel for the defendants contended further that the increase in rates in respect of which the notice of increase of Apr. 20, 1946, was served was calculated on a wrong basis because it was taken as being the difference between the increased rates and the rates payable in respect of the relevant earlier period on the amended rateable value of £34 and not, as in his submission it should have been, on the difference between the increased rates and the rates payable in respect of the relevant earlier period on the rateable value of £41 at which the flat was originally included in the valuation list.

The argument turns on the meaning in s. 2 (1) (b) of " the corresponding amount paid in respect of the . . . period which included Sept. 1, 1939." Counsel submitted that the amount so paid consisted of the rates calculated on the original rateable value of £41 and not on the amended rateable value of £34. I think this argument breaks down on the facts, as appears from the following passage in the judgment of the learned judge:

> " Counsel for the defendants submits that it is established in evidence that the landlords in fact paid the rates for that period on the basis of a rateable value of £41, but I am not satisfied that this is so. The oral evidence on this point was given by Mr. Buttle, the manager of the plaintiff company's managing agents and by Mr. Lay, an officer of the Hornsey Borough Council. Neither of these gentlemen had any personal knowledge of what happened about these payments in 1939. But there has been put in evidence a letter of Aug. 9, 1941, from the borough treasurer of Hornsey to the plaintiff company's managing agents which clearly indicates that the rates for 1939-40 and 1940-41 for Northwood Hall had not been settled and paid at that date; there was then a very substantial balance outstanding even on the revised assessments. That being so, the amount paid in respect of

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* See the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1), Sch. 1.

> the period including Sept. 1, 1939, was the amount ultimately paid on the revised valuation and not the amount which had appeared to be payable on the valuation originally made and I find accordingly."

Moreover, I agree with the learned judge that, even if the rates in respect of the period including Sept. 1, 1939, had in fact been paid on the original rateable value of £41, the retrospective operation of the amendment by virtue of the Rating and Valuation Act, 1925, s. 37 (10), demands that the rates paid in respect of that period should be treated as having been paid on the amended rateable value of £34, which, after the adjustment necessary to give effect to the retrospective amendment, would in the end represent the amount actually paid. I am accordingly of opinion that the defendants fail on both their objections to the plaintiffs' method of calculating the recoverable rent so far as the increase due to the increase in rates in 1946 and the reduction due to the transfer to the tenant in 1947 of the liability for general rates are concerned.

(ii) Repairs. In order to deal intelligibly with this aspect of the dispute, it is necessary to state briefly the letting history of the flat. The first letting, by reference to which the standard rent of £115 was fixed, was a letting by the plaintiffs to Sudbury House Developments, Ltd., under a tenancy agreement dated Apr. 8, 1936, for three years from Mar. 25, 1936, at the yearly rent of £115 payable quarterly. This letting was inclusive of general and water rates, which the landlord covenanted to pay, and it contained the following covenant by the tenant in regard to repairs:

> "The tenant hereby agrees with the landlord . . . (b) To keep the flat in good tenantable and sanitary preservation order and condition together with all the fixtures and fittings belonging to the landlord in and about the flat and on demand to make good any damage or want of repair caused by neglect or default and in the last month before the determination of the tenancy whether by effluxion of time or otherwise to paint with materials and colours selected by the landlord and with two coats of good oil paint enamel and varnish the parts of the flat usually so treated and to strip stop and hang the walls ceiling and other parts with paper and materials in a suitable and workmanlike manner all the interior parts of the flat which are usually so treated and in such repair and condition to deliver up the flat at the end of the tenancy."

It appears that the tenant under this agreement held over at the end of the three years, and was still in occupation on the same terms on Sept. 1, 1939. The next letting was to one Clements under a tenancy agreement dated Nov. 26, 1943. The rent under this letting was £117 17s. 1d. per annum, the increase as compared with the standard rent of £115 being apparently due to an increase in rates as to which there is no dispute. The only relevant difference between the terms of this letting as compared with the first was that it contained a covenant by the plaintiffs in, I understand, identical terms with those of the corresponding covenant by them in the defendants' tenancy agreement as to the supply of constant hot water and central heating.

Thirdly, the flat was let to one Nitka under a tenancy agreement dated June 9, 1949, which differed from its predecessors in the material respect that for the covenant by the tenant as to repairs contained in the agreements of Apr. 8, 1936, and Nov. 26, 1943, there was substituted a covenant by the tenant limited to the repair of the interior of the flat with an exception of fair wear and tear, in, I understand, identical terms with the corresponding covenant by the defendants in their tenancy agreement. Under Nitka's tenancy agreement the tenant covenanted to pay the general rates (liability for which, it will be remembered, had been transferred to the then tenant by notice dated Feb. 20, 1947) and any increase in the water rates, the landlord on his part covenanting to pay the water rate. There was also a covenant by the landlord as to the supply of constant hot water and central heating in, I understand, identical terms with those of the corresponding covenants in Clements' and the defendants' agreements. The rent was altered by what I have held to be the correct deduction on account of the transfer to the tenant of the liability to pay the general rates (which deduction had no doubt been in fact applied since the notice of Feb. 20, 1947) and on the other hand increased by £14 on account of the transfer to the landlord of the liability for external repairs and the exception of fair wear and tear from the tenant's repairing covenant. Finally, there was the letting to the defendants under the agreement of Feb. 12, 1953, the material terms of which I have already stated, such terms being, as regards rates and repairs and I think in all other respects save the amount of the rent, identical with those contained in Nitka's tenancy agreement. The rent was, however, increased by a further £11 on account of the restriction to the interior of the flat of the tenant's repairing covenant and the exception from that covenant of fair wear and tear, that is to say, on account of the like departure from the terms of the 1936 letting as had been made the subject of the increase of £14 on the letting to Nitka.

Such being the letting history of the flat, the question to be determined is whether the two rent increases of £14 on the letting to Nitka and £11 on the letting to the defendants, making together an increase of £25, were justified under the provisions of s. 2 (3) of the Act of 1920. That sub-section (apart from the concluding proviso regarding rates, to which I have already referred) is in these terms:

> " Any transfer to a tenant of any burden or liability previously borne by the landlord shall, for the purposes of this Act, be treated as an alteration of rent, and where, as the result of such a transfer, the terms on which a dwelling-house is held are on the whole less favourable to the tenant than the previous terms, the rent shall be deemed to be increased, whether or not the sum periodically payable by way of rent is increased, and any increase of rent in respect of any transfer to a landlord of any burden or liability previously borne by the tenant where, as the result of such transfer, the terms on which any dwelling-house is held are on the whole not less favourable to the tenant than the previous terms, shall be deemed not to be an increase of rent for the purposes of this Act."

It is, I think, clear that on the letting to Nitka there was, within the meaning of the sub-section, a " transfer to a landlord " (i.e., the plaintiffs) of a " burden or liability previously borne by the tenant " (i.e., Clements and, before him, Sudbury House Developments, Ltd.), inasmuch as the obligations imposed successively on Sudbury House Developments, Ltd., and Clements, by their respective tenancy agreements, to repair the exterior of the flat and to do repairs attributable to fair wear and tear, were not imposed on Nitka by his tenancy agreement, so that what had been treated on the previous lettings as a tenant's burden or liability was made on the letting to Nitka a landlord's burden or liability. This accords with Scott, L.J.'s construction of the word " transfer " as a synonym for " shifting " in *Winchester Court, Ltd.* v. *Miller* (2) ([1944] 2 All E.R. 106) where he said (ibid. at p. 109): " . . . it is the shifting of the burden that matters, not how or by whom it is brought about ". It is, I think, also clear that there was a " transfer " of this burden or liability to the plaintiffs even though they entered into no covenant with Nitka to do the repairs in question, for, having omitted to impose any covenant covering them on Nitka, they would either have to do these repairs themselves or allow their property to deteriorate. This again accords with the position in *Winchester Court, Ltd.* v. *Miller* (2), and the observations on that decision made by Asquith, L.J., in *Seaford Court Estates, Ltd.* v. *Asher* (3) ([1949] 2 All E.R. 155 at p. 161).

Counsel for the defendants did not, as I understood his argument, in the end dispute that on the letting to Nitka there was a transfer to the plaintiffs within the meaning of s. 2 (3) of the repairing obligations of which Nitka, as compared with the previous tenants, was relieved. He suggested, however, that the compensating increase in rent, assessed by the plaintiffs at £14, ought to have been calculated by reference to the cost of performing the transferred obligations as at Sept. 1, 1939, and not by reference to the cost of performing them at the date of the letting to Nitka (i.e., June 9, 1949). I see no justification for this. The transfer benefited Nitka to the extent of the current cost of performing the obligations transferred, and I see no reason why the compensating increase in rent should not be likewise assessed by reference to current cost. The practical difficulty of reverting to 1939, or I suppose in some cases 1914, for the purposes of this calculation would obviously be great.

Counsel for the defendants submitted that the increase of £11 made on the letting to the defendants could not be justified as a further increase in respect of the transfer of burden which took place on the letting to Nitka. He said that once a transfer of burden from tenant to landlord had taken place, and the amount of the compensating increase in rent to be made in respect of it had been agreed, or determined by the court under s. 2 (6) of the Act, the landlord could not claim any further increase in respect of that transfer on the ground of increased costs or otherwise. The relevance of that argument depends on the validity of the defendants' main submission on this part of the case, which was to the effect that the one and only transfer to the plaintiffs of any burden in respect of repairs was the transfer which took place on the letting to Nitka, and that there was no further or other transfer of such burden to the plaintiffs on the letting to the defendants, inasmuch as that letting left the burden precisely where it was placed by the letting to Nitka, i.e., on the plaintiffs. If the only transfer in the case was the transfer effected on the letting to Nitka, then, said counsel, there could be no warrant for making any increase in the rent on the letting to the defendants over and above the £14 already added on the letting to Nitka. This argument turns on the true construction of s. 2 (3) and in particular on the meaning of the words " previously borne by the tenant " and the words " not less favourable to the tenant than the previous terms ". According to counsel's submission, " previously borne by the tenant " means borne by the person occupying the position of tenant immediately before the date of the transfer or who last occupied that position prior to such date, and " the previous terms " means the terms of the letting in force at the date of, or of the last letting prior to, the transfer. Thus, according to counsel's submissions, in order to ascertain whether a given letting effects a transfer of a burden or liability, one must compare the terms of that letting with the terms of the letting which last preceded it, and if the burden or liability in question was by the terms of the last preceding letting placed on the tenant and is likewise placed on the tenant by the terms of the new letting, then the new letting effects no transfer of such burden or liability to the tenant under the first branch of s. 2 (3) even though it was borne by the landlord under the terms of the letting by reference to which the standard rent was fixed; while conversely if the burden or liability in question was by the terms of the last preceding letting placed on the landlord and is likewise placed on the landlord by the terms of the new letting, then the new letting effects no transfer of such burden or liability to the landlord under the second branch of s. 2 (3), even though it was borne by the tenant under the terms of the letting by reference to which the standard rent was fixed.

The plaintiffs disputed the construction placed on s. 2 (3) of the Act of 1920 by the defendants and contended in effect that there was a transfer of a burden or liability within the meaning of the sub-section whenever a given letting placed on the tenant a burden or liability which rested on the landlord under the terms of the tenancy by reference to which the standard rent was fixed, or conversely placed on the landlord a burden or liability which rested on the tenant under those terms. They contended further, in effect, that on the true construction of the sub-section the expressions "previously borne by the landlord" and "previously borne by the tenant" mean borne by the landlord or tenant (as the case may be) under the terms of the letting by reference to which the standard rent was fixed, and the expression "the previous terms" means the terms of that letting, notwithstanding the terms of any letting or lettings there may have been between the letting by reference to which the standard rent was fixed and the letting immediately in question.

I will not attempt to repeat in my own words what has been better said by others, but will content myself by observing that the construction for which the plaintiffs contend appears to me to have received the considered approval of this court in *Winchester Court, Ltd.* v. *Miller* (2) and of the House of Lords in *Asher* v. *Seaford Court Estates, Ltd.* (3) ([1950] 1 All E.R. 1018) in terms which for my part I find it impossible to pass over as mere obiter dicta. I refer in particular to the passages quoted in the judgment of Hodson, L.J., in the present case, which I have had the advantage of reading. In conformity with the views expressed in those cases, I hold that in the present case there was on the letting to the defendants a transfer to the plaintiffs within the meaning of s. 2 (3) of the burden or liability in respect of repairs which was cast on the plaintiffs by the exclusion from the defendants' covenant of exterior repairs and of repairs attributable to fair wear and tear, notwithstanding that the immediately preceding letting to Nitka had cast on the plaintiffs the like burden or liability. It follows that, in my opinion, the defendants' objection to the plaintiffs' claim to include in the recoverable rent the appropriate increase in respect of the transfer to the plaintiffs of this burden or liability on the letting to the defendants must fail. I should add that the increase must, in my opinion, be based on the cost to the plaintiffs of performing the transferred burden or liability in respect of repairs as at the date of such transfer, due allowance, of course, being made for the addition of £14 to the rent on the letting to Nitka. I understand that a figure has been agreed on this basis.

(iii) Constant hot water and central heating. A covenant by the plaintiffs as to the provision of these services was, as appears above, first introduced on the letting to Clements, and repeated in identical terms in the lettings to Nitka and the defendants. Counsel for the defendants used the same argument (with the substitution of Clements for Nitka) as was advanced by him in regard to the liability to repair, i.e., that there could have been no transfer to the plaintiffs on the letting to the defendants of any burden or liability on this account, inasmuch as the relevant covenant had already been included in the terms of the lettings to Clements and Nitka. In my opinion, that argument must be held to fail in the matter of constant hot water and central heating as I have held it to fail in the matter of repairs.

Certain other points requiring notice were also raised on this part of the case. First, it was said that there was no transfer to the plaintiffs of any obligation to supply constant hot water or central heating, because the plaintiffs were throughout under an obligation to do so by virtue of the Law of Property Act, 1925, s. 62. I think this is clearly wrong. The obligation in question involves the performance of services, and is essentially a matter of personal contract as distinct from a right, easement or privilege capable of being granted by lease or conveyance so as to pass under the general words implied by s. 62. Next, it was said that there was no transfer or burden in this respect because from the outset constant hot water and central heating were in fact supplied by the plaintiffs. I have some sympathy with this argument, for the flat was so laid out and equipped as to make it plain that the plaintiffs intended to supply constant hot water and central heating, and in practice they could not have ceased to do so without adverse consequences to their goodwill and their prospects of finding tenants for their properties. Nevertheless, I am not prepared to hold that the plaintiffs were under any legal obligation to supply constant hot water and central heating for the flat before their covenant in that behalf contained in Clements' tenancy agreement. If they were not under any such legal obligation, then I think we are bound by the combined effect of *Winchester Court, Ltd.* v. *Miller* (2) and *Asher* v. *Seaford Court Estates, Ltd.* (3) to hold that on the letting to the defendants there was, within the meaning of s. 2 (3), a transfer to the plaintiffs of a burden or liability previously borne by the tenant, in the shape of the obligation to supply central heating and constant hot water, inasmuch as under the letting of 1936, by reference to which the standard rent was fixed, the plaintiffs assumed no legal obligation to provide such supply, so that in point of legal liability the position then was that, while the plaintiffs might voluntarily provide such supply, the tenant could not compel them to do so, and, therefore, in the eye of the law the supply of constant hot water and central heating for the flat was a burden or liability borne by the tenant. The result, which I confess I do not find wholly satisfactory, is that an increase of rent is now exigible for services which for all practical purposes were included in the original standard rent of £115. But, in view of *Asher* v. *Seaford Court Estates, Ltd.* (3), this conclusion is one from which I see no escape.

Finally, it was argued that the form of the covenant as to the supply of constant hot water and central heating was such as to impose no legal obligation on the plaintiffs, inasmuch as they only covenanted to use their best endeavours to maintain the supply of constant hot water and central heating, and were themselves to determine the dates marking the beginning and end of the cold season to which the provision of central heating was to be limited. I do not agree that the covenant imposed no legal obligation. The plaintiffs assumed a legal obligation to do their best. Nor do I think it would be open to them to nullify the covenant as regards central heating by a purely arbitrary selection of dates. It may be that a covenant in this qualified form is qua legal obligation to some measurable extent less valuable than an unqualified covenant (which I imagine few proprietors of flats would be prepared to enter into on a matter of this sort). But the figure representing the addition to the rent to be made in respect of the value of these services on the footing that there was a transfer to the plaintiffs of the burden or liability of providing them has, I understand, been agreed, and I do not think it should be re-opened on this account.

I therefore conclude that the defendants fail on all points, with the result that this appeal should be dismissed.

HODSON, L.J.: In my opinion, the judgment of the learned judge was right and his order should stand, subject to the proposed variation* in the declaration dealing with any future agreement or determination under the Housing Repairs and Rents Act, 1954. I agree with the other members of the court on the main questions raised on this appeal, and will confine myself to consideration of the question of the dates when the transfers of burdens took place, (i) as to the supply of hot water and central heating, (ii) as to repairs. On this matter, since there is a difference of opinion in this court, it is necessary that I should express my own view.

The flat, 0/16 Northwood Hall, having been first let by an agreement of Apr. 8, 1936, which fixed the standard rent, the plaintiffs first undertook the liability for the supply of hot water and central heating when they let the flat to one Clements on Nov. 26, 1943, and first undertook the liability for repairs when they let the flat to one Nitka on June 9, 1949. They claim, however, that they can charge an increase of rent or, to put it more accurately, obtain payments in respect of such transfers of burdens or liabilities which shall be deemed not to be increases of rent within the meaning of s. 2 (3) of the Increase of Rent and

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* See p. 352, letter E, post.

Mortgage Interest (Restrictions) Act, 1920, on the footing that the transfers of A burdens or liabilities took place on the date of the letting to the defendants on Feb. 12, 1953. The defendants contend that no transfer took place in 1953, for the transfers had already occurred in the case of the hot water burden in 1943 and in the case of the repairs burden in 1949. At first impression, the defendants' contention would appear to be correct, for, comparing the letting in 1953 with the previous letting in 1949, there was in 1953 no transfer to the landlord of any B burden or liability previously borne by the tenant. The burdens and liabilities were then, as they had been previously, borne by the landlord. Section 2 (3) of the Act of 1920 has, however, been judicially considered, and I think it is clear from the authorities, in particular *Winchester Court, Ltd.* v. *Miller* (2) ([1944] 2 All E.R. 106) and *Asher* v. *Seaford Court Estates, Ltd.* (3) ([1950] 1 All E.R. 1018) that the terms of the existing tenancy are to be compared with the C terms of the tenancy which established the standard rent.

In this case the standard rent was established by the letting of the flat on Apr. 8, 1936, and, if one compares the terms of the first letting with the terms of the 1953 letting, there has admittedly been a shifting of the burden. It is true that in the two cases I have mentioned the precise point to be determined in this case did not arise, for, although in the former case there had been a series of D lettings, there was no attempt by a landlord to re-assess a burden previously evaluated on an earlier transfer as there is in this case. Nevertheless, in my opinion, the plaintiffs are entitled so to do.

The argument that the words "previously borne" in sub-s. (3) must mean borne immediately before the transfer was expressly rejected in *Winchester Court, Ltd.* v. *Miller* (2). SCOTT, L.J., accepted the argument put forward by the E landlords that the object of s. 2 (3) is to preserve the equilibrium as between the liabilities of the landlord and tenant established by the legislative fixation of the standard rent of a dwelling-house. He said ([1944] 2 All E.R. at p. 109):

> "The language of the sub-section which contains this statutory recognition of the fundamental principle of equilibrium ought, in my opinion, to be F liberally construed so as to give effect to that principle, if its words permit that construction, and I think they do. For these reasons I would construe the word 'transfer' as a synonym for 'shifting', because the emphasis of the section is on the fact of a change in the equilibrium; it is the shifting of the burden that matters, not how or by whom it is brought about."

This last sentence was quoted with approval by LORD MACDERMOTT in *Asher* v. G *Seaford Court Estates, Ltd.* (3) ([1950] 1 All E.R. at p. 1027). MACKINNON, L.J., expressed the opinion ([1944] 2 All E.R. at p. 110) that the tenant who previously bore the burden must be or include the tenant by a demise to whom the standard rent was fixed and the "previous terms" must mean or include the terms of the previous tenancy which fixed the standard rent.

In *Asher* v. *Seaford Court Estates, Ltd.* (3), LORD PORTER said ([1950] 1 All H E.R. at p. 1022):

> "The rent, in my opinion, is increased by the landlord 'in respect of' the transfer of a burden or liability where a greater burden or liability has been imposed on the landlord by the terms of a particular letting than was I imposed on him by the terms of the letting under which the standard rent is ascertained. It is that change by which the increase of rent is justified and in respect of which it is rightly made."

LORD NORMAND used language to the same effect (ibid., at p. 1026). LORD REID said (ibid., at p. 1031):

> "The Rent Acts do not prevent a landlord who lets his house to a new tenant from undertaking different obligations from those undertaken by

> him in the lease which determined the standard rent. This lease may have imposed onerous obligations on the landlord with the result that the rent was high. Apart from s. 2 (3) of the Act of 1920 there is nothing in the Acts to prevent the landlord from making a valid bargain with a new tenant under which the tenant pays the full standard rent but does not get the favourable conditions contained in the last tenant's lease. Conversely, the lease which determined the standard rent may have imposed onerous obligations on the tenant with the result that the rent was low. The landlord could, of course, give a new tenant more favourable conditions, but, apart from s. 2 (3), he would not on that account be entitled to raise the rent. An agreement by the tenant to pay more in return for the alteration of terms would be unenforceable and money paid under such an agreement would be recoverable."

Thus, in my opinion, whenever there is a tenancy which puts a greater burden on the shoulders of one party than the original tenancy placed on those shoulders, there is a shifting. Bearing in mind the two propositions established by the cases cited—first, that the words " previously borne " are not limited to a tenancy immediately preceding the transfer; second, that a shifting is sufficient to satisfy the word " transfer " —I think that it is still true of the agreement of 1953 that there was then a shifting of the burden as between landlord and tenant notwithstanding that the same was true of the agreements of 1943 and 1949.

The position when the defendants came forward as prospective tenants was that the plaintiffs could have let to them on exactly the same terms as those on which the flat was let to the original tenants. The plaintiffs were under an obligation not to charge more than the standard rent, but they could have imposed on the defendants the full liabilities of the agreement of 1936. If the defendants had agreed to a tenancy on those terms, the weight of the burden would have been determined by the cost to the tenant ascertained at that date. In 1953 this course was not taken by the parties, but the plaintiffs must, I think, as the county court judge thought, be regarded as having said to the defendants: " We are prepared to vary the original terms by undertaking to supply you with hot water and central heating and by freeing you from the liability under a full repairing covenant if you are prepared to pay £x, that is to say, the present annual value of those burdens in addition to the standard rent of the flat ". When the defendants entered into the agreement, there was then a shifting to the landlords of the burden which had previously lain on the shoulders of the original tenant by reference to whose tenancy the standard rent was fixed. In my opinion, therefore, the transfers of burdens and liabilities did take place on Feb. 12, 1953, and are to be valued as at that date. The appeal, therefore, should be dismissed.

LORD EVERSHED, M.R.: Save on one point, I agree with the two judgments that have just been delivered. Thus I agree (i) as regards rates: that on the transfer in February, 1947, of the liability for general rates (and no point arises as to the water rate) the appropriate amount whereby the rent had to be reduced was an amount corresponding to the rates payable in respect of the premises at the date of the transfer, and that the amount or amounts by which in the meantime the rent could be lawfully increased corresponded to the increase or increases in the rates over the sum paid and payable for rates on Sept. 1, 1939, on the basis of the amended valuation of £34 duly made retrospective to a date anterior to Sept. 1, 1939, by virtue of the Rating and Valuation Act, 1925, s. 37 (10). (ii) As regards the provision of hot water and central heating: (a) that the right to receive a supply of hot water, etc., cannot be treated as having passed to the original tenant in 1936 by virtue of the Law of Property Act, 1925, s. 62, not being a right or privilege of the kind contemplated by that section; and I add that if the defendants' point be a good one, then it must have been wholly overlooked in *Asher* v. *Seaford Court Estates, Ltd.* (3) ([1950] 1 All E.R. 1018), to which I later return: (b) that the terms of cl. 3 (c) of the defendants' contract of tenancy cannot be regarded as of so vague a character as not to impose any enforceable obligation at all—though I agree with Jenkins, L.J., that its terms do impose a somewhat less valuable and comprehensive obligation than the comparable covenant in *Asher* v. *Seaford Court Estates, Ltd.* (3), a matter not, however, relevant for the purposes of the present case; and (c) that we cannot, consistently with loyalty to the speeches of the majority of the House of Lords in *Asher* v. *Seaford Court Estates, Ltd.* (3), hold otherwise than that the burden of supplying hot water, etc., must be regarded as having been transferred to the plaintiffs who, since 1943 (but not in the contract subsisting on Sept. 1, 1939), have been under the obligation in this respect now contained in cl. 3 (c) of the present tenancy. On this matter, I venture respectfully to associate myself with Jenkins, L.J.'s feeling of dissatisfaction, having regard in the present case to the character and quality of this flat and the apparatus with which it has at all times been supplied. I add also that nothing that this court says in the present case affects the case of any other tenant who could prove that he or his predecessor, under a contract of tenancy subsisting on Sept. 1, 1939, had, on entering into such contract, made a collateral contract with the landlords for the supply of hot water, etc., by the latter. (iii) As to repairs: that, on the authority of *Asher* v. *Seaford Court Estates, Ltd.* (3) and of *Winchester Court, Ltd.* v. *Miller* (2) ([1944] 2 All E.R. 106) (also hereafter mentioned) (a) the obligation of the tenant under the original tenancy must be treated as comprehending an obligation to do external repairs and (b) there must be treated as having been transferred to the landlords the burden of external repairs and also such repairs as are covered by the present exception of fair wear and tear, though the landlords are under no contractual obligation to the tenant to do them. I also think that since, on the figures found or agreed, the sum of £14 added to the rent in Nitka's contract was less than the true value of the burden then treated as transferred, it was competent for the landlords to make in the contract with the defendants such further addition to the rent as represented the difference between £14 and the true value of the burden at the date of Nitka's contract, such addition not being so remote from the occasion of the transfer in Nitka's contract as not fairly to be " in respect of " such transfer within the terms of Asquith, L.J.'s judgment in *Seaford Court Estates, Ltd.* v. *Asher* (3).

But the question of liability for repairs raises another question which arises also in relation to the assumption by the landlords in 1943 and thereafter of the contractual obligation to supply hot water, etc., in the terms contained in cl. 3 (c) of the present contract of tenancy. It is, to my mind, the only question of real difficulty in the present appeal, and on it I have the misfortune to find myself at variance with the view of the county court judge and also of my brethren. It turns on the effect of the second half of s. 2 (3) of the Act of 1920 (omitting the proviso). The sub-section has already been read and I do not read it again, but its language is, plainly enough, on the face of it, somewhat artificial and involved. The judgment of Asquith, L.J., in the Court of Appeal in *Asher* v. *Seaford Court Estates, Ltd.* (3), which was substantially adopted by the House of Lords in the same case, contains a full exposition of its requirements; but the present question, which did not at all arise on the facts in *Asher* v. *Seaford Court Estates, Ltd.* (3), cannot, in my judgment, be treated as determined one way or the other by anything said either in this court or in the House of Lords in that case. The question (and, for brevity, I confine myself to its application to the matter of repairs) is, briefly, this: Since by the terms of the tenancy operative on Sept. 1, 1939 (which I will for convenience call " the starting date ") the tenant's liability for repairs extended to external repairs and was unqualified by the exception of fair wear and tear, can the landlords justify a claim to an increase in the standard

A rent (being the rent payable on the starting date) on the making of the contract of tenancy with the defendants in 1953, by virtue of the fact that the tenants in such contract were absolved from liability for external repairs and for fair wear and tear (which, as I have said, must be treated for present purposes as constituting an assumption by the landlords of an equivalent burden), notwithstanding that the terms of the contract of 1953 in this respect were precisely the same **B** as the previous contract of tenancy made with Nitka in 1949 ? It is the contention of the plaintiffs that this question must be answered affirmatively. The argument on the plaintiff's behalf is that, for the purpose of applying s. 2 (3) of the Act, comparison can and must be made between the terms of the tenancy subsisting at the starting date and the terms of the contract made in 1953; that if, on such comparison, it appears that an obligation which on the starting date rested on **C** the tenant is under the contract of 1953 assumed by the landlords, then for the purposes of s. 2 (3) there is, on the making of the contract of 1953, a transfer—that is, a " shifting " (see per SCOTT, L.J., in *Winchester Court, Ltd.* v. *Miller* (2) hereafter mentioned)—of the obligation to the landlords justifying an increase of rent over the standard rent equivalent to the valuation of the burden in 1953; and that it is irrelevant that in the preceding contract of 1949 the same burden **D** had already been assumed by the landlords and that the standard rent had, on the making of that (1949) contract, been increased by reference to the (smaller) sum which had then represented the value of the obligation. For the defendants, on the other hand, it is argued that for the purposes of the sub-section the shifting occurs when, but only when, the burden, having previously been what I will call a " tenant obligation ", becomes a " landlord obligation ", and that the **E** value of the burden, for the purposes of increasing the standard rent, must be arrived at once and for all in reference to that date—unless and until it is re-transferred or re-shifted back again to the tenant. According to this view of the sub-section, the words in the sub-section " previously borne " must mean " borne immediately before the transfer or shifting ".

Counsel for the plaintiffs forcibly argued before us that the question must be **F** treated as having been decided in his favour by the judgments of this court in *Winchester Court, Ltd.* v. *Miller* (2) and in the circumstances it is necessary to examine somewhat closely the facts in that case and the report of the arguments and judgments. The facts, so far as relevant, may be shortly stated. The flat in question had been on the starting date (Sept. 1, 1939) the subject of a contract of tenancy in favour of A, whereby, as in the present case, the tenant had been **G** under an unqualified repairing obligation. Later, in 1941 and again in March and November, 1942, the flat had been the subject of new contracts of tenancy, in each case to B. In each case the tenant's repairing liability had been qualified by an exception of fair wear and tear, but in no case had the landlords claimed any increase in the standard rent by reference to the transfer of the fair wear and tear burden under s. 2 (3) of the Act. In August, 1943, the landlords determined the **H** November, 1942, letting and then claimed for the first time, as a condition of B's continued occupation, an increase of rent equivalent to the valuation of the transferred fair wear and tear burden. As appears from the headnote ([1944] 2 All E.R. 106) this value had been agreed at £20; but it is of the highest importance for present purposes to note that this sum was not referable to the value at any particular date, i.e., 1941, March or November, 1942, or **I** August, 1943; and no question was therefore, so far as I can find, raised whether, if any increase in rent was justifiable, it must be quantified in relation to the date when the burden was first transferred as distinct from the date of the notice, namely, August, 1943. The county court judge had held that, in order to be within the terms of the sub-section, a transfer of burden must be a transfer from the same tenant who had borne the burden immediately before the increase in rent and that therefore the landlords' claim to increase the rent against B (who had in fact never himself borne the transferred burden) must fail. All the members of this court rejected that view, holding that the word " tenant " was not confined to the tenant occupying the dwelling-house at the time when the claim for increase was made, but " included " the tenant at the starting date, that is A, who was, in the case before the court, the only other relevant tenant. This court, also, by a majority (Scott and MacKinnon, L.JJ., Luxmoore, L.J., dissenting), held that an increase under s. 2 (3) could be made in invitum against the then occupying tenant, if otherwise justified.

It is clear then, in my judgment, that the difficult question with which we are now concerned was neither raised nor determined by this court. It is true that learned counsel for the tenant is reported as submitting in the course of his argument ([1944] K.B. 738):

> " ' Previously borne ' must mean ' borne immediately before the transfer.' No other point of time is indicated in the sub-section. The only alternative meaning would be ' borne at any time previously,' but that would lead to an impossible position as there might have been several tenancies with different covenants. If the meaning intended were ' borne at the date by reference to which the standard rent is to be fixed,' the sub-section would have used words to that effect."

But that argument was being addressed to the question who was meant by " tenant." As appears immediately after the words I have quoted, the landlords were claiming (according to counsel) that the transfer had taken place in 1941 and not (as would be required to support the present argument) in August, 1943. It is true also that Scott, L.J., in the course of his judgment, laid great stress on what he refers to as " the equilibrium " which, under the scheme of the Act, is to be treated as established between landlord and tenant at the starting date by the fixing of the standard rent on that date, so that all changes in rent required or justified under s. 2 must be required or justified in relation to the standard rent. But there is nothing, in my judgment, amounting, expressly or implicitly, to the conclusion that there should be a re-assessment of the burden by reference to the standard rent on the grant of each subsequent new tenancy.

In my judgment, accordingly, and with all respect to the contrary opinion of my brethren, *Winchester Court, Ltd.* v. *Miller* (2) does not provide the answer to the present question. I have also already expressed my own view that it is left open by *Asher* v. *Seaford Court Estates, Ltd.* (3) where the only contracts of tenancy under consideration were (i) a contract subsisting on the starting date and (ii) a contract made in 1943 whereunder the landlord assumed a contractual obligation which had not found any place in contract No. (i); and where the only question which fell to be determined was whether on the facts there had been any transfer of a burden or liability at all. I cannot for my part treat the passages from the speeches in *Asher* v. *Seaford Court Estates, Ltd.* (3) which Hodson, L.J., has read as determining the question to which they were not directed. I have referred to *Property Holding Co., Ltd.* v. *Clark* (4) ([1948] 1 All E.R. 165), to which reference was made during the argument, but I have not found there any guide to our decision. The question must, therefore, in my judgment, be answered by construing the relevant language of s. 2 (3) of the Act. The sub-section, apart from the proviso in the last three lines, consists of two contrasted or complementary provisions. The first deals with the case of a transfer of a burden or liability from the landlord to the tenant, and the second with the converse case of a transfer from the tenant to the landlord. It is, in my judgment, clear, following *Winchester Court, Ltd.* v. *Miller* (2), that by the terms " the tenant " and " the landlord " are meant the persons occupying for the time being and at the relevant time the position of tenant and landlord respectively in respect of a given dwelling-house within the Act. By expanding the formula in its two halves the sub-section may then be regarded as dealing with the shifting to the tenant, for the time being, of a " landlord obligation " and with the shifting to the landlord for the time bring of a " tenant obligation." So much would not, I think, be disputed. But, in my judgment, the sub-section is concerned and only concerned with the consequences in terms of rent arising from the fact of the shifting and related to that specific occasion. This result, to my mind, follows in the first place from the language occurring in each half of the sub-section:

> ". . . where, as the result of such a transfer, the terms on which a dwelling-house is held are . . .";

for the words " is held " seem to me to require that the essential condition which the words quoted impose shall be satisfied by reference exclusively to the facts as they are found to be immediately after and as a consequence of the transfer. But, secondly, the same conclusion is, in my judgment, the inevitable consequence of the natural meaning, in their context, of the words " previously borne by ", which I contrue as meaning " borne immediately before the occasion of the shifting ": and the same construction must naturally, in my judgment, be given to the word " previous " in the phrase " not less favourable . . . than the previous terms." If this view is right, it follows that the estimation of the value of the repairing obligation and the obligation as to hot water, etc., by the landlords must be made by reference to the occasions when those obligations were (in effect) taken over by the landlords, that is in 1949 and in 1943 respectively, and that the obligations cannot be re-valued for the purpose of rent increases in 1953. My view strictly follows the argument of counsel in *Winchester Court, Ltd.* v. *Miller* (2) which I have already quoted. But, though the point to which the argument was directed was rejected, I do not find that SCOTT, L.J., or either of his colleagues expressed any disapproval of the argument as such; and, as I have more than once said, the point to which the argument is now directly relevant was not then before the court.

It is said on the other side that " previously borne " means in effect borne at the starting date; but I am unable to accept this view. If the intended reference had been to the starting date, then, as it seems to me, Parliament would have used for the purpose the appropriate language which it used in fact elsewhere (see s. 2 (1) (a)). Such a construction, moreover, would not, as I think, fit with the effect of the language " where, as a result of the transfer, the terms on which a dwelling-house is held." Furthermore, such a construction would necessarily assume that the incidence of the obligation must be different at the starting date and the date in respect of which the claim for increased rent is made. But this might well not be so. Suppose a case in which, at the starting date, the relevant repairing obligation was on the shoulders of the landlord, that it was later shifted to the tenant, and then that it was later shifted back again to the landlord and continued in successive tenancies to remain on the landlord's shoulders. In such a case, according to the plaintiffs' construction, no increase of rent could be claimed by the landlord over the standard rent in respect of the shifting back of the burden, however much the cost of the burden had in the meantime increased. It is said that, if my view is right, then the landlord can, in such a case as the present, get no compensation by way of increase of rent for the added cost of his repairing (and hot water) obligations in 1953. This, I concede, may well be so. But the result is to show that in this respect, as in others, the code of the old rent restriction legislation may have fallen short of attempting to do complete justice. The result, after all, is the same in cases where the obligations have remained, ever since the starting date, on the landlord. For, apart from the limited, special and quite different provisions of sub-s. (1) (d), no provision is made by s. 2 for giving to the landlord any compensation by way of increased rent for increases in the cost to him of performing his obligations under the tenancy, save only in the case of rates. The reason may no doubt be sought in the circumstance that rent restriction legislation was originally conceived as a temporary expedient for relieving hardships arising out of emergency conditions. The defect has been since remedied by the Housing Repairs and Rents Act, 1954.

I have not so far referred to the proviso in the last three lines of sub-s. (3). I agree that the proviso relates only to rates; but its language makes it, in my judgment, clear that in the case of rates the estimation of the cost or value of the burden transferred must be made exclusively in relation to the date or occasion when the transfer in fact occurs. For my part, I see no reason for assuming that a different principle of computation is applicable in cases of the transfer of burdens other than the burden of rates.

In my judgment, accordingly, the defendants before us are entitled to succeed to the extent of establishing that the increases of rent attributable to the transfer of the burdens as to repairs and hot water services must be calculated by reference to their cost in 1949 and 1943 respectively and cannot be re-assessed in 1953. The total effect of this view, if well-founded, would be, as I understand, to reduce the amount of the recoverable rent which the county court judge has declared to be the sum of £138 9s. 4d. by approximately £15 per annum from Feb. 12, 1953, with not unsubstantial results to the proper conclusion on the claim and counterclaim. But, since on the last question on which I have expressed my own view, the opinion of my brethren is to the opposite effect, the result is that the appeal must be dismissed.

I add two final observations. (i) Although, no doubt, some matters of principle and general interest have been discussed on this appeal, the actual figures applicable to the case have, as I understand, all been found or agreed, and to that extent therefore our decision in the present case cannot be regarded as covering other cases. (ii) It has been agreed by the learned counsel before us that, notwithstanding the final paragraph of the order under appeal, our decision is entirely without prejudice to any question which the landlords may raise on an application under the Housing Repairs and Rents Act, 1954, or to any question which the defendants may put forward on such an application. The form of the order appealed from will be varied accordingly to make this clear.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *F. R. Earle* (for the defendants, the tenants); *Stikeman & Co.* (for the plaintiffs, the landlords).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re MURRAY (*deceased*).
MURRAY *v.* MURRAY AND OTHERS.

[CHANCERY DIVISION (HARMAN, J.), April 27, May 1, 1956.]

Will—Dependent relative revocation—Name and arms clauses Codicil expressly revoking clauses in will—New clauses in codicil invalid and ineffective—Whether clauses in will revived.

By his will dated Jan. 11, 1951, the testator settled the C. estate on a strict settlement and by cll. 8, 9, 10 and 11 provided that every person who should become tenant for life of the C. estate should take and use and continue to use the surname Murray and bear and use and continue to use the testator's family arms and apply for a royal licence to do so, and on refusal or failure to do so the person who so refused or failed should forfeit his interest. The testator provided a gift over. By codicil dated June 3, 1952, the testator revoked cll. 8, 9, 10 and 11 of his will and directed that it should be read as if it contained the clauses which he then provided in the place of those which he had revoked. He then set out the name and arms clauses in less stringent terms than those contained in the will, merely providing that the name should be assumed, but not that it should be taken and used, and not providing for forfeiture on discontinuance but merely expressing his heartfelt wish that any tenant for life should bear his surname and arms. The testator died on Aug. 11, 1953, and his trustees took out an originating summons to determine whether the name and arms clauses contained in the codicil were valid. The Court of Appeal held that they were void on the ground of uncertainty. On a summons to determine whether, the clauses in the codicil having been declared invalid, cll. 8, 9, 10 and 11 of the will had been revived,

Held: the invalidity of the name and arms clauses substituted by the codicil for the original clauses of the will did not have the consequence that the original clauses were effective, because the will and codicil did not show an intention on the part of the testator that that should be the consequence but left the question as one of speculation, particularly as the clauses of the codicil were more stringent than the original clauses and the substitution of the codicil's clauses had not been a mere alteration of machinery for imposing a condition but was a substitution of a new scheme of things.

Onions v. *Tyrer* ((1716), 1 P. Wms. 343), *Quinn* v. *Butler* ((1868), L.R. 6 Eq. 225) and *Re Bernard's Settlement* ([1916] 1 Ch. 552), considered.

[As to dependent relative revocation, see 34 HALSBURY'S LAWS (2nd Edn.) 89, para. 127; and for cases on the subject, see 44 DIGEST 361-363, *1947*.]

Cases referred to:

(1) *Quinn* v. *Butler*, (1868), L.R. 6 Eq. 225; 44 Digest 363, *1966*.

(2) *Onions* v. *Tyrer*, (1716), 1 P. Wms. 343; 2 Vern. 741; 24 E.R. 418; 44 Digest 354, *1852*.

(3) *Re Bernard's Settlement, Bernard* v. *Jones*, [1916] 1 Ch. 552; 85 L.J.Ch. 414; 114 L.T. 654; 44 Digest 528, *3448*.

(4) *Duguid* v. *Fraser*, (1886), 31 Ch.D. 449; 55 L.J.Ch. 285; 54 L.T. 70; 44 Digest 528, *3449*.

(5) *Ward* v. *Van der Loeff, Burnyeat* v. *Van der Loeff*, [1924] A.C. 653; 93 L.J.Ch. 397; 131 L.T. 292; 44 Digest 336, *1662*.

Adjourned Summons.

The plaintiff, Richard Patrick Gordon Murray, applied by originating summons for the determination of the following questions, namely, whether cll. 8, 9 and 10 of the codicil of the testator John George Murray, dated June 3, 1952, having been declared invalid on the ground of uncertainty, cll. 8, 9, 10 and 11 of the testator's will, dated Jan. 11, 1951, were revived.

By his will dated Jan. 11, 1951, the testator devised his estate, Coles Park Estate, to his trustees, the first defendants, on trust for his grandson, the plaintiff Richard Patrick Gordon Dill, with remainder in strict settlement. By cl. 8 he provided that

> "every person who under the trusts . . . shall become entitled to the . . . estate shall take and use and continue to use in all deeds and writings . . . upon all occasions the surname of 'Murray' in substitution for any other surname and also bear and use and continue to bear and use my family arms and apply for and endeavour to obtain a royal licence and take such steps as may be requisite to authorise the user and bearing of the said surname and arms."

By cl. 9 he provided that on refusal or failure to do so, or on a discontinuance of use and bearing of the name and arms the person who so refused or failed should forfeit his interest in the estate and there should be a gift over. By cl. 10 he provided that the conditions should not apply to a peer or an infant while under the age of twenty-one and that there should be a year in which to comply with the provisions.

By codicil dated June 3, 1952, the testator after reciting that it was a codicil to his will provided:

> "I hereby revoke cll. 8, 9, 10 and 11 of my said will and direct that my said will shall be read as if it contained the following clauses in the place of those which I have hereby revoked."

Clause 8 provided:

> "Every person who . . . becomes entitled as tenant for life . . . to the possession . . . of the Coles Park Estate and also the husband of any female becoming so entitled shall unless prevented by death or accident assume the surname of Murray either alone or in substitution of his or her usual surname (yet so that the name of Murray shall be the last or usual name) and shall apply for proper authority to bear and use my family arms";

by cl. 9,

> "In case any person becoming so entitled or being a married woman her husband shall refuse or neglect to assume the surname of Murray and arms aforesaid or to make such application as aforesaid within one year after he or she shall so become entitled"

then the interests of that person should absolutely determine; and by cl. 10:

> "It is my earnest wish and desire that every person becoming entitled as tenant for life . . . to the possession . . . of the Coles Park Estate or in the case of a married woman her husband shall continue to use the surname of Murray as aforesaid and to bear my family arms so long as they are entitled to the possession of the Coles Park Estate . . ."

The testator died on Aug. 11, 1953, and his trustees took out an originating summons to determine whether the provisions in the codicil for the assumption of the surname Murray and for applying to proper authority to bear and use the testator's arms were valid. The Court of Appeal on July 30, 1954, overruling a decision of Upjohn, J., held that they were invalid on the ground of uncertainty (see [1954] 3 All E.R. 129).

R. W. Goff, Q.C., and *G. D. Johnston* for the plaintiff.
B. S. Tatham for the second and third defendants.
E. J. A. Freeman for the sixth, seventh, eighth and ninth defendants.
The first, fourth and fifth defendants did not appear.

HARMAN, J., stated the facts and continued: In the course of the discussion in the Court of Appeal, counsel for the remaindermen put forward the view that if the codicil were declared invalid, the result would be to revive the

A rather more stringent provisions of the will, under the doctrine of dependent relative revocation. The Court of Appeal confined itself very carefully to saying that, on the words actually used in the codicil, there was an uncertainty which vitiated the clause, and did not make any general pronouncement about the validity or otherwise of what might be in the will, or on name and arms clauses in general. A new summons now comes before me, taken out by the B plaintiff, who seeks to say that having got rid of the codicil, he has not been caught by the provisions of the will. He has, nevertheless, ex cautela, for the time being adopted the name of "Murray" as his grandfather wished him to do, and thinks he has good reason for wishing to reject that name again if the law allows him to do so. With that, I have nothing to do. The doctrine of dependent relative revocation is only a branch of the ordinary law of construing wills. C When there is a codicil it is always necessary to see to what extent it revokes the will, and it is elementary that no codicil revokes a will further than is required for the purposes of the codicil. That does not mean that all revocation is dependent on the efficacy of the codicil, because the latter document may show that an out-and-out revocation of the will was intended in any event, and where that is shown, nothing will revive the will which has been revoked. By this codicil D the testator used words of express reservation, which I shall read. After reciting that it was a codicil to his will, he says:

> "I hereby revoke cll. 8, 9, 10 and 11 of my said will and direct that my said will shall be read as if it contained the following clauses in the place of those which I have hereby revoked",

E and then those clauses are set out which are to be read as part of the will. Those are very formidable words. The testator does not give any reason why he substituted the new clauses for the old and I am not going to speculate why he did it. The cases show that words of revocation of this sort do not put an end to the matter; in other words, whether the revocation is expressed in the instrument or to be implied necessarily from its content, the question remains F one of intention. Nevertheless, where there are express words of this sort, there is a heavy burden resting on those who say that those words were not intended to be, as they appear to be, absolute, but only relative.

Among the cases which I have had cited to me was *Quinn* v. *Butler* (1) ((1868), L.R. 6 Eq. 225) which was an instance of a revocation which was ineffective and yet did not revive the terms of the will. In that case there was a power G given to charge certain hereditaments with the payment of £7,000 as a provision for younger children, and the donee of the power charged the hereditaments by his will with £7,000, part to a son and the rest to the three daughters. Then by codicil he provided:

> "I hereby revoke and make void the bequest and appointment or charge of the said sum of £7,000 so made by my said will . . ."

H and in exercise of the power he appointed the money to his son. That exercise of the power failed. LORD ROMILLY, M.R. said (ibid., at p. 227):

> "In this case I am of opinion that the codicil is a simple revocation of the appointment made by the will, and nothing more. I think the whole question depends on the intention of the testator. If a will is simply revoked in order to make a gift in favour of another person, and you can see that there I is no intention to revoke unless for that purpose, then the doctrine of *Onions* v. *Tyrer* (2) ((1716), 1 P. Wms. 343) applies."

(*Onions* v. *Tyrer* (2) is the oldest reported case on this subject.) He goes on to say that in the case before him there could be no doubt the intention was to revoke the will altogether, and he conceived that that was the end of the matter. It is only a question of intention. *Onions* v. *Tyrer* (2) is not easy to follow, but it was apparently a case where the second instrument did not alter the beneficial uses or trusts but merely substituted different trustees, and the second failing, it was held in spite of words of apparently general revocation of the earlier instrument that the failure of the second revived the first. I, however, do not understand that the second document, which was described there as a will, revoked in general terms any other will that had been made. It was not so very difficult to conclude in that case, because it was only a matter of changing machinery, and the purpose of the testator remained the same.

When one looks at the other case which is much relied on (*Re Bernard's Settlement, Bernard* v. *Jones* (3), [1916] 1 Ch. 552) it is to be seen that having appointed certain funds to her six daughters equally, the testatrix revoked that appointment in so far, but no further, as it gave one of them an absolute interest, and settled that particular interest. That settlement being bad for perpetuity, it was held that the original gift remained. Neville, J. ([1916] 1 Ch. at p. 559) referred to *Quinn* v. *Butler* (1) and to *Duguid* v. *Fraser* (4) ((1886), 31 Ch.D. 449 at p. 452) from which he cited this passage:

> " 'There have been cases where the intention to revoke in any event being clear, as where the appointor began the invalid appointment by saying " I revoke the former appointment to this extent ", and then proceeded to appoint—in which the courts have been compelled by the language to give effect to the revocation, though not to the subsequent appointment. I do not feel myself fettered by anything of that kind.' "

Then the learned judge, having discussed the old doctrine about the difference between invalidity in the terms of the gift and in the capacity of the taker, a distinction which now is exploded, said this ([1916] 1 Ch. at p. 560):

> " I think the question which the court has to determine is, Did the testator intend by the second appointment to revoke in any case the prior appointment, or did he really only intend to revoke it for the purpose of carrying out the alteration made in his second appointment and without having any intention of revoking the previous gift except for the purpose of the altered appointment ? "

Then he came to the conclusion that there was no intention to revoke beyond the necessity of the matter as the testatrix saw it. In my judgment, none of these cases bind me, any more than does the leading case in the House of Lords *Ward* v. *Van der Loeff* (5) ([1924] A.C. 653). I do not need to go through that case. There was much judicial wisdom expended on it, but it all comes in the end to this same question of intention.

The strong point for the remaindermen is this, that on the face of it this is not a question of altering a gift, but altering a condition attached to a gift. The settlement of the Coles Park Estate was left where it stood, but the provisos contained in the name and arms clauses are revised by the testator. It may be said, therefore, that this is only a matter of altering machinery, and of seeking to bind the first taker and then his immediate successor, if he be tenant for life, or tenant in tail, by a different form of words. That has weighed in my mind a good deal; but when one looks at the new form of words, they are not the same in scope as the old form. They do not seek to perpetuate the imposition; they do not say " take and use the name "; but " assume the name ". They do not have a forfeiture clause for discontinuance; they merely express the testator's heartfelt wish that those who take his bounty will feel it is right to comply with his wishes. Therefore, it is not merely a new piece of machinery which is being substituted for the old, but rather a different scheme of things, and the question, I think, as Viscount Haldane, L.C., put it in *Ward* v. *Van der Loeff* (5) ([1924] A.C. at p. 661) is " Was there an independent revocation ?". Certainly there are words of independent revocation, and the new words are put in " in the place of those which I have hereby revoked ". I am asked to say that if the testator had been told that the second versiculus of words was no good, he would have said at once: " Well, let the will stand "; or he might say on the other side: " No; let us try a third expedient ". That, to my mind, is speculation. I

A think that I must do no more than hold on to the words of the codicil, which say "which I have hereby revoked", and that, for some reason or other on which I will not speculate, he was dissatisfied with the earlier form of words and revoked them in order to replace them by the later form. It would be merely a guess to conclude that it was his intention, if the second form of words did not pass through the eye of the needle now constituted by the Court of Appeal, that the B first series of words should stand, remembering always that the first series of words is more stringent than the second. I think that he had rejected the first expedient and adopted the second, for all purposes, and the second having proved ineffective, it does not revive the first. I am, therefore, of opinion that the doctrine of dependent relative revocation has no part to play in this will and codicil. *Declaration accordingly.*

C Solicitors: *Oswald Hickson, Collier & Co.* (for the plaintiff); *Crossman, Block & Co.* (for the second and third defendants); *Rooper & Whateley* (for the sixth, seventh, eighth and ninth defendants).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

D

ESDAILE AND OTHERS *v.* LEWIS.

[COURT OF APPEAL (Jenkins and Hodson, L.JJ., and Danckwerts, J.), May 2, 1956.]

Rent Restriction—Sub-tenancy—"Lawfully sub-let"—Part of premises sub-let—Term of tenancy that "no sub-letting allowed"—No breach by sub-letting E *part of premises.*

A tenant of a dwelling-house to which the Rent Acts applied held on a contractual tenancy one term of which, entered in writing in the rent book as a condition, was "no sub-letting allowed without the written consent of the landlord". The tenant sub-let part of the premises to the defendant without the landlord's consent and subsequently quit the premises after F giving notice to the then landlords. The landlords claimed possession against the sub-tenant on the ground that the defendant was not tenant of any part of the premises as any purported sub-letting had been in breach of the term of the tenancy.

Held (DANCKWERTS, J., dissenting): having regard to the well-established principle that a covenant not to sub-let premises was not broken by sub-G letting part of them, the term "no sub-letting allowed" would not be construed as forbidding the sub-letting of part of the dwelling-house, and the landlords were not entitled to possession.

Cook v. *Shoesmith* ([1951] 1 K.B. 752) followed.

Appeal dismissed.

[**Editorial Note.** By s. 15 (3) of the Increase of Rent and Mortgage Interest H (Restrictions) Act, 1920, the defendant became the tenant of the landlords on the determination of her mesne landlord's tenancy if the sub-letting to her were lawful; see 13 HALSBURY'S STATUTES (2nd Edn.) 1019.

As to what constitutes a breach of a covenant against sub-letting premises, see 20 HALSBURY'S LAWS (2nd Edn.) 348, para. 419, note (u); and for cases on the subject, see 31 DIGEST (Repl.) 418, *5467-5470*.]

I

Cases referred to:

(1) *Cook* v. *Shoesmith*, [1951] 1 K.B. 752; 2nd Digest Supp.

(2) *Church* v. *Brown*, (1808), 15 Ves. 258; 33 E.R. 752; 31 Digest (Repl.) 409, *5384*.

(3) *Grove* v. *Portal*, [1902] 1 Ch. 727; 71 L.J.Ch. 299; 86 L.T. 350; 31 Digest (Repl.) 414, *5436*.

(4) *Crusoe d. Blencowe* v. *Bugby*, (1771), 3 Wils. 234; 2 Wm. Bl. 766; 95 E.R. 1030; 31 Digest (Repl.) 435, *5630*.

Appeal. A

The landlords appealed against an order of His Honour JUDGE ELDER-JONES
at Bow County Court dated Mar. 1, 1956, adjudging that the landlords were not
entitled to recover possession of premises occupied by the defendant.

The facts appear in the judgment.

J. C. Lawrence for the landlords.

R. G. Freeman for the defendant. B

JENKINS, L.J.: The appellants, the plaintiffs in the action, are, in their
capacity as personal representatives, the landlords of premises known as 53,
Merchant Street, Bow, a dwelling-house within the protection of the Rent Acts.
The tenant was formerly a Mr. Kaufman, who gave notice to quit and departed.
The landlords sought possession of the premises and found that the defendant, C
Mrs. Lewis, was in occupation of part of them. She claimed the right to remain
in occupation as a person to whom part of the premises had been lawfully sub-let.
She therefore remained in occupation of her part of the premises, and the proceedings
out of which this appeal arises were brought by the landlords in the Bow
County Court for possession of the premises. On Mar. 1, 1956, His Honour
JUDGE ELDER-JONES made an order refusing the landlords' claim for possession. D
The sole question in the case is whether a stipulation relating to sub-letting
contained in the conditions of the tenancy as they appear on the inside cover at
the back of the rent book applied to the letting made to the defendant. Various
other questions arose relating to the possibility of waiver by the landlords of any
breach of the tenancy agreement that might have been constituted by the
letting to the sub-tenant. The learned judge resolved these questions in favour E
of the landlords and held that there had been no waiver, but on the stipulation
as to sub-letting he held that it did not on its true construction extend to a sub-letting
of a part only of the premises, and that is the sole matter which has been
debated before us.

The subject-matter of the sub-tenancy was the basement and a room on an
upper floor of the premises, and it was not in dispute that these parts of the F
premises were separately let to her so as to be capable of protection under the Rent
Acts. The conditions of the tenancy as printed on the back inside cover of the
rent book are these:

> "Conditions upon which this rent book is accepted: Tenants must give
> notice according to the terms of their agreement: quarterly, monthly, or
> weekly, or alternatively pay the amount of such term previous to removal. G
> Notice to quit will not be taken until all arrears have been paid, broken
> windows and other damage repaired. The key to be delivered to the
> landlord or his agent before 12 o'clock noon on the day of leaving. No
> sub-letting allowed without the written consent of the landlord. The
> landlord reserves the right to refuse to pay the rates and taxes if the tenant
> is in arrears in the payment of his rent." H

Then attention is called to those conditions on the outside of the back cover at
the foot of it, where these words are printed: "Conditions upon which this rent
book is accepted, see inside cover." We have been provided with a specimen
rent book with the names and details not filled in, but it appears that on the
outside front cover of the book there would be the tenant's name, and, as his I
address, the property the subject-matter of the tenancy. That would be
followed by a figure to be inserted against the word "rent" printed on the cover,
and finally the date of entry with a space for the insertion, I take it, of the date
from which the tenancy was to operate.

The appeal, then, turns entirely on the true construction of these words in
the conditions: "No sub-letting allowed without the written consent of the
landlord". I confess, speaking for myself, that if the matter had been free
from authority I would have been disposed to hold that the words "No sub-

A letting allowed " meant that there was to be no sub-letting at all in relation to the premises, whether in whole or in part. The learned judge felt constrained to reject that view on the authority of *Cook* v. *Shoesmith* (1) ([1951] 1 K.B. 752). We have been invited by counsel for the landlords to hold that the learned judge was wrong in regarding the condition now under consideration as in pari materia with the condition which was construed in *Cook* v. *Shoesmith* (1). The material B provisions of the tenancy agreement in *Cook* v. *Shoesmith* (1) were these. The tenant agreed as follows: " I hereby agree to rent " the house in question, at a specified rent, " and I further agree not to sub-let ". Then the headnote says:

> " The tenant, without the landlord's consent, sub-let two of the top rooms of the house, and the landlord sought possession for breach of the C undertaking not to sub-let. Held, that on its true construction, the undertaking in the agreement ' not to sub-let ' was not broken by sub-letting part of the premises, for the verb ' to sub-let ' must have an object and its only possible object was the house which was the subject-matter of the agreement. Consequently, the principle that a covenant not to sub-let ' the premises ' demised was not broken by the sub-letting part of them D applied. Dictum of LORD ELDON in *Church* v. *Brown* (2) ((1808), 15 Ves. 258 at p. 265), as applied in *Grove* v. *Portal* (3) ([1902] 1 Ch. 727) followed."

The reason underlying the decision in *Cook* v. *Shoesmith* (1) was of this nature. It is a well-established principle, treated as such by LORD ELDON in *Church* v. *Brown* (2), that a covenant not to sub-let premises is not broken by the sub-letting of part only of the premises. It follows that wherever there is a stipula- E tion in a tenancy agreement against sub-letting, or a covenant not to sub-let, then if, on its true construction, that stipulation or covenant prohibits the sub-letting of the premises it is not broken by the sub-letting of part only of the premises. I think that it is right to add that it behoves a landlord who is seeking to cut down the rights prima facie conferred on his tenant by the letting to express in clear words the extent to which those rights are intended to be cut F down. Under a tenancy agreement containing no stipulations regarding sub-letting the tenant is entitled to sub-let in right of his proprietary interest. If that right is to be denied him then the provision by which it is denied should be clearly expressed. It is true that in *Cook* v. *Shoesmith* (1) the undertaking not to sub-let was in the form, " and I further agree not to sub-let," following on and in the same sentence as the words, " I hereby agree to rent " the particular G house. On that form of words the court felt bound to hold that inasmuch as the verb " to sub-let " must have an object, and inasmuch as the agreement not to sub-let occurred in the same sentence as the agreement to rent " the above house ", 53, Marine Avenue, Hove, the only object that could be assigned to the verb was " the above house ", or, in other words, the premises. Once that conclusion was reached the principle recognised in *Church* v. *Brown* (2) applied, H so that the agreement not to sub-let was construed simply as an agreement not to sub-let the whole of the premises, and not as an agreement not to sub-let the premises or any part thereof.

Counsel for the landlords says that while he does not and could not challenge the correctness of the decision in *Cook* v. *Shoesmith* (1) on the language with which the court there had to deal, the language in the present case is of wider import I and is not covered by the *Cook* v. *Shoesmith* (1) decision. The words in the present case are, " No sub-letting allowed without the written consent of the landlord ", and counsel says that, according to the ordinary meaning of those words, what is prohibited is the act of sub-letting in any shape or form. He says that the meaning can be brought out by adding after " sub-letting " the words " at all ", so that it would read " No sub-letting at all allowed ", that is to say, " nothing amounting to a sub-letting to be done at all ". Counsel asks us to hold that these words, " No sub-letting allowed ", have that comprehensive significance and, according to their natural meaning, apply to the letting of part as well as to a letting of the whole. I find that argument attractive, and I would be glad to accede to it if, on the authorities, I felt able to do so. But it seems to me that, just as the words " I agree not to sub-let ", in *Cook* v. *Shoesmith* (1), demanded an object, so the words, " No sub-letting allowed ", demand some subject-matter to which they can relate. " No sub-letting allowed " immediately raises the question, " No sub-letting of what ? " It seems to me that it is impossible to say that the sub-letting which is not allowed is anything other than a sub-letting of the premises. I see no more warrant here for adding, " or any part thereof ", than there would have been in *Cook* v. *Shoesmith* (1) for adding to the words, " I further agree not to sub-let the premises ", the words, " or any part thereof ". Whatever one may think of the principle which the cases establish, it is an established principle for better or for worse, and I do not think that any service would be done to the law or to the public in seeking to whittle it down by means of fine distinctions. The distinction sought to be drawn in the present case seems to me to be altogether too fine to command acceptance, and for these reasons I think that the learned county court judge came to the right conclusion, and I would dismiss this appeal.

HODSON, L.J.: I agree. If the matter had been free from authority I should, as indeed would the learned county court judge, have accepted the submission of counsel for the landlords that the words " No sub-letting allowed without the written consent of the landlord ", mean " No sub-letting at all allowed without the written consent of the landlord ", that is to say, no sub-letting of any part of the premises in question. But, in my judgment, we are constrained by authority to dismiss this appeal. The principle that a covenant not to under-let the premises demised is not broken by under-letting only a part of them is laid down by authority going back to a dictum of LORD ELDON in *Church* v. *Brown* (2) ((1808), 15 Ves. 258) and on the construction of a provision of this kind reliance is always placed on the principle that the courts have always held a strict hand over these conditions for defeating leases, a principle which goes back to *Crusoe d. Blencowe* v. *Bugby* (4) ((1771), 2 Wm. Bl. 766). I would refer to a passage from JENKINS, L.J.'s, judgment in *Cook* v. *Shoesmith* (1) to which reference has been made. He concluded his judgment by saying ([1951] 1 K.B. at p. 756):

> ". . . any doubt should be resolved in favour of the tenant whose prima facie right to dispose as he thinks fit of the interest vested in him under the tenancy is cut down by the stipulation in question."

The stipulation in question, " No sub-letting allowed without the written consent of the landlord," must have an object, and the question is whether it is reasonable to construe this provision as having for its object the premises as a whole. The rent book has not been produced, but it appears that on the face of the original rent book there appeared the address of the premises in question, that is to say, 53, Merchant Street, Bow, and on the inside cover there were conditions on which the rent book was accepted, and then on the back a notice drawing attention to those conditions. There were five conditions, and excluding for the moment the one in question, all the other conditions must I think necessarily have as their object the premises in question. They are provisions as to giving notice, a provision as to the key, and a reservation of the landlord's right to refuse to pay rates and taxes. All those provisions relate to the premises and the whole of the premises, in my opinion. The fourth and penultimate condition deals with sub-letting, and I think that counsel for the defendant is right in his contention that it is a reasonable construction of that condition to give it the same object as the other conditions have, that is to say, to give it as its object the premises and the whole of the premises. This to my mind makes the case virtually indistinguishable from *Cook* v. *Shoesmith* (1), where the court had to determine whether the agreement not to sub-let had as its object the whole of the premises. The problem in that case differed in this way. There is, I think, no distinction to be drawn between the words, " I agree not to sub-let ", and, " No sub-letting allowed ", but the address was contained in the same sentence as the agreement not to sub-let, so that the court was able readily to reach the conclusion that the object of the sub-letting was the premises as a whole; whereas counsel for the landlords points out that in the present case the condition as to sub-letting stands in a sentence by itself, and therefore he argues that the court is at liberty to give this sentence its widest and, as he says, its natural meaning. For my part I feel unable to accept that contention. There is this fine distinction, but I think that it would be an over-refinement for the court to seek to free itself from the fetters which are imposed on it by the authorities which were summarised in *Cook* v. *Shoesmith* (1), and indeed by the authority of *Cook* v. *Shoesmith* (1) itself, which is a decision of this court. I think, therefore, that the appeal must be dismissed.

DANCKWERTS, J.: I am sorry to say that I find myself unable to agree. If *Cook* v. *Shoesmith* (1) covers the matter that is an end of it, but I remember the words of SIR GEORGE JESSEL, M.R., in regard to rules of construction of wills. He pointed out in regard to the construction of documents how a case of one kind may be extended to a slightly different wording in another will, until finally you get a result which outrages the common sense of the judge who has to deal with the matter. I quite agree that if a landlord wishes to restrict the rights of a tenant to dispose of his interest or part of it in the property, he must use clear words, and I agree of course that if there is any doubt about the proper construction of the words they should be construed against the landlord. The trouble is that the words in the present case seem to me to be perfectly clear. The words are confined within the limits of the property, 53, Merchant Street, Bow. The rent book and the conditions in it are not dealing with anything else. But it seems to me that " No sub-letting allowed " is a perfectly plain expression which means, if the other members of the court will forgive me, exactly what it says, that there is to be no sub-letting whatever, and that therefore there must be no sub-letting of a part of the premises any more than of the whole premises. There simply must be no sub-letting, and, therefore, I should be in favour of allowing the appeal. *Appeal dismissed.*

Solicitors: *Barnes & Butler* (for the landlords); *Breeze, Benton & Co.* (for the defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

PROBATE NOTICE.

Probate—Grant—Resealing—English grants in Northern Ireland.

Section 27 of the Administration of Estates Act (Northern Ireland), 1955 has made it possible for the Northern Irish Court to reseal an English grant of administration without requiring a fresh bond, subject to the production of an official certificate that the bond given in England covers the Northern Irish estate.

Practitioners wishing to make use of this provision should include in the administrator's oath statements as to the domicil of the deceased and the total value of any real and personal estate in Northern Ireland, and should increase the normal penalty in the bond by twice this amount. The necessary certificate under the hand of a registrar may then be obtained after the issue of the grant from the Notation Department of the Principal Probate Registry or from the District Registry, as the case may be.

B. LONG,
Senior Registrar.

May 17, 1956.

LEVERMORE AND ANOTHER *v.* JOBEY.

[COURT OF APPEAL (Jenkins and Hodson, L.JJ. and Danckwerts, J.), April 30, May 1, 1956.]

Rent Restriction—" Dwelling-house "—Premises containing shop and dwelling accommodation—Lease—Covenant by tenant to use premises for specified business purposes—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5 *c.* 32), *s.* 16 (1)*—Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6 *c.* 71), *s.* 3 (1) (3).

By a lease there was demised to a tenant property described as " all that building or tenement shop and premises " and the tenant covenanted that he would " not use or permit to be used the demised premises or any part thereof for any illegal or immoral purpose but will use and occupy the demised premises and permit them to be used and occupied as and for the trades or business of a newsvendor stationer bookseller toy merchant and tobacconist only ". The premises comprised a building on three floors. On the ground floor was a shop, with a living room, dining room and a kitchen behind. On the first floor was a sitting room and a bedroom, and between the ground and first floors, off a half-landing, there were a bedroom, bathroom and a water closet. On the second floor there were two bedrooms. There was a separate door from the street to the upper floors. The question arose whether the demised premises were within the protection of the Rent Restrictions Acts, viz., whether they were a house let as a separate dwelling within the meaning of s. 16 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, so as to be a dwelling-house within s. 3 (1) and (3) of the Act of 1939.

Held: the premises were within the protection of the Rent Restrictions Acts because, on the true construction of the lease and having regard in particular to the nature of the premises, the tenant was entitled without breach of covenant to live on the premises and, therefore, they were let as a separate dwelling and were a dwelling-house within the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and (3).

Wolfe v. *Hogan* ([1949] 1 All E.R. 570) and *Court* v. *Robinson* ([1951] 1 All E.R. 209) explained.

R. v. *Brighton & Area Rent Tribunal, Ex p. Slaughter* ([1954] 1 All E.R. 423) considered.

Per JENKINS, L.J.: for the purpose of construing the lease and in particular the tenant's covenant it is . . . obligatory on the court to pay regard to the surrounding circumstances with reference to which the lease was entered into, and in particular to look at the nature of the subject-matter of the letting (see p. 365, letter C, post).

Appeal dismissed.

[As to premises used partly for business purposes, see 20 HALSBURY'S LAWS (2nd Edn.) 315, para. 371; and for cases on the subject, see 31 DIGEST (Repl.) 647-649, *7517-7527*.

As to evidence of surrounding circumstances being admitted for the interpretation of deeds, see 11 HALSBURY'S LAWS (3rd Edn.) 405, para. 658.

For the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 16 (1), see 13 HALSBURY'S STATUTES (2nd Edn.) 1057; and for the Rent and Mortgage Interest Restrictions Act, 1939, s. 3, see ibid., 1077.]

Cases referred to:

(1) *Wolfe* v. *Hogan*, [1949] 1 All E.R. 570; [1949] 2 K.B. 194; 31 Digest (Repl.) 640, *7477*.

(2) *Gidden* v. *Mills*, [1925] 2 K.B. 713; 95 L.J.K.B. 1; 134 L.T. 21; 31 Digest (Repl.) 649, *7530*.

(3) *Court* v. *Robinson*, [1951] 1 All E.R. 209; [1951] 2 K.B. 60; 3rd Digest Supp.

(4) *Whitty* v. *Scott-Russell*, [1950] 1 All E.R. 884; [1950] 2 K.B. 32; 31 Digest (Repl.) 645, *7507*.

(5) *R.* v. *Brighton & Area Rent Tribunal, Ex p. Slaughter*, [1954] 1 All E.R. 423; [1954] 1 Q.B. 446; 118 J.P. 231; 3rd Digest Supp.

(6) *Burns* v. *Radcliffe*, [1923] 2 I.R. 158; 31 Digest (Repl.) 650, *2531*.

(7) *Vickery* v. *Martin*, [1944] 2 All E.R. 167; [1944] K.B. 679; 113 L.J.K.B. 552; 171 L.T. 89; 31 Digest (Repl.) 649, *7527*.

Appeal.

This was an appeal by the landlord from an order of His Honour JUDGE GLAZEBROOK at Bromley County Court dated Feb. 22, 1956, whereby he declared that the premises, the subject-matter of this application, fell within the protection of the Rent Restrictions Acts, and that the tenants were entitled to have the standard rent thereof ascertained.

J. G. Wilmers for the landlord.

R. B. Willis for the tenants.

JENKINS, L.J.: This is an appeal by the landlord of premises known as 224, Algernon Road, Ladywell, in the parish of Lewisham, from a decision of the learned county court judge to the effect that these premises were within the protection of the Rent Restrictions Acts. The matter arose in the county court as an application by the tenants, now the respondents, to fix the standard rent of the premises on the footing that they were premises within such protection. The premises were let on Dec. 7, 1935, by the landlord, Florence Eliza Jobey, to a Mrs. Alice Charlotte Brown for a term of fourteen years from Dec. 25, 1935. That lease expired in 1949 when a new lease, dated Nov. 16, 1949, was granted between the same parties. The terms of the two leases, the residue of the latter of which became vested in the present tenants, are identical for the purposes of the present case, and we have been supplied with a full copy of the earlier lease.

The question at issue is whether these premises are let as a separate dwelling, for it is only on that footing that the protection of the Acts can be claimed for them. I should, I think, refer briefly to the relevant provisions. The Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1), provides:

> " Without prejudice to the operation of the two preceding sections in relation to any dwelling-house to which the principal Acts applied immediately before the commencement of this Act, the principal Acts, as amended by the last preceding section, shall, subject to the provisions of this section, apply to every other dwelling-house of which the rateable value on the appropriate day did not exceed [the amounts therein set out] and in relation to any such dwelling-house as aforesaid, not being a dwelling-house to which the principal Acts applied immediately before the commencement of this Act, the provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933, set out in the first column of Sch. 1 to this Act shall have effect as if there were made in those provisions the modifications respectively prescribed by that Schedule."

In s. 7 (1) it is provided:

> " In this Act the following expressions have the meanings hereby respectively assigned to them, that is to say [and then certain expressions are set out and the sub-section concludes] and other expressions have the same meanings as in the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933."

One should also notice s. 3 (3) which says: " Subject to the provisions of para. (a) of the last preceding sub-section " (which relates to " any dwelling-house consisting of, or comprising, premises licensed for the sale of intoxicating liquor for consumption on the premises ")

> "the application of the principal Acts, by virtue of this section, to any dwelling-house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes . . ."

A

Section 16 (1) of the Act of 1933 contains certain definitions, including this definition of dwelling-house:

B

> "'Dwelling-house' has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let."

The question at issue is whether 224, Algernon Road, is let as a separate dwelling within the meaning of the Act. The learned judge held that it was, with the consequence that the Act applied to it. The landlord now appeals to this court and contends that the premises are excluded from the protection of the Act because they were not let as a separate dwelling or indeed as a dwelling at all, but were let wholly and exclusively for business purposes and consequently the Act does not apply to them.

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This question has been many times before this court, and it has been laid down that the first thing that must be looked at in considering it in any particular case is the formal lease or tenancy agreement, if any, by which the letting was created. If from the provisions of that lease or tenancy agreement it appears that the premises were let on terms excluding their use for residential purposes, then the matter is concluded against the tenant notwithstanding the use to which the premises may in fact have been put unless on the facts it can be shown that by the common consent of the tenant and the landlord the provision excluding use for residential purposes was relaxed, so as to create a new or modified letting of the premises which, as modified, constitutes a letting of them for residential purposes. If there is no formal lease or tenancy agreement, or any document there may be is silent on the question of user, then it is legitimate to look at what was actually done, to look at the purposes for which the premises were in fact used with the assent of the landlord, in order to ascertain whether they were let as a separate dwelling or were let for business purposes.

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The first thing to be done, therefore, in the present case is to look at the terms of the lease. For this purpose I am reading from the earlier lease, i.e., the lease of Dec. 7, 1935. That is made between the parties I have already mentioned, and it contains a demise to the lessee of

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> "all that building or tenement shop and premises known as No. 224 Algernon Road Ladywell in the parish of Lewisham . . . to hold the same unto the lessee from Dec. 25, 1935, for the term of fourteen years yielding and paying therefor during the said term the clear yearly rent of £75 by equal quarterly payments on the usual quarter days and the last payment to be made in advance two calendar months before the expiration of the said term."

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Then there is provision for payment of the cost of insurances as additional rent, and then there are a number of tenant's covenants. We were referred to certain covenants as to painting the premises, but I do not think that anything turns on them as they would be equally appropriate both to business premises and to residential premises. The important covenant is number (11), which is in these terms:

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> "And also will not do or suffer anything to be done or take place or remain on the demised premises which may render an increased or extra premium payable for the insurance of the premises against fire as hereafter provided or which may make void or voidable any policy for such insurance And will not use or permit to be used the demised premises or any part thereof for any illegal or immoral purpose but will use and occupy the

> demised premises and permit them to be used and occupied as and for the trades or business of a newsvendor stationer bookseller toy merchant and tobacconist only."

Tenant's covenant (13) is a covenant that the tenant

> "will not assign transfer underlet or part with the possession of the demised premises or any part thereof without the previous written licence in that behalf of the lessor but so that such licence shall not be withheld to an assignment or underletting of the demised premises to a respectable and responsible person."

Those are the relevant provisions of the lease of 1935 which, as I have said, were reproduced in the lease of 1949. I should say that the rent in the lease of 1949 was increased from £75 to £100.

For the purpose of construing the lease and in particular tenant's covenant (11) it is permissible for the court, and indeed obligatory on the court, to pay regard to the surrounding circumstances with reference to which the lease was entered into, and in particular to look at the nature of the subject-matter of the letting. As to that I may quote from the judgment of the learned judge. He described the premises in this way:

> "The house has three floors and the accommodation was described by the tenant (in uncontradicted evidence) as follows: On the ground level at the front, is a shop; behind that is a living room, a dining room, and a small kitchen. On the first floor is the main sitting room and a bedroom. Between these two floors, on a half-landing there is a bedroom, a bathroom and a w.c. On the top floor there are two small bedrooms. The main door leads from the street into the shop and through the shop access can be had to the floors above. There is also a separate door from the street to the upper floors."

That is a description of premises of a very familiar kind, consisting of a shop fronting the street with living accommodation behind and above it. Such being the nature of the premises with which the lease was dealing, I pass to the question of construction.

I observe first of all that the parcels are described as "all that building or tenement shop and premises". That indicates that the shop is regarded as something distinct from the rest of the building. I think I may also note the expression "tenement". That is an expression which is sometimes used to mean a house and in particular a dwelling-house. That, however, is not its strictly correct meaning in law, its correct meaning extending, as I understand, to every kind of hereditament, both corporeal and incorporeal. I therefore do not found myself on the use of the word "tenement", but I do gain some slight assistance from the fact that the shop is specially and separately mentioned.

As to covenant (11), which is the crux of the case, I approach it bearing in mind that this was a lease of premises consisting of a shop with premises above and behind it plainly adapted for living purposes. The relevant part of covenant (11) begins with the words,

> "And will not use or permit to be used the demised premises or any part thereof for any illegal or immoral purpose."

That is a prohibition which I should have thought would be more appropriate to a dwelling-house than to a shop. Prima facie it would hardly be within the contemplation of the parties that a shop or business premises in which nobody lived at all would be used for any illegal or immoral purpose. That, perhaps, is a slight indication, but I think it is an indication of some small significance.

Then comes the provision directly in point. I will read it again:

> "but will use and occupy the demised premises and permit them to be used

> and occupied as and for the trades or business of a newsvendor stationer bookseller toy merchant and tobacconist only."

It is ungrammatically expressed, since the words "occupied" and "for the trades or business" are separated by the words "as and" which have no grammatical connection with what follows, but it does purport to impose an obligation on the tenant to use and occupy the demised premises and permit them to be used and occupied for the specified trades or business only. For the landlord it is urged that the effect of it is to impose on the tenant a positive obligation to use and occupy every part of the demised premises and permit every part of the demised premises to be used and occupied for the trade or business specified and for no other purpose. If that were the right construction, then it follows that the tenant by using as a dwelling-house or as living accommodation those parts of the demised premises clearly adapted for such purposes would be committing a breach of covenant on which the landlord could bring proceedings for forfeiture. I cannot accept that construction of the language used, and in rejecting it I think I am entitled to take into account as part of the surrounding circumstances the design and the lay-out of the premises and the adaptation of the rear and upper parts of it as living accommodation. It is quite incredible to me that the parties to a lease of premises such as those would intend that the tenant should be subject to a covenant such as that. But in my view that is not the right construction. I think that the word "only" with which the covenant concludes means "and for no other trade or business"; I think that it is at least equally capable of that meaning as it is of the meaning "and for no other purpose." I think that the effect of the covenant is that the tenant undertakes to use the premises for the designated purpose but not for any other trade or business. So that the lease on its true construction is a lease of the premises under which the tenant is under an obligation to carry on the trade or business of a newsvendor, stationer and bookseller, toy merchant and tobacconist on the premises, and further, is under an obligation not to carry on any other trade or business on the premises, but the tenant is under no prohibition against living on the premises. If that construction is right, then one has the position that premises adapted for use as a shop with living accommodation over are let to a tenant with a provision to the effect that he is to carry on a specified trade or business on the premises but no other trade or business. That means, in my view, that so far as the terms of the lease are concerned the tenant is allowed without breach of covenant to live on the premises, and it would seem to me that the effect of that is that the premises were let as a dwelling-house notwithstanding that they were to be used in part for business purposes. I think that follows from s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939.

Accordingly, were the matter free from authority I, speaking for myself, would have little hesitation in holding that these premises were let as a separate dwelling, albeit they were to be used partly for business purposes, and consequently that they were premises to which the Acts applied. In a very careful and interesting argument on the part of the landlord it was pressed on us that it was not open to this court to come to that conclusion inasmuch as the matter was concluded in a contrary sense by authority binding on this court. We were referred to a number of authorities. I can begin with *Wolfe* v. *Hogan* (1) ([1949] 1 All E.R. 570). From that case it appeared that on the issue whether premises of which possession was sought by a landlord were "let as a separate dwelling", within the meaning of s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, it had to be shown by the tenant prima facie, that the two parties to the contract had on the one hand let, and on the other taken, the premises as a separate dwelling. That might be shown by the terms of the original letting, or it might be shown where the tenant had altered, subsequently to the original letting, the user of the premises to that of a separate dwelling, with the full knowledge of the landlord, by the landlord having accepted the changed position, so that the court had again to imply a mutual consensus of the two parties to the contract in regard to the user (whether or not there had been in the original letting a prohibition against that use). Where the terms of the tenancy provided for or contemplated the user of the premises for some particular purpose, that purpose would prima facie be the essential factor. Thus, if the premises were let for business purposes, the tenant could not claim that they had been converted into a dwelling-house merely because someone lived on the premises. If, however, the tenancy agreement contemplated no specified user, then the actual user of the premises at the time when possession was sought by the landlord, had to be considered. EVERSHED, L.J., referred to some observations of BANKES, L.J., in *Gidden* v. *Mills* (2) ([1925] 2 K.B. 713), and went on ([1949] 1 All E.R. at p. 574):

> "I think that the matter is more accurately stated by MR. MEGARRY in his book on the RENT ACTS (4th Edn.), and adopt as part of my judgment the brief summary of the position which I find on p. 19 of the book: 'Where the terms of the tenancy provide for or contemplate the use of the premises for some particular purpose, that purpose is the essential factor, not the nature of the premises or the actual use made of them. Thus, if the premises are let for business purposes, the tenant cannot claim that they have been converted into a dwelling-house merely because somebody lives on the premises '."

Continuing a little lower down with the quotation from that work, EVERSHED, L.J., went on (ibid.):

> "'If, however, the tenancy agreement contemplates no specified use, then the actual use at the time when possession is sought by the landlord must be considered '."

I will next refer to *Court* v. *Robinson* (3) ([1951] 1 All E.R. 209). That was a case where premises were let on lease with a covenant that the tenant should use them only for the purposes of a working men's social club, and it was held that the premises were let for business purposes and not as a separate dwelling. The user had been specified in the lease and there was no evidence that the contract in the lease had been superseded by a different contract between landlords and tenants providing that the premises should be used as a separate dwelling. Counsel had said that the premises were let under a certain lease, and ASQUITH, L.J. said this (ibid., at p. 212):

> "Undoubtedly, they were let at that time, but were they let as a dwelling-house ? Prima facie, when the lease itself specifies clearly a particular purpose for which, and, a fortiori, for which alone, the premises are to be used, for instance, for an office or for a barn, I should read that as excluding the notion that they were intended to be let, or were let as a dwelling-house, and it is unnecessary to look further as DENNING, L.J., said in *Wolfe* v. *Hogan* (1)."

Then ASQUITH, L.J., referred to his judgment in *Whitty* v. *Scott-Russell* (4) ([1950] 1 All E.R. 884) and said ([1951] 1 All E.R. at p. 212):

> "in . . . delivering the judgment of the court, I said ([1950] 1 All E.R. at p. 887): 'It is, however, argued in answer to this objection that the Court of Appeal, in certain of its decisions of which the most recent is *Wolfe* v. *Hogan* (1), has held that, where there has been a formal instrument of letting the terms of which express the purpose for which the premises were let, this is conclusive, and evidence of any other purpose derived from, e.g., the actual use, is excluded. In that case DENNING, L.J., used language which lends strong colour to such a contention when he said, in the opening sentences of his judgment ([1949] 1 All E.R. at p. 575): "In determining whether a house or part of a house is 'let as a dwelling' within the meaning of the

> Rent Acts, it is necessary to look at the purpose of the letting. If the lease contains an express provision as to the purpose of the letting, it is not necessary to look further, but, if there is no express provision, it is open to the court to look at the circumstances of the letting " '."

Then Asquith, L.J., said ([1951] 1 All E.R. at p. 213):

> " There are cases in which a covenant not to use the premises otherwise than as, say, an hotel or a lodging-house or a temperance hotel have been held not to be broken by the tenant sleeping there, nor the house thereby denuded of the protection of the Rent Restrictions Acts. Those cases, however, are clearly distinguishable, to my mind, from the present case because it may be difficult to conduct the business of an hotel efficiently without sleeping there, and in that case to sleep there would be to observe the covenant, not to violate it."

Those cases, I think, indicate sufficiently for the present purpose, the principles which the court has laid down, and the question is whether without departure from those principles it is open to the court to arrive at the conclusion which I have provisionally indicated. In my view it is. I do not think that it is necessary to deduce from any of the observations in these and other cases that a letting cannot be a letting of a dwelling-house in any case in which it is contemplated that any part of the premises should be used as business premises. In my view what the court has had in mind in the cases where lettings have been held to be business lettings is a stipulation in the lease which may be said to define the whole purpose of the letting or to preclude the use of the premises as a dwelling-house or to be inconsistent with such use. In my view the stipulation relied on here by the landlord does none of these things. In its application to premises of the kind here in question covenant (11) to my mind should be construed merely as providing that a particular trade or business shall be carried on and that no other trade or business shall be carried on; but it does not stipulate that this shall be the exclusive use of the premises, rather indicating that the business is to be carried on in the shop and that the tenant is free, if so minded, to live in the upper part of the premises.

I am fortified in this conclusion by the judgment of Lord Goddard, C.J., in the Divisional Court, in *R.* v. *Brighton & Area Rent Tribunal, Ex p. Slaughter* (5) ([1954] 1 All E.R. 423). In that case the premises were comparable to those in the present case. They consisted of a shop on the ground floor with a self-contained flat over it, and they were let for the first time as a whole for twenty-one years at a rent of £350 a year. The lease contained a covenant that the tenant would not permit the premises to be used otherwise than for the business of a greengrocer. The tenant carried on a greengrocer's business in the shop and lived in the flat above. On an application by the tenant under s. 1 (1) of the Landlord and Tenant (Rent Control) Act, 1949, to a rent tribunal to fix a reasonable standard rent for the premises, the landlords objected that, in view of the covenant in the lease, the premises were not a dwelling-house to which the Act applied and that the tribunal had no jurisdiction. It was held that if the covenant debarred the use of the whole of the premises as a dwelling-house so that the tenant could be restrained from such user, that was conclusive against the premises being a dwelling-house, but if it appeared that the premises were let for the purpose of the tenant living in them, provided he was not a service tenant, then they came within the Act. In that case, so long as the tenant carried on a greengrocer's business it was impossible to say that he was in breach of his covenant because he lived on the premises, and therefore, the tribunal had jurisdiction to fix the rent. Lord Goddard, C.J., said (ibid., at p. 426):

> " Provided that the tenant carries on a greengrocer's business, it would, in our opinion, be impossible, and, indeed, absurd, to say that he was in breach of his covenant because he lived on the premises. So to hold would

> mean that the whole of the upper part was sterilised, at least to the extent that the rooms could be used only as a store or for some such purpose, and not for that which they were designed although the tenant is under covenant to preserve and not to alter them."

Then LORD GODDARD, C.J., went on to refer to certain repairing covenants which in that case were inappropriate in some respects to business premises, and continued:

> " The premises are obviously let both for residential and shop purposes, and a shop is to be maintained there because they are in a shopping street and, if they were not used as such, their value would or might be impaired . . . Cases in which the demise was of a barn or a warehouse, but in which the lessee squatted, to use a convenient expression, or lived as a caretaker are not in pari materia with the present. To use a convenient phrase borrowed from the judgment of MOORE, L.J. ([1923] 2 I.R. 158 at p. 162) in *Burns* v. *Radcliffe* (6), ' . . . the nature of the business is not incompatible with the residence of the tenant . . . [and] I can see no reason for holding that the whole premises were not [his] dwelling-house '."

In my view there is nothing in that judgment which is in conflict with the other authorities to which I have referred. Nor do I think there is anything in those authorities which, fairly construed, precludes this court, in construing a lease for the purpose of deciding whether it effected a letting of a dwelling-house, from looking at the subject-matter of the lease, namely, the property let, and seeing whether it is or is not adapted for living purposes.

A subsidiary argument was advanced to the effect that the exigencies of a newsvendor's business were such that a newsvendor carrying on a business of the kind carried on by the tenants here must perforce live over the shop for the sake of the efficient carrying on of his business, and it was sought to equate this case in that respect with the cases of hotel keepers and so forth adverted to in a passage I have already quoted from the judgment of ASQUITH, L.J., in *Court* v. *Robinson* (3). In the view I take the tenants succeed on the main argument, and it is therefore not necessary to decide whether this subsidiary argument, if it had been essential to that success, would have sufficed to entitle them to hold their judgment.

I am much indebted to the careful judgment of the learned county court judge in which the authorities were more completely and effectively reviewed than I have been able to review them*, and for the reasons which I have endeavoured to give and those which he has given in his judgment, I think that he came to a right conclusion and that this appeal should be dismissed.

HODSON, L.J.: I entirely agree with the judgment which has just been delivered. I agree also with the learned county court judge in the construction which he places on the lease in question. Counsel for the landlord has argued before us that in some respects the courts have been fettered in construing such documents by their own decisions, in particular by a decision of this court in *Court* v. *Robinson* (3) ([1951] 1 All E.R. 209) to which my Lord has referred. I do not accept that submission. The courts could not, unless directly ordered to do so by statute, construe documents except by reference to surrounding circumstances, and that approach must necessarily be correct.

These premises were adapted not only as a shop but also for living accommodation, and that is the situation in which they were let, and those are the premises which are the subject-matter of the lease. I see no conflict at all in approach between that of the Court of Appeal in *Court* v. *Robinson* (3) and that of the Divisional Court in *R.* v. *Brighton & Area Rent Tribunal, Ex p. Slaughter* (5)

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* The following additional cases were referred to by the county court judge: *Whiteley* v. *Wilson* ([1952] 2 All E.R. 940), *Kitchen's Trustee* v. *Madders* ([1949] 2 All E.R. 1079), ***R.* v. *Folkestone Rent Tribunal, Ex p. Webb*** ([1954] 1 All E.R. 427).

([1954] 1 All E.R. 423) and I respectfully adopt the test which LORD GODDARD, C.J., expressed in the latter case in these words ([1954] 1 All E.R. at p. 425):

> "If the covenant debars the use of the whole of the premises for the purposes of a dwelling-house so that the tenant can be restrained from such user, that is conclusive against the premises being a dwelling-house apart from any assent to change of user."

It has to be remembered that what we are considering here is s. 3 (3) of the Act of 1939 which lays down that

> ". . . the application of the principal Acts . . . to any dwelling-house shall not be excluded by reason only that part of the premises is used for a shop or office or for business, trade or professional purposes . . ."

It has been decided by this court that the question is not whether the dominant user is for business or for a dwelling-house. That was decided in *Vickery* v. *Martin* (7) ([1944] 2 All E.R. 167). When one looks at the relevant covenants in this case and at the parcels one, I think, arrives necessarily at the conclusion that there is, as the county court judge held, no prohibition against the use of these premises for the purposes of a dwelling-house.

I need not repeat the features of the agreement to which my Lord has referred. I arrive at the same conclusion as he did and for the same reasons, and I also adopt the reasons which were given by the learned county court judge on this part of the case. It is unnecessary to express any opinion on the subsidiary question whether the tenant's business required his residence on the premises where I think the tenant is not on quite such secure ground. I agree that the appeal fails and should be dismissed.

DANCKWERTS, J.: I agree also and will add only a very few words. It seems to me that it would be useless and quite wrong to construe a lease without reference to the nature of the premises with which the lease was dealing. A lease is not intended to be either a mental exercise or an essay in literature; it is a practical document dealing with a practical situation. Therefore it is right to look and see what is the property with which the document is dealing. That is a very different matter from considering to what use the property may have been put at a subsequent date. When one looks at the property in the present case it is plain that it is a dwelling-house and a shop. There is a bathroom, there are bedrooms, there is a separate entrance to the upper part of the property. The house has been, so far as one can see, the same ever since it was built in about 1895, a dwelling-house with a shop. It is plain from the parcels to the lease that it is dealing with something more than a shop. That being so, it would be absurd to construe the covenant contained in para. (11) of the lessee's covenants as confining the use of the whole of the property to the use for a tobacconist's etc., shop and nothing else. That covenant, as it seems to me, is really a compendious covenant which is attempting to deal with more than one thing. It is attempting to prevent the use of the dwelling part of the premises for illegal or immoral purposes, and is designed to confine the business part of the premises to a particular trade. That being so there is nothing provided by the covenant to prevent one reaching what seems to me the sensible conclusion that the property is what it obviously is, a dwelling-house with a shop.

Appeal dismissed.

Solicitors: *Kenneth Brown, Baker, Baker* (for the landlord); *James & Charles Dodd* (for the tenants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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BEEVIS *v.* DAWSON AND OTHERS.

[QUEEN'S BENCH DIVISION (Finnemore, J., sitting with a jury), April 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, May 1, 1956.]

Jury—Trial by—Request by jury to stop case after close of plaintiff's case—No B *direction to jury by judge—Libel action—Plea of justification—Plaintiff not having given evidence but contemplating giving evidence in rebuttal.*

Libel—Justification—Jury returning verdict before conclusion of defence—Plaintiff intending to give evidence in rebuttal of justification—Whether jury entitled to intervene.

At the trial of a libel action in which the defendants pleaded justification C the plaintiff called his evidence but did not himself give evidence; before the defence had been concluded the jury asked to retire and were permitted by the court to do so. On their return they brought in a verdict in favour of the plaintiff and awarded him a farthing damages. It was contended by the plaintiff that his case was not closed since he was entitled to withhold his own evidence and to give it in rebuttal of the evidence to be given by the D defendants in support of their plea of justification, and that therefore the verdict ought not to be accepted, the jury ought to be discharged and a new trial ordered.

Held: the verdict, which on the facts was not unreasonable, must be accepted because

(i) as a matter of law the plaintiff's case had been closed and the jury E were entitled to return their verdict notwithstanding the fact that it was or might be open to the plaintiff to give his own evidence in rebuttal of the plea of justification (*Maclaren & Sons* v. *Davis* (1890), 6 T.L.R. 372, and *Browne* v. *Murray* (1825), Ry. & M. 254, considered);

(ii) there was no necessity for the judge to give a direction to the jury on their retirement where, as in the present case, the jury had heard the F plaintiff's case and had intervened only after his case had been concluded (*Hobbs* v. *Tinling, Hobbs* v. *Nottingham Journal,* [1929] 2 K.B. 1, distinguished).

[As to the conduct of a jury during the hearing of an action, see 19 HALSBURY'S LAWS (2nd Edn.) 313, para. 652; and for cases on the subject, see 30 DIGEST (Repl.) 267, 268, *312-318.*]

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Cases referred to:

(1) *Hobbs* v. *Tinling, Hobbs* v. *Nottingham Journal,* [1929] 2 K.B. 1; 98 L.J.K.B. 421; 141 L.T. 121; 30 Digest (Repl.) 267, *318.*
(2) *Alexander* v. *H. Burgoine & Sons, Ltd.,* [1939] 4 All E.R. 568; Digest Supp.
(3) *Maclaren & Sons* v. *Davis,* (1890), 6 T.L.R. 372; 30 Digest (Repl.) 281, *500.*
H (4) *Wright* v. *Willcox,* (1850), 9 C.B. 650; 19 L.J.C.P. 333; 15 L.T.O.S. 228; 137 E.R. 1047; 22 Digest (Repl.) 474, *5218.*
(5) *Browne* v. *Murray,* (1825), Ry. & M. 254; 171 E.R. 1012.
(6) *Rees* v. *Smith,* (1816), 2 Stark. 31; 171 E.R. 562.
(7) *De Freville* v. *Dill,* (1927), 43 T.L.R. 431; 30 Digest (Repl.) 267, *314.*

I **Action.**

The plaintiff, Frederick John Beevis, claimed damages for libel against the defendants, George John Dawson, Gilbert Alastair William Cockburn and Jasper Addis. Judgment for damages to be assessed at the trial of the action was entered against the third defendant before the hearing. On the trial of the action before the evidence for the defence had been completed, the jury retired and returned a verdict for the plaintiff and awarded a farthing damages against the first and second defendants. It was contended by the plaintiff that the verdict ought not to be accepted and that the jury ought to be discharged and a new trial ordered.

Leonard Caplan, Q.C., *N. C. Tapp* and *M. F. Gettleson* for the plaintiff.
J. F. F. Platts-Mills and *R. G. Freeman* for the defendants.

Cur. adv. vult.

May 1. **FINNEMORE, J.:** This case falls for decision on the verdict of the jury returned on the eighth day of the trial. The plaintiff, suing for libel, called his evidence and occupied some four and a half days in putting his case before the court; there was a day and a half opening address for the defence and some evidence called for the defence, and then on the eighth morning, when the court assembled, the jury asked, by unanimous request, that they might retire to their room to consider matters. Before that, and before counsel's address for the defence had been concluded, the jury were allowed, owing to a fortuitous break in the trial, to go to their room to discuss matters and asked, on their return to court, whether they could give a majority decision. They were told that they could not. That at least showed, I suppose, which way the wind was blowing. On the occasion of the eighth morning when they asked if they could go out, I raised the matter with counsel about the right of the jury to retire. Counsel for the plaintiff then said, as he was perfectly entitled to say, that he would prefer the jury to have waited for the end of the particular witness who was then in the box. Certain matters were then put to the jury, through me, about the witness who was then in the box, who was really a formal witness producing company files. There was a suggestion that those could be ignored altogether; and, after counsel for the plaintiff had made his point and counsel for the defence had made one, counsel for the plaintiff said that he thought it would be useful if they took the two files away with them. This does not in any way—and I am not using it for that purpose—absolve the court from its responsibility and its duty, but I am bound to say that my own impression was that no one was objecting at that stage to the jury retiring. They could only retire for one purpose, I should have thought. Nor did anybody ask for any direction to be given to the jury or for a further speech to be made. Certainly I was under the impression that their retirement and discussion were being acquiesced in. Before they came back finally, the jury asked whether, if they found the libel was justified in substance and in fact, they could find a verdict for the defendants without any damages at all. They were told by me in a written answer that they could, of course, find a verdict for the defendants completely, if and when they were satisfied that "the sting" of the libel had been justified. They came back with a plain indication that they had reached agreement; counsel raised the point that it might be dangerous to take their decision then, and a reference was made to *Hobbs* v. *Tinling*, *Hobbs* v. *Nottingham Journal* (1) ([1929] 2 K.B. 1), which will have to be referred to later on. It seemed to me that it was inevitable at that stage that everybody must know what decision the jury had reached. The jury, having been allowed by the court to retire, could not be told on their return after considering the matter that no one wanted to know what they had decided or what they had in mind and that the case must go on as it was before. They were, therefore, asked their decision. They said that they were unanimously of the opinion that the plaintiff ought to receive a farthing damages.

My duty at the moment is to deal with one question: whether or not the jury's verdict can be accepted. It is not for me (and I am not going to try) to give any detailed judgment on the case or to review in detail the evidence. That is not my province. I have to deal with the legal point which arises. Counsel for the defendants says that the jury's verdict should be accepted and the usual consequences follow, and counsel for the plaintiff argues strenuously that I ought to refuse to enter that verdict, discharge the jury and direct a new trial to take place. In this country we are very jealous of the rights of a jury and very loth for the court itself to interfere with the decisions on fact made by a jury. It is only in a very strong case indeed that the court will interfere. The jury decide the facts, not the court, and, to enable this court to refuse a verdict, it must, I think, be in a real sense a perverse verdict. If, as I think LORD HALSBURY once put it, reasonable men might find a verdict which has been found, no court has jurisdiction to disturb a decision of fact which the law has confided to juries, not judges. One reason, which is the issue in the present case, might be that the jury reached a decision without hearing all the evidence. Counsel for the defendants argued that normally a new trial is ordered, not by the court which hears the case, but by the Court of Appeal, under the provisions of R.S.C., Ord. 39, r. 1. There is one case in particular in which the court at the trial may refuse the jury's verdict and order a new trial: if the jury wrongly and prematurely give a decision, or indicate a strong view for one side before they have heard the full case, thereby showing that they could not have properly understood what they were supposed to do, and could not be trusted thereafter to come to a fair decision between the parties.

We have always recognised in this country the right of a jury to stop a case. When they have heard all the plaintiff's case, they can find for the defendant, but they cannot do it before the end of the plaintiff's case, any more than they can find for the plaintiff before the end of the defendant's case. That is the normal practice in our courts, and it is by no means unknown for a jury to intervene and say that they have heard enough of a certain case. It is always subject to the proviso that the decision to which they come is one which they could reasonably find on the evidence which has been given before them. Whether or not the court agrees with them is quite immaterial. Apart from the famous case that I will discuss later, my experience has been—and I do not think anyone argued the contrary—that, in those circumstances, it is not usual for the judge to give a summing-up or any special direction to the jury. The present case was unusual in this sense, that the verdict of the jury was a formal verdict for the plaintiff, given before the evidence for the defence had been concluded. Counsel for the defendants makes no complaint about that. Indeed, he could not, because he asked the jury to do that very thing. More than once in his opening address, counsel told the jury that they could stop the case if they had heard enough. He also indicated to them that they could, if they thought it right and proper, find for the plaintiff for a very small sum of money. I am afraid that we overlooked it at the time, but it is held not to be right for counsel in a civil case to tell a jury that they may stop the case. That was decided by *Alexander* v. *H. Burgoine & Sons, Ltd.* (2) ([1939] 4 All E.R. 568), where GODDARD, L.J., gave the decision. It was not, I think, always so, because in days gone by one certainly heard and read of cases where the suggestion had been made; but it is laid down in that case that it is for the judge, not counsel, to tell a jury. Counsel apologised for having said it, because he overlooked that case, but it is not a matter which invalidates the trial. The plaintiff's case had been concluded, and at the end of the evidence for the plaintiff, his counsel said, in the usual phrase used in these courts, " That is the plaintiff's case ". Up to that time, the plaintiff had not himself gone into the box to give any evidence. It was stated in *Maclaren & Sons* v. *Davis* (3) ((1890), 6 T.L.R. 372), to which I will refer later, by CAVE, J., that he had never heard of a plaintiff in a libel case who did not go into the box being awarded more than a farthing damages by the jury. Two main points were put forward by counsel for the plaintiff why, although he had not gone into the box to give his own evidence and although his case had been in that sense concluded, it was nevertheless wrong for the jury at that stage to stop the case and to return a verdict which, while nominally in his favour, was, of course, substantially not so.

The first argument was this: Where, as in the present case, there is a plea of justification, the plaintiff is able to reserve his evidence and to give it in rebuttal, if and when it becomes necessary, of evidence given by the defendant to prove the plea of justification. *Maclaren & Sons* v. *Davis* (3) was cited in support of that proposition, although there there was no plea of justification. It was a case in which the libel and its publication were admitted, but evidence was given, pursuant to a notice under R.S.C., Ord. 36, r. 37, in mitigation of damages. When Huddleston, B., who tried the case refused to allow the plaintiff to give evidence in rebuttal, his decision was reversed. There are many differences between that case and the present, though it does establish the principle that there may be cases in which it is right for the plaintiff, even in a libel case, to say: " I am not going into the box myself yet. I have proved the libel, or it has been admitted. You prove what you say against me and then, if it is necessary, if you put forward any evidence, I will give my evidence in rebuttal ". There was some argument whether that was an absolute right on the part of the plaintiff; although it was a matter subject to the discretion of the judge, which, of course, might include consideration of other issues which have to be decided. Cave, J., at the beginning of his judgment, referring to *Wright* v. *Willcox* (4) ((1850), 9 C.B. 650), said that that (6 T.L.R. at p. 373)

> " showed that it was in the discretion of the judge, subject to the reviewal of the court, to determine at what stage of the cause evidence might be produced."

Browne v. *Murray* (5) ((1825), Ry. & M. 254) was also cited to me. In that case Lord Abbott, C.J., certainly said in plain terms that a plaintiff could content himself with proof of the libel and leave it to the defendant to make out his justification. In the notes to that case other cases are referred to, and in *Rees* v. *Smith* (6) ((1816), 2 Stark. 31), Lord Ellenborough is reported as saying that the general rule was that (ibid., at p. 32):

> " when, by pleading or by means of notice, the defence was known, the counsel for the plaintiff was bound to open the whole case in chief, and could not proceed in parts; . . . that when it was known what the question in issue is, it must be met at once."

In the present case, of course, there were, as there must be, full particulars of justification, setting out what case the plaintiff has to meet, as distinct from the much wider case that was put in *Maclaren & Sons* v. *Davis* (3). However that may be, there are those authorities. No one was able to find in the books or otherwise any modern case where the plaintiff in a libel action had failed to go into the box as part of his own case. The fact that the plaintiff may give evidence in rebuttal does not mean that his case is not closed. When he has called his evidence and has said " That is my case ", that is the case on which he is asking the jury to decide, and that is the case on which he is asking the jury to give him damages.

In the present case, justification was not the only issue raised, and it had been argued that evidence given already in the plaintiff's own case might be thought to need his answer or explanation and, unanswered and unexplained, might have created a very unfavourable impression on the jury. Publication was in issue. The plaintiff's case was that the first defendant (who was, of course, the principal person) had entered on a campaign of dissemination of the anonymous letter which contained the libel. In fact, I think, at the most some four or five people, all close associates of the plaintiff and the first defendant, were concerned. There was plain evidence in the plaintiff's own case of some publication, especially to Mr. George Beevis, the plaintiff's brother, and to Miss Collins, his secretary. The circumstances of that were, perhaps, a little odd, because one witness, if not two witnesses, agreed that it was a very discreet and limited publication, and showing the letter to Mr. George Beevis and Miss Collins was accompanied by the statement by the first defendant that he did not bother about it and that he himself had had also at the same time an anonymous letter; and, still more odd perhaps, after this publication the first defendant sent a bottle of whisky to the plaintiff, who was in bed with influenza. Mr. George Beevis seems to have acquiesced in it and Miss Collins conveyed it, together with some advice that was suggested about taking it with hot milk. That had not been denied, though some challenge of it had been suggested.

There was another matter which may have been thought by the jury to be far more serious. A witness, Mr. Pyper, was called. He was one of the people to whom publication was alleged to have been made for which damages were claimed. Mr. Pyper's evidence was that he had deliberately asked for the letter to be shown to him, on the invitation or instructions of the plaintiff himself. In law, that could not be a publication; but it may be something more than that. If a plaintiff deliberately gets someone to go and get a document shown to him and then claims that that is a publication and claims damages on it, I am not sure that he can complain very much if people think that is not honest conduct. Obviously, if his legal advisers had known the true facts, they would not have dreamed of putting Mr. Pyper in the box as though he were an honest witness of an honest publication. The jury had before them, therefore, on the plaintiff's own case, this piece of what they may have considered deliberately inviting or inciting publication and then, not honestly or properly, claiming damages thereon. One might have thought that the plaintiff should have answered or explained that incident if he was really jealous to preserve and defend his own reputation. There was also the evidence of Mr. Hatton which required consideration. Mr. Hatton was a witness of whom the jury may have formed their own opinion, having seen and heard him and having heard his own description of some of his activities, at least on the tape recording machine. Mr. Hatton denied that he was what is commonly called maintaining this action, but, by the time the evidence had finished, it looked as though that is very much what he was doing, because he agreed that he had either found or guaranteed a sum of some £750, that he was seeing that the plaintiff " did not starve " and he also admitted that he had previously done a similar thing for the plaintiff to the extent of some £2,000 in another action in which he had been involved with somebody else. More than that, another witness, Mr. McLaglen, gave evidence that, on an occasion when Mr. Hatton and the plaintiff were together, Mr. Hatton said, boldly and plainly: " I am behind Fred in this. He need not worry about money. I am seeing him through ", and also said " We are all right " or words to that effect " because, on what we know about him, Dawson dare not go into the witness-box ". Those are matters on which I pass no judgment. I merely say: Can it be complained that a jury took the view that those were matters which ought to have been answered and dealt with by the plaintiff, if he wanted damages of any real amount, and that if they are unanswered and the jury accepted them, they showed that the gravest doubts must be cast on the plaintiff's bona fides in this particular action?

The legal point is this: Can the plaintiff avoid what otherwise would be the inevitable consequence by saying that as there was a plea of justification he was entitled to withhold his evidence and to give it in rebuttal of the evidence given in support of that plea? I do not think that he can. While he may be able to keep his evidence in regard to justification as evidence given in rebuttal, I think that he takes the risk that, on some other issue, he may never reach that stage because of the intervention of the jury.

Can it be said that the jury who take that view were acting unreasonably, or that the verdict they reach would be perverse? Evidence was given by the third defendant which, if accepted, cast a very different light on all these proceedings. Judgment had been signed against him while he was away elsewhere. He appeared to resent that, and he wrote a letter to the plaintiff offering to make him a statement. He wrote other letters after that, letters which the jury might have thought were rather sinister. In one which he wrote to the plaintiff's solicitors he said that the plaintiff would realise that his, the third defendant's, evidence would, in all likelihood, win the case for the plaintiff and without it he, the plaintiff, would stand very little chance indeed. He also said something similar to what Mr. Hatton had said, that the first defendant could not possibly survive cross-examination on the lines disclosed in his statement. Then he added, to make no mistake about the matter, that that would place the plaintiff under an obligation to him. There was another matter more important than that; that is, that the third defendant, in these very proceedings, had previously sworn an affidavit which was in flat contradiction to every important thing that he said in the witness-box in this court, and he himself said in the plainest terms that that was a false and perjured affidavit. It was said by counsel for the plaintiff that it was an unprecedented step, or something approaching it, to call the third defendant. It was certainly a very bold step; but could anybody be surprised if, having seen and heard that defendant, having known what he swore in his affidavit, and knowing what he wrote in his letters, the jury said that they were not going to rely on a single word that he had said to them? The importance of that evidence is that counsel for the plaintiff, quite rightly, if I may say so, at the end of the argument after verdict, pressed on me the alleged publication at Prunier's restaurant. It is enough to say that that publication depends, of course, on the evidence of the third defendant and his reliability.

The second argument, which is partly parallel with what I have called the first argument, is that in the present case no direction was given by the court to the jury when they retired, as there should have been. On the first point that I am deciding, I have plainly indicated that as a matter of law the plaintiff's case had been concluded and the jury, therefore, were entitled to say that they had heard enough and to come to a certain decision. I think that on the evidence, evidence which had been called by the plaintiff, they would have been entitled to say that they thought little or nothing of the bona fides of the plaintiff in bringing and pursuing this particular action, particularly having regard to the incident with regard to procuring the deliberate publication to Mr. Pyper and then claiming that as a basis of damages. The second point is: Allowing all that for the moment, if the jury go out to consider a case of this sort in these circumstances, they must receive a full and careful direction by the judge. My own experience, for what it is worth, has been that, where a jury has intimated that it has come to a certain decision and has heard all the evidence on the side against which they are likely to find, it is not the practice for the judge to say to the jury that before they retire they must listen to what he had to say to them. Against that has been cited, quite rightly, and pressed strongly, *Hobbs* v. *Tinling* (1). I gave no direction to the jury. There is no question about that. I did give them one warning. They had listened to a very long speech of counsel for the defendants, which indicated in a good deal of detail the evidence that he was going to call, and I did think it right to warn the jury that they must not act on that or, indeed, any speech; they must act only on evidence which had actually been called and proved before them in the witness-box.

The argument which counsel for the plaintiff developed that, in circumstances of this sort, there must be a full and careful direction by the judge, rests entirely on *Hobbs* v. *Tinling* (1). I do not think that it is the normal practice for a direction to be given if the jury stop the case at a proper point; that is, after the evidence in support of the plaintiff's case has been given to the jury. Obviously, if the case goes on, the jury must be directed on all the points mentioned by counsel for the plaintiff. *Hobbs* v. *Tinling* (1) is, I think, a special case, governed by one thing: that the jury intervened at what was plainly the wrong time to say that they wanted to find a verdict for the defendant before the plaintiff's case had been finished. That is where this argument is parallel to the argument on what I call the first point. That, on any showing, is wrong. The judge may do several things in those circumstances. He may discharge the jury altogether, on the ground that he cannot expect a fair result, and that is what AVORY, J., did in *De Freville* v. *Dill* (7) ((1927), 43 T.L.R. 431), where the jury found for the plaintiff before the defence had been finished. He may, if he thinks it right, continue the trial, subject to giving the jury, of course, a very careful direction.

Where, as in *Hobbs* v. *Tinling* (1), the jury tried to stop the case before the plaintiff's case was finished, it might reasonably be argued that the jury cannot have understood what they were doing, or that they were unfairly taking a line against the plaintiff when they obviously ought not to have done so, because they had not even heard his case. In those circumstances, what does the court do? SCRUTTON, L.J., put it ([1929] 2 K.B. at p. 24):

> " (1) He may, if he thinks this premature intervention renders it impossible for the trial to proceed with justice, discharge the jury and order a retrial [as in *De Freville* v. *Dill* (7)]. (2) If he thinks justice can still be done, he may inquire of the party whose case has not been completed if he desires to complete it, and that party has the right to complete his case, to re-examine any witness under cross-examination, to call any other evidence he desires, and to address the jury, if he desires . . . The judge is, in my opinion, bound to sum up to the jury sufficiently to make clear what are the issues they have to decide . . ."

and goes on about the particular facts of that case (ibid., at p. 25):

> " especially where the evidence largely consists of answers and complete or partial denials to the assertions of cross-examining counsel in the form of questions."

The same point is again emphasised later (ibid., at p. 33):

> " The grounds on which I think it right that a new trial should be granted are two . . . Secondly, and independently, that when the jury purported to decide against the plaintiff before his case was finished, they should have received a direction to listen to the re-examination, if any, and the speech of counsel for the plaintiff, and should then have been directed carefully as to the issues they had to try and the nature of the evidence they had listened to . . ."

That is applicable to a case where a jury has intervened prematurely and tried to find against a person before it has heard that person's case. I do not think that it applies to a case where they have heard the case for the plaintiff and intervene only after that case has been completed.

That is all that I propose to say now. There were many other points which were canvassed. There were other matters of evidence for the jury from the plaintiff's own case, through which I am not pretending to go. I have come to the conclusion that the jury were entitled to intervene in the way that they did. I do not think that it was incumbent, or necessary, on the court to give them any special direction, and I do not feel myself able to say that they came to a decision to which twelve reasonable people could not have come, having heard the evidence. That means that I ought to accept their verdict. There will be judgment against the first two defendants for a farthing, and an assessment of damages against the third, because there was a judgment given against him.

Judgment for the plaintiff.

Solicitors: *C. Butcher & Simon Burns* (for the plaintiff); *R. K. George* (for the first and second defendants).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

LEVER FINANCE, LTD. *v.* TRUSTEE OF PROPERTY OF NEEDLEMAN AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), April 11, 12, 26, 27, 1956.]

Mortgage -Power of leasing—Restriction—No power to lease without consent but lessee not concerned to see that consent given—Lease granted by mortgagor in possession without consent of mortgagee—Tenancy by estoppel.

Land Registration—Charge—Transfer—Powers of proprietor remaining in transferor until registration—Appointment of receiver—Land Registration Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 21), *s.* 33, *s.* 34.

By a lease dated Mar. 14, 1952, certain premises in London were let to N. and N. for a term of sixty-three years to commence on Dec. 25, 1951. On the same day they charged the property by way of legal mortgage to D.W. and F. and both the lease and the charge were registered on Mar. 29, 1952. Clause 8 of the charge provided: " The mortgagors shall not except with the consent in writing of the mortgagees exercise the powers of leasing . . . conferred by the Law of Property Act, 1925, on a mortgagor while in possession but it shall not be necessary to express such consent in any such lease . . . nor shall any lessee be concerned to see that any such consent has been given ".

On Feb. 23, 1953, the mortgagors without obtaining the consent of the mortgagees let the first floor of the premises for a term of twenty-one years to L. who went into possession, and he, on Mar. 24, 1954, having obtained the consent of the mortgagors, assigned his term to the second defendant. On Aug. 26, 1954, a second mortgage was executed in favour of the plaintiffs. On Mar. 23, 1955, the mortgagors gave notice to the second defendant authorising her to pay future rent to the plaintiffs who demanded the rent on that date and again on Mar. 31. On Mar. 23 the mortgagors committed an act of bankruptcy and on May 13 they were adjudicated bankrupt. On Apr. 19 the legal charge dated Mar. 14, 1952, was transferred to the plaintiffs who on Apr. 21 purported to appoint a receiver of the property; he on two occasions thereafter demanded payment of rent by the second defendant to him and, on June 29, gave a receipt for a quarter's rent. On July 10 the plaintiffs were registered as proprietors of the charge. On Oct. 31 the plaintiffs served a notice to quit on the mortgagors' trustee in bankruptcy, and subsequently took possession of all the premises save that part occupied by the second defendant. On a summons for possession,

Held: the plaintiffs' claim for possession against the second defendant failed because

(i) as cl. 8 of the charge dated Mar. 14, 1952, provided that a lessee should not be concerned to see whether the mortgagors had obtained the consent of the mortgagees to grant a lease, a lessee was entitled to assume that such consent had been given, and the mortgagees were estopped from denying that the lease had been granted with their consent; and

(ii) demand and receipt of rent by the receiver from the second defendant prior to July 10, 1955, was an unequivocal recognition of the existence of a tenancy by the plaintiffs since the person appointed receiver was their agent until then, as the statutory power to appoint a receiver remained by virtue of the Land Registration Act, 1925, s. 33 and s. 34, in the transferor of the legal charge until the plaintiffs were registered on July 10 as proprietors and accordingly the person appointed receiver was their agent until then.

Semble: as a receiver appointed by a mortgagee under the Law of Property Act, 1925, was by s. 109 (2), the agent of the mortgagor, such a receiver's receipt for rent would not create a tenancy by estoppel as against the mortgagee (see pp. 382, 383, post).

[As to a mortgagee's right to possession of mortgaged premises occupied by a tenant, see 23 Halsbury's Laws (2nd Edn.) 361, para. 538; and for cases on the mortgagee's right to possession, see 35 Digest 394-398, *1370-1404*.

As to a receiver appointed by a mortgagee being the agent of the mortgagor and the position of a receiver appointed otherwise than under the statutory power, see 23 Halsbury's Laws (2nd Edn.) 449, paras. 659, 660.

For the Land Registration Act, 1925, s. 33 and s. 34, see 20 Halsbury's Statutes (2nd Edn.) 973; and for the Law of Property Act, 1925, s. 109, see ibid., 673.]

Cases referred to:

(1) *Dudley & District Benefit Building Society* v. *Emerson*, [1949] 2 All E.R. 252; [1949] Ch. 707; [1949] L.J.R. 1441; 31 Digest (Repl.) 639, *7472*.

(2) *Corbett* v. *Plowden*, (1884), 25 Ch.D. 678; 54 L.J.Ch. 109; 50 L.T. 740; 35 Digest 337, *790*.

(3) *Public Trustee* v. *Lawrence*, [1912] 1 Ch. 789; 81 L.J.Ch. 436; 106 L.T. 791; 35 Digest 334, *767*.

(4) *Serjeant* v. *Nash, Field & Co.*, [1903] 2 K.B. 304; 72 L.J.K.B. 630; 89 L.T. 112; 18 Digest 265, *46*.

Adjourned Summons.

The plaintiffs, Lever Finance, Ltd., applied by originating summons under R.S.C., Ord. 55, r. 5a, for an order that the first defendant, the trustee in bankruptcy of Leslie Needleman and Harry Mark Needleman, deliver to the plaintiffs possession of the premises known as 142, Broadhurst Gardens, Hampstead, being premises charged by the said Leslie and Harry Needleman by way of legal mortgage under a charge dated Mar. 14, 1952, and made between them of the one part and Dowson, Wasbrough and Fisher of the other part.

The facts are stated in the judgment.

I. S. Richard for the plaintiffs.

The first defendant did not appear and was not represented.

P. M. H. Mottershead for the second defendant.

HARMAN, J.: This is an originating summons under R.S.C., Ord. 55, r. 5a, taken out by the mortgagee and asking for possession only. The first defendant is the trustee in the bankruptcy of Leslie Needleman and Harry Mark Needleman, who were mortgagors and went bankrupt in their firm name; their property has become vested in the trustee, who does not appear and has not opposed the order. The second defendant is one of the persons in occupation of the first floor flat of the mortgaged premises; the plaintiffs say that they have no connection, contractual or otherwise, with her, and that they are entitled to treat her as a trespasser. It is clear law that a mortgagee is not concerned in a case where he wishes to take possession with persons he may find on the premises unless they are there with his consent, because he is concerned only with the mortgagor. The modern authority for that proposition is *Dudley & District Benefit Building Society* v. *Emerson* (1) ([1949] 2 All E.R. 252), which was overlaid by questions under the Rent Restrictions Acts, and in which it was decided that those Acts had nothing to do with the matter and that the mortgagee might treat a person in occupation as a trespasser, even though he might in some circumstances have been protected by the Act. The statement quoted in the judgment of Sir Raymond Evershed, M.R. (ibid., at p. 255), is from the judgment of the Earl of Selborne, L.C., in *Corbett* v. *Plowden* (2) ((1884), 25 Ch.D. 678 at p. 681) in these words:

> "If a mortgagor left in possession grants a lease without the concurrence of the mortgagees (and for this purpose it makes no difference whether it is an equitable lease by an agreement under which possession is taken, or a legal lease by actual demise) the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor who granted

> it, the paramount title of the mortgagees may be asserted against both of them."

The mortgagees say that the second defendant has no title against them at all, and they may oust her from possession. The second defendant resists that on a number of grounds and the point taken before the master, he having jurisdiction to make an order himself, was that the actions of the plaintiffs as mortgagees had created a new tenancy between them and the second defendant by recognising her position as tenant in the house. The case has been adjourned to me on the master's decision.

The facts are these: The property, 142, Broadhurst Gardens, Hampstead, was let to the bankrupts by a lease dated Mar. 14, 1952, for a term of sixty-three years beginning on Dec. 25, 1951. On the same day they charged their interest in the property by way of legal mortgage in favour of Dowson, Wasbrough and Fisher, and both lease and charge were registered in the Land Registry on Mar. 29, 1952. The charge was by way of legal mortgage for payment to the mortgagees of £3,600 with interest at six per cent. and provided for paying off the capital by instalments. It operated as though it were a sub-demise. There were clauses for peppercorn rent and power to give notice to determine within seven days. Clause 8 is in these terms:

> "The mortgagors shall not except with the consent in writing of the mortgagees exercise the powers of leasing or of agreeing to lease or of accepting surrenders of leases conferred by the Law of Property Act, 1925, on a mortgagor while in possession but it shall not be necessary to express such consent in any such lease, agreement or surrender nor shall any lessee be concerned to see that any such consent has been given."

On Feb. 23, 1953, the mortgagors, without obtaining the leave of their mortgagees, let the first floor of the property on lease to one Lifschuetz for a term of twenty-one years. This document was not put on the register, being a twenty-one year term only in possession. Lifschuetz went into possession, and after a year, on Mar. 24, 1954, obtained from his landlords, the mortgagors, a licence to assign the term to the second defendant and her daughter and on the same day assigned his term to them jointly. On Aug. 26, 1954, a second mortgage of the property was executed in favour of the plaintiffs, Lever Finance, Ltd., who thus came into the picture for the first time. On Mar. 23, 1955, the mortgagors gave notice, which I must take to have been notice to the second defendant and her daughter, authorising them to pay future rent to the plaintiffs. As it now turns out, it was on that same day that the bankrupts, the mortgagors, committed an act of bankruptcy which eventually resulted in their adjudication on May 13, 1955. I do not know what the act of bankruptcy was. On Mar. 23 the plaintiffs demanded rent of the second defendant. They did that under the authority given on that day by the mortgagors; and they made a similar demand on Mar. 31. On Apr. 19, 1955, the legal charge was transferred to the plaintiffs, who thus became both first and second mortgagees; and they immediately thereafter, on Apr. 21, appointed a receiver, acting in purported exercise of their powers under the Law of Property Act, 1925. The receiver, on May 5, demanded payment of rent to him, and the same thing happened on June 22. On June 29 he gave a receipt for a quarter's rent to the second defendant. Thereafter, on July 10 the plaintiffs became registered as proprietors of the legal charge. There was a further demand by the receiver for rent on Sept. 19 and a further receipt from him at Michaelmas. Notwithstanding that, on Oct. 31 notice to quit was served on the bankrupts or their trustee (I do not know which) and the originating summons was issued on Nov. 16. It is for the plaintiffs to prove their case even as against the first defendant, who is in default; but I believe it to be a fact (although I do not think it is in evidence) that the plaintiffs have in fact recovered or taken possession as against the trustee in bankruptcy of all except the first floor of the house, which is in the occupation of the second defendant and her daughter.

The first point now taken arises out of the form of cl. 8 of the legal charge, a form that I have never seen before. It starts by excluding in plain terms the mortgagors' statutory power of leasing*, which, it will be remembered, is a power of leasing for fifty years in a case of this sort. If that were all it would be clear that the mortgagors could create no estate in the property by a lease good against their mortgagees without the mortgagees' consent. Further, it is clear that the mortgagors, in creating the lease of Feb. 23, 1953, did not obtain consent. The last three lines of the clause, however, contain these strange provisions:

> " but it shall not be necessary to express such consent in any such lease, agreement or surrender "

—that is merely a matter of form; then come the important words—

> " nor shall any lessee be concerned to see that any such consent has been given."

It is argued that the result, so far as any lessee is concerned, is to free the mortgagors from the restrictions contained in the earlier part of the clause. It is said that it may be a breach by the mortgagors of the terms of the mortgage deed as between them and the mortgagees which may give some rights to the mortgagees against them, but that they can, having regard to those words, create a good lease. In support of that proposition *Public Trustee* v. *Lawrence* (3) ([1912] 1 Ch. 789), was cited. The mortgage in that case contained an extension of the mortgagors' statutory power of leasing giving them a power to lease for any term not exceeding one thousand years, with a proviso that a counterpart of any such lease, duly executed by the lessee, be delivered to the mortgagees within a month, and providing that the consent thereto of the mortgagees should not be required. There must be imposed on that, having regard to what Swinfen Eady, J., said (ibid., at p. 792) the provision in s. 18 (11) of the Conveyancing Act, 1881†, which dealt with such deeds:

> " but the lessee shall not be concerned to see that this provision is complied with."

It was held that the lease under the extended power was valid, even if no counterpart was delivered. There there was the requisite power in the mortgagors, which was, as the judge must have held, not cut down by the proviso which bound the mortgagors to deliver a counterpart in due course but absolved the lessee from the mortgagors from being concerned to see that that was done. It seems clear that in such a case there was not any difficulty in coming to the conclusion that the lease as between the mortgagee and the person who had taken was a good one in spite of the mortgagors' default. Swinfen Eady, J., said (ibid., at p. 793):

> " The result is that failure to deliver a counterpart to the mortgagees would not invalidate the lease although it would cause the statutory power

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* See the Law of Property Act, 1925, s. 99 (1), (3) (i).

† The Conveyancing Act, 1881, s. 18, which has been repealed, provided as follows:—
" (11) In case of a lease by a mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with . . .

" (14) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exercisable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects and consequences, unless a contrary intention is expressed in the mortgage deed."

In *Public Trustee* v. *Lawrence* (3) Swinfen Eady, J., held that no contrary intention was expressed in the mortgage deed (see [1912] 1 Ch. at p. 793).

> of sale to become immediately exercisable under s. 20, cl. iii, of the same Act."

In the present case the position seems to me to be radically different. The power of leasing is excluded by the earlier part of cl. 8 of the charge. Therefore the mortgagors had no power to grant a lease valid against the mortgagees. The clause, however, provided that the lessee should not be concerned to see whether any such consent, as is mentioned in the clause, had been given. It does seem to me to follow that, although there was no power in the mortgagors to grant a lease, the lessee, having been expressly absolved by the mortgagee from seeing that such a consent had been given, was entitled to assume that it had. In my judgment that operated by way of estoppel against the mortgagees, who could not later say: " It is quite true that you have not to be concerned to see that any such consent has been given, and we have expressly said that you have not; nevertheless, as a matter of fact, there was no consent and therefore we are going to treat the lease as void ". The lessee on the contrary could say: " As you have represented that I need not inquire, that is equivalent to saying that I can assume that everything is in order. I having entered into possession in reliance on that representation you cannot be heard to say that you did not give consent ". This is a novel point arising from a form of words which though to be found in another connection both in the Conveyancing Act, 1881, and the Law of Property Act, 1925*, has not, so far as I know, previously been used as it is here. In my judgment this is a good answer to the mortgagees' claim for possession, for the tenant can say that she is in possession under a lease for twenty-one years which the plaintiffs are estopped from denying was granted with their consent. That is the ground of my decision; but a great many other points were taken before me, and I must deal with them, because I may be wrong in my decision on the point which I have just said is a novelty.

It was said, first, that the demand and receipt by the receiver of rent was a recognition by the mortgagees that the second defendant was properly there as a tenant and thus of a new tenancy. The retort to that was that by s. 109 (2) of the Law of Property Act, 1925, a receiver is made the agent not of the mortgagee but of the mortgagor, and therefore receipt of money by a receiver is not a recognition by the mortgagee of the tenant's position. There must be some clear authority on that subject; but I have found it very hard to find it. *Serjeant* v. *Nash, Field & Co.* (4) ([1903] 2 K.B. 304), is cited in the text-books such as CARSON'S REAL PROPERTY STATUTES (3rd Edn.), as authority for the proposition that receipts by a receiver are not a recognition of a new tenancy. In that book, at p. 703, it is said:

> " . . . the payment of rent to such receiver by the occupying tenant did not under the circumstances create a tenancy by estoppel as between the tenant and the mortgagee."

For that proposition this case is cited. Having looked at the case, I think it is a very unsatisfactory authority for that proposition. It was argued on the other side that, although under s. 109 (2) the receiver is made the agent of the mortgagor, he does not cease thereby to be the agent of the mortgagee. I would not accept that proposition. The statute makes the mortgagor solely responsible for his receipts, and it seems to me that the purpose of s. 109 (2) is to create this position, which used to be created by specific clauses in the mortgage deed, that the receiver shall not be the agent of the mortgagee but shall be deemed, so to speak, to be the agent of the mortgagor. In my judgment, a receiver under the Act is such an agent, and, although he may use the mortgagee's name for certain purposes, he is not, by virtue of the statute, the mortgagee's agent. Therefore, I think there is a good deal to be said for the view that the receipt of rent by a receiver under the Act does not create a tenancy by estoppel as against the mortgagee.

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* See the Conveyancing Act, 1881, s. 18 (11) (footnote p. 381, ante), and the Law of Property Act, 1925, s. 99 (11); 20 HALSBURY'S STATUTES (2nd Edn.) 646.

This case contains another complication, in that the appointment of the receiver was made on Apr. 21, 1955, two days after the transfer of the charge to the plaintiffs. They did not, however, become the registered proprietors of the charge until July 10, and it is said, therefore, that they could not exercise statutory powers to appoint a receiver until the latter date. For that proposition s. 33 and s. 34 of the Land Registration Act, 1925, were relied on. Section 33 says:

> " (1) The proprietor of any registered charge may, in the prescribed manner, transfer the charge to another person as proprietor.
>
> " (2) The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the charge transferred, but the transferor shall be deemed to remain proprietor of the charge until the name of the transferee is entered on the register in respect thereof."

Section 34 (1) says:

> " Subject to any entry on the register to the contrary, the proprietor of a charge shall have and may exercise all the powers conferred by law on the owner of a legal mortgage."

I think that justifies the proposition for which it was cited, namely that, until the transfer is completed by registration, the statutory powers remain in the person deemed to be the proprietor, namely, the person whose name is on the register; and therefore until July 10, when the plaintiffs were registered, they were not in a position to exercise statutory powers. That being so, they appointed a receiver not under the Act, but merely like any other person who appoints an agent to do something for him, and the receiver was their agent; and if, as their agent, he demanded, as he did, and collected, as he did, two quarters' rent, that is an unequivocal recognition of the existence of the tenancy. So on that ground also I think that the second defendant would be entitled to resist this claim. That would not necessarily mean recognition of the twenty-one years' lease; it might only set up a yearly tenancy; but it would be enough to answer the claim made in the originating summons.

There was one other ground which I think I should mention. It was based on the fact that the date at which the direction was first given to pay rent to the plaintiffs was the same as that on which the act of bankruptcy of the mortgagors was committed, namely, Mar. 23, 1955. My attention was called to s. 110 (1) of the Law of Property Act, 1925, which provides:

> " Where the statutory or express power for a mortgagee either to sell or to appoint a receiver is made exercisable by reason of the mortgagor committing an act of bankruptcy or being adjudged a bankrupt, such power shall not be exercised only on account of the act of bankruptcy or adjudication, without the leave of the court."

It was said that the proper inference to draw was that the receiver was appointed by reason of the commission of an act of bankruptcy, and as no leave of the court was obtained, as admittedly it was not, the appointment was a bad one. I have not the evidence to adjudicate on that matter. It will be observed that the section says that must be the only reason for the exercise of the power. I cannot possibly conclude, on any evidence before me, that, even if that were one of the reasons, it was the only reason. Therefore, I should not have been willing to accede to that submission.

Accordingly, I decide this case on the ground that there is a good lease by estoppel as between the mortgagees and the second defendant. I should also have been prepared to dismiss the summons on the other point, namely, that there was a recognition of the second defendant's tenancy which created a new relationship of landlord and tenant between her and the mortgagees which would be enough, the tenancy not having been determined, to answer the claim for possession, which alone is the subject-matter of the action.

Summons dismissed.

Solicitors: *Tringhams* (for the plaintiffs); *A. L. Bryden & Williams* (for the second defendant).

[*Reported by* Philippa Price, *Barrister-at-Law.*]

ASHDOWN *v.* SAMUEL WILLIAMS & SONS, LTD. AND ANOTHER.

[Queen's Bench Division (Havers, J.), April 10, 11, 12, 18, 1956.]

Licensee—Negligence—Licensor excluding liability—Notice on land purporting to exclude liability—Knowledge of licensee of existence of notice but allegation of ignorance of its terms—Whether liability of licensor for negligence excluded.

Master and Servant—Duty of master—Access to place of work over private land of another person—Duty to warn servant of known dangers existing on authorised route.

The first defendants owned and controlled a large dock estate, part of which was occupied by the second defendants under a lease granted to them by the first defendants in 1927. As access to the second defendants' premises could be obtained only across land retained and occupied by the first defendants, the second defendants, by the lease, were granted a right of way for all purposes over a specified route across the first defendants' land. The lease also contained a covenant by the first defendants to haul, at least once a day, railway wagons between the second defendants' premises and the railway station as the second defendants should require. Over a long period, to the knowledge of the first defendants and without any objection on their part, the second defendants' employees had used not only the route over which the right of way had been granted (referred to hereinafter as the "long route"), but also a shorter route, which crossed a curving railway track near the side entrance to the second defendants' premises. In various parts of the dock estate, including a point visible from the short route, the first defendants had put up notices purporting to exclude any liability that might attach to them by reason of any accident on the estate, and stating that persons were only allowed on the estate at their own risk. From April, 1948, to Sept. 8, 1948, the plaintiff was employed by the second defendants as a canteen worker. When she was engaged, the second defendants' manager showed her the short route and told her that she could use it. Thereafter she used sometimes one route and sometimes the other. She had seen one of the warning notices put up by the first defendants but had read only the first few lines of it. On the morning of Sept. 8, as the plaintiff was proceeding to her work by way of the short route, she saw three trucks standing on the railway track near the second defendants' premises. Fly-shunting operations were being carried out by the first defendants' employees, but the plaintiff did not realise that, as, owing to the curve in the railway track, she could not see the engine. No warning was given and no look-out was kept. As the plaintiff was about to cross the track, the trucks were shunted forward, and the plaintiff was knocked down and seriously injured. In an action against both defendants for damages for personal injuries,

Held: (i) the first defendants were not liable to the plaintiff because, although she was their licensee on their land at the time of the accident, she was bound by the terms of the warning notice since, even if she had not read those terms, she was aware of the existence of the notice and had good reason to believe that the statements on it were intended to convey to her the relative rights of herself and the first defendants as regards her user of the first defendants' land, and accordingly liability of the first defendants for their own or their servants' negligence was excluded.

Principle in *Parker* v. *South Eastern Ry. Co.* ((1877), 2 C.P.D. 416) applied.

(ii) the second defendants were liable to the plaintiff for negligence in that, having assented to her using the short route and being aware of the dangers which she might incur through using it, they failed to warn her of them and their failure to warn her was the cause of her being injured; but the plaintiff was guilty of contributory negligence and, her responsibility for the accident being one-fifth, the second defendants' liability would be proportionally reduced.

Per Curiam: where an employee's place of work abuts on a public highway . . . the duty of the employer to the workman does not begin until the workman has arrived at the entrance to his place of work (see p. 391, letter B, post). Where an employer's place of work is surrounded by another person's private land and there is a right of way over it which the employer intends his employees to use, he is under a general duty to take reasonable care to see that that way is reasonably safe for his employees to use (see p. 391, letters C to E, post). Where an employer consents to his employees using a route over the private land of another person, not being the route along which the employer has a right of way, the employer is under a duty to take reasonable care that the route which he has consented to his employees using is reasonably safe (see p. 391, letter I, post).

[As to occupiers' duties to licensees, see 23 Halsbury's Laws (2nd Edn.) 609-612, paras. 859-863; and for cases on the subject, see 36 Digest (Repl.) 63-69, *345-374*, and Supplements.

As to the liability of the master in case of accident to the servant, see 22 Halsbury's Laws (2nd Edn.) 187-189, paras. 313, 314.]

Cases referred to:

(1) *Parker* v. *South Eastern Ry. Co.*, *Gabell* v. *South Eastern Ry. Co.*, (1877), 2 C.P.D. 416; 46 L.J.Q.B. 768; 36 L.T. 540; 41 J.P. 644; 8 Digest (Repl.) 141, *909*.

(2) *Priestley* v. *Fowler*, (1837), 3 M. & W. 1; Murp. & H. 305; 7 L.J.Ex. 42; 150 E.R. 1030; 34 Digest 202, *1647*.

(3) *General Cleaning Contractors, Ltd.* v. *Christmas*, [1952] 2 All E.R. 1110; [1953] A.C. 180; 3rd Digest Supp.

(4) *Davidson* v. *Handley Page, Ltd.*, [1945] 1 All E.R. 235; 114 L.J.K.B. 81; 172 L.T. 138; 2nd Digest Supp.

Action.

The plaintiff, Violet Ashdown, claimed damages against the first defendants, Samuel Williams & Sons, Ltd., and the second defendants, Wagon Repairs, Ltd., for personal injuries and consequential loss and suffering due to the negligence of the defendants, or of one of them, or of their respective servants or agents.

The first defendants, who carried on the business of wharfingers, mechanical engineers and contractors, owned and controlled a large dock estate situated between the main London and Tilbury railway line and the River Thames at Tilbury, being south of Dagenham Dock station. Some parts of the estate were retained in the occupation of the first defendants, and other parts were let to tenants, among whom were the second defendants. On the estate were private roads, giving access to various parts of the estate, and also several railway sidings and a large number of railway lines, which intersected the estate and crossed the private roads at several points. At various times of the day shunting operations took place, trucks being shunted over different parts of the lines into the sidings. One of the private roads was known as Chequers Lane. This road ran southward from a railway crossing at Dagenham Dock station, and practically through the centre of the estate.

The second defendants were the tenants of the first defendants under a lease, dated July 8, 1927, for a term of forty-two years from Mar. 25, 1927. As access to the second defendants' premises was obtainable only across land forming part of the first defendants' estate, there was demised by the lease, not only the plot of land, but also a right of way, at all times and for all purposes, for the second defendants, their servants, and others having business with them, over Chequers Lane and another way which ran eastward from Chequers Lane, at some considerable distance south of Dagenham Dock station, and led to the main entrance of the second defendants' premises. The lease also contained a covenant by the first defendants to haul railway wagons to and from the station during working hours at least once a day as the second defendants should require, the second defendants paying for the haulage.

In addition to the route (referred to hereinafter as " the long route ") over which the second defendants were granted the right of way, access to the second defendants' premises was obtainable by another route (referred to hereinafter as " the short route ") over land which had been retained in the occupation of the first defendants. This route branched eastward from Chequers Lane almost immediately south of Dagenham Dock station and led to the side entrance of the second defendants' premises. Immediately after leaving Chequers Lane the route passed through a coalyard, and, shortly before reaching the second defendants' premises, it crossed a curving railway track, the inner side of the curve being the side nearer to the second defendants' premises. Although the second defendants had not been granted a right of way over this route, they and their employees had, to the knowledge of the first defendants, used it as an alternative route since 1939, and perhaps earlier, and the first defendants had never objected to their doing so. The first defendants had erected a number of warning notices at various parts of the estate, and, at the material time, there was a notice in Chequers Lane at a point (referred to hereinafter as " A"), north of where the short route to the second defendants' premises joined Chequers Lane. There was also another notice in Chequers Lane at a point (referred to hereinafter as " B ") slightly south of point " A ". The notice at point " A " was erected on a board three feet high and mounted at such a height that the bottom of the board was eight feet three inches above the ground. The notice could be seen by anyone using the short route, and was decipherable from the ground. It was headed " Notice and Warning ", in capital letters, and there followed these words:

> " This property is private property. Every person, whether an invitee or otherwise, whilst on the said property is there entirely at his own risk and must be deemed to take the said property with everything thereon as he finds it with notice of the nature, condition and state thereof and he shall not have or make any claim for injury or damage against Messrs. Samuel Williams & Sons, Ltd., howsoever such injury and/or damage may be occasioned, or any of their assigns, or their respective lessees or tenants, or their respective servants agents or workmen whether or not such injury or damage is in any way whatsoever due to any negligent act, breach of duty, default and/or omission on the part of Messrs. Samuel Williams & Sons, Ltd., and/or any of their assigns or their respective lessees or tenants or their respective servants agents or workmen. All persons are only allowed to be on the said property upon the distinct understanding that they do so entirely at their own risk."

At the foot of the notice was written: " Samuel Williams & Sons, Ltd. W. J. Crafter, Secretary ".

In April, 1948, the plaintiff went to the second defendants' premises, by way of the long route, to seek employment, was interviewed by Mr. Dear, the second defendants' manager, and was engaged, as a part-time employee, to clean the offices and to serve in the canteen. At the end of the interview Mr. Dear pointed out the short route to the plaintiff and told her that she would be entitled to use it. Thereafter, on her way to and from the second defendants' premises, the plaintiff used either of the routes as she chose. On the morning of Sept. 8, 1948, she took the short route on her way to work. As she approached the curved railway track near the second defendants' side entrance, she saw that there were three trucks on the line, one of them being exactly opposite to the side entrance. She did not see any engine, nor could she see anyone in charge of the trucks. Fly-shunting operations were, in fact, being carried out by employees of the first defendants. This operation involved running two trucks into the three stationary ones, with the inevitable result that the stationary trucks would be pushed forward some distance. Owing to the curve in the railway track, the plaintiff did not realise that this operation was taking place, and, partly for the same reason, neither the engine driver, nor the shunter, nor the points-boy saw the plaintiff or knew that she was near the track. No whistle was sounded, no look-out was kept, and no warning was given. As the plaintiff was about to cross the track, the stationary trucks were shunted back and the buffer of the leading truck caught her on the side and knocked her over. Her right hand and foot were caught under the truck, which passed over them, and she was seriously injured. The third and fifth fingers of her right hand had to be amputated, and there was now a twenty-five per cent. loss of function of her right hand. All the toes of her right foot were severely crushed and had to be amputated, and the loss of function in regard to the right foot was now fifty per cent. She also suffered from traumatic neurosis as a result of the injuries and the treatment which she had to undergo. She was now about fifty-three years of age, and had been a widow since 1950.

By her statement of claim the plaintiff alleged that the second defendants, their servants or agents were negligent in that (a) they expressly or impliedly assented to the use by the plaintiff of the " short route ", the dangers whereof were or ought to have been known to them; and (b) they failed to provide and enforce the use by their servants of a safe route to their premises. She further alleged that the first defendants, their servants or agents were negligent in that they failed (a) to keep any proper look-out, (b) to give any or any sufficient warning of the approach of the trucks, and (c) to provide any or any adequate supervision of the fly-shunting operation. Both the first defendants and the second defendants denied liability and alleged negligence on the part of the plaintiff. The first defendants alleged, alternatively, that any use made by the plaintiff of the first defendants' land for her own purpose was subject to the terms of the warning notices at points " A " and " B ". At the trial of the action the plaintiff said that she had read the first three or four lines of the warning notice at point " A ", that she could have read the rest if she had wanted to, and that she had not seen the notice at point " B ".

R. F. Levy, Q.C., and *N. N. McKinnon* for the plaintiff.

Geoffrey Lawrence, Q.C., and *D. P. Croom-Johnson* for the first defendants, Samuel Williams & Sons, Ltd.

Marven Everett, Q.C., and *G. R. F. Morris* for the second defendants, Wagon Repairs, Ltd.

Cur. adv. vult.

Apr. 18. **HAVERS, J.**, having reviewed the evidence and stated the facts, continued: The first question which I have to decide is: What was the status, in law, of the plaintiff at the time when she sustained the accident ? In view of the long time during which the employees of the second defendants have used the short-cut, without any sort of objection or protest from the first defendants, and with their knowledge, I do not think that there can be any doubt that the plaintiff was, as were other employees of the second defendants who used this short-cut, a licensee of the first defendants. Then the difficult question arises: What were the terms of that licence ? On that question there has been an acute controversy between the parties.

With regard to the facts, I am satisfied that the plaintiff did see the notice at " A ", and that she saw the words " Notice and Warning." I am also satisfied that she only read the first few lines of the notice. I am satisfied that she knew that the notice at " A " referred to the dock estate, and concerned her and others who were walking about the coalyard. I am satisfied that she knew from the notice that she was there, on this land of the first defendants, at her own risk; and I am satisfied that the remainder of the notice, which she did not read, was clearly legible, and could have been read by her if she had wanted to do so.

Counsel for the plaintiff admitted that, in so far as she read this notice, she would be bound by it; but he contended generally that the first part of the notice only referred to the first part of the statutory conditions and terms, and that in so far as she did not read the notice which dealt with the question of negligence she was not bound by it.

There seems to be no clear authority dealing with a situation like this—with regard to the extent to which a person who is a licensee on the land of another, and who sees a large notice board which she realises is a notice relating to her and her user of the land, is bound by the terms of the notice, if she, for some reason or another (either intentionally or negligently), does not read the rest of the terms. My attention was called to *Parker* v. *South Eastern Ry. Co.*, *Gabell* v. *South Eastern Ry. Co.* (1) ((1877), 2 C.P.D. 416). That was a case of contract, where a cloak-room ticket had been handed to a person who had deposited articles at the cloak-room in a railway station. The headnote reads:

> " On the deposit of articles at the cloak-room at a railway station, a charge is made of 2d. for each, and the depositor receives a ticket, on the face of which are printed the times of opening and closing the cloak-room and the words ' See back,' and on the back there is a notice that the company will not be responsible for any package exceeding £10. A placard upon which is printed in legible characters the same condition is also hung up in the cloak-room. The plaintiff deposited his bag, of value exceeding £10, in the defendants' cloak-room, paid 2d., and received a ticket. The bag was lost or stolen. In an action to recover its value the plaintiff swore that he took the ticket without reading it, imagining it to be only a receipt for the money paid for the deposit of the article, or as evidence that the company had received the article, that he did not read the condition at the back of the ticket, nor did he see the notice hung up in the cloak-room. The judge left two questions to the jury,—1. Did the plaintiff read or was he aware of the special condition upon which the article was deposited ? 2. Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or to make himself aware of the condition ? The jury answered both the questions in the negative, and judgment was directed for the plaintiff."

There are certain passages in the judgments of MELLISH, L.J., and of BAGGALLAY, L.J., to which my attention was directed. In the judgment of MELLISH, L.J., there appears this passage (2 C.P.D. at p. 422):

> " Now the question we have to consider is whether the railway company were entitled to assume that a person depositing luggage, and receiving a ticket in such a way that he could see that some writing was printed on it, would understand that the writing contained the conditions of contract, and this seems to me to depend upon whether people in general would in fact, and naturally, draw that inference. The railway company, as it seems to me, must be entitled to make some assumptions respecting the person who deposits luggage with them: I think they are entitled to assume that he can read, and that he understands the English language, and that he pays

> such attention to what he is about as may be reasonably expected from a person in such a transaction as that of depositing luggage in a cloak-room. The railway company must, however, take mankind as they find them, and if what they do is sufficient to inform people in general that the ticket contains conditions, I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness. But if what the railway company do is not sufficient to convey to the minds of people in general that the ticket contains conditions, then they have received goods on deposit without obtaining the consent of the persons depositing them to the conditions limiting their liability. I am of opinion, therefore, that the proper direction to leave to the jury in these cases is, that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions."

MELLISH, L.J., went on to say that the real question to which the attention of the jury ought to have been directed was whether the railway company did what was reasonably sufficient to give the plaintiff notice of the conditions.

In the judgment of BAGGALLAY, L.J., there appears this passage (ibid., at p. 425):

> "The question then remains whether the plaintiffs were respectively aware, or ought to be treated as aware, of the intention of the company thus to modify the effect of the ordinary contract. Now as regards each of the plaintiffs, if at the time when he accepted the ticket, he, either by actual examination of it, or by reason of previous experience, or from any other cause, was aware of the terms or purport or effect of the endorsed conditions, it can hardly be doubted that he became bound by them. I think also that he would be equally bound if he was aware or had good reason to believe that there were upon the ticket statements intended to affect the relative rights of himself and the company, but intentionally or negligently abstained from ascertaining whether there were any such, or from making himself acquainted with their purport. But I do not think that in the absence of any such knowledge or information, or good reason for belief, he was under any obligation to examine the ticket with the view of ascertaining whether there were any such statements or conditions upon it."

I was told that there was no other authority which the industry and the research of learned counsel engaged in this case have been able to discover, which would assist me on this point; and, therefore, I have to deal with the matter on principle, and with the assistance of *Parker* v. *South Eastern Ry. Co.* (1), which is an authority relating to a contract where a ticket was handed to one of the contracting parties, whereas the present case is not one of contract, but a case of licence. No document was handed to the plaintiff, and everything depends on the terms of this particular notice.

I think that, in principle, what the Court of Appeal held in *Parker* v. *South Eastern Ry. Co.* (1) also applies to a case such as this—a case of licence. I hold that, in so far as the plaintiff did actually read the terms of the notice, she is clearly bound by those terms. Secondly, I hold that the fact that she left the rest unread, when she could have read it, does not avail her. I find that she was aware, or had good reason to believe that there were on the notice board statements intended to convey to her the relative rights of herself and the first defendants as regards her user of the land; and I hold that, if she intentionally or negligently refrained from ascertaining whether there were such statements, or from acquainting herself with their purport, she is bound as equally as if she read them. I hold, therefore, that she was a licensee on the terms of the notice which was stationed at "A". It follows that, if the first defendants were guilty of negligence, that is a defence. Another way of putting it is, that, the plaintiff being bound by the terms of the notice, they were not under the duty which they would otherwise have been under, as a licensor to a licensee.

With regard to the notice at " B ", I am not satisfied that the plaintiff actually saw that notice. On the other hand, applying the principle of *Parker* v. *South Eastern Ry. Co.* (1), as I am satisfied that the notice was there and was plainly visible to anybody who kept his eyes open, I think that the first defendants did what was reasonably sufficient to give the plaintiff notice of the terms contained in that notice. For that reason I hold that she was also bound by the terms contained in the notice at " B." It is not, I think, necessary for the purposes of this case for the first defendants to rely on that. In my view, it is enough for them to rely on the terms contained in the notice at "A". I hold, therefore, that as far as the first defendants are concerned, the plaintiff's case fails against them.

As this case may go elsewhere, it would be right that, on the assumption that I am wrong with regard to the question whether the plaintiff was a licensee on the terms of the notice at " A ", I should decide the question whether or not, if the first defendants had been licensors without those initial terms, they were guilty of negligence. I propose, therefore, to deal with that question on that footing.

This is not a case where the injury to the plaintiff was caused by the static condition of the premises: it is a case where a licensee was injured by the conduct of the first defendants, as occupiers, in the course of doing things on their land —things which were alleged by the plaintiff to be negligent. Everybody agrees that shunting is a dangerous operation, not only to those engaged in it, but also to persons who may be near the rail-track on which the shunting is being done. It is still more dangerous if the line on which the shunting takes place is on a curve, so that it would be blind on one side to the engine-driver, and to the shunter, who would be on one side of that curve. Without a look-out, or without some sort of warning being given, there would, in my view, be an obvious danger to persons crossing the line.

[HIS LORDSHIP then considered the circumstances in which the shunting operation took place and the system used, and found that the shunter knew that people might be taking the short-cut route; that there was a duty on him to take care for the safety of such persons, and that no precautions were in fact taken; and, accordingly, HIS LORDSHIP held that the first defendants, if they had been in the position of ordinary licensors and not protected by the terms of the notice at "A", would have been guilty of negligence. HIS LORDSHIP continued:]

The second question which I have to consider is, again, a novel one, and one on which learned counsel, again, were unable to provide me with any specific authority precisely covering the point. I have, therefore, to deal with it on principle. On consideration, taking into account the arguments of counsel for the plaintiff, I do not think that the decision of this question is a simple matter. There is no doubt at all about the general duty of an employer to his employees; it is to take reasonable care for the safety of his workmen, and so to conduct his operations as not to expose them to any unnecessary risk. This duty clearly subsists while a workman is in the course of his employment. Counsel for the second defendants cited to me a passage from *Priestley* v. *Fowler* (2) ((1837), 3 M. & W. 1), where LORD ABINGER, C.B., used the words (ibid., at p. 6): ". . . to provide for the safety of his servant in the course of his employment . . ." The difficulty is to know exactly what are the limits of " the course of his employment," especially in circumstances such as these. The duty clearly extends to matters arising while the workmen are coming to and leaving their place of work, at any rate, while they are on their employer's premises, and the duty continues while the workmen are working on the premises of other persons, as was decided in *General Cleaning Contractors, Ltd.* v. *Christmas* (3) ([1952] 2 All E.R. 1110). The duty is not confined to the actual performance of work, but also applies when the servant is doing something reasonably incidental to work, as where the plaintiff had gone to wash a tea cup when she slipped on an oily duckboard and injured herself: see the judgment of LORD GREENE, M.R., in *Davidson* v. *Handley Page, Ltd.* (4) ([1945] 1 All E.R. 235 at p. 237).

Where the place of work abuts on a public highway, and there are a variety of public highways from which the entrance to the place of work can be reached, then it seems to me clear that the duty of the employer towards his workmen does not begin until the workman has arrived at the entrance to the place of work. An employee is free to come by any route he knows and likes, and by any method of transport that he likes; and it seems to me to be clear that the employer would be under no duty with regard to those matters. A different position may arise if, as in this case, the employer's place of work is entirely surrounded, for all practical purposes, by private land belonging to somebody else. The employer clearly has to provide some means of access for his employees by which they can reach their place of work. Indeed, in this case the second defendants had provided such a way, by obtaining the grant of the right of way along the long route, under the lease of July 8, 1927. In such a case, where there is a right of way which the employee is entitled to use, it seems to me that, if that is the right of way which the employer intends his employees to use, he would be under a duty, a general duty, to take reasonable care that that way was reasonably safe for his employees to use. As regards the precautions which he could take, regard would have to be had to the fact that he had only a limited right on the land, and that the land belonged to somebody else. I hold, therefore, that in such circumstances there would be a duty on the employer to take reasonable care that that way was reasonably safe for his employees.

A still more complicated position arises in the circumstances of this case because, not only was there the right of way over the long route which the employees could use if they were so minded, but also there was the short route and it was on that route that the plaintiff sustained the accident. The further and more difficult question arises whether the second defendants are under any duty, and if so, what duty, to their employees who take the short route in the circumstances in which the plaintiff took the short route in this case. The facts which one has to bear in mind in dealing with this are that when the plaintiff was first engaged it was indicated to her that she could use the short route, if she pleased, and that she was taken over it by Mr. Dear. She was well aware that there was the alternative route, the long route, which she could use if she pleased, and she used either of those routes, just as she pleased. Mr. Dear, on the other hand, did not tell her—perhaps it was not necessary to tell her, but he did not tell her, in fact, because he did not know—that the long route was a route over which the second defendants had a right of way demised by the lease.

In those circumstances, was there any duty on the second defendants to take care for the safety of their employees when they were using the short route ? And if so, what were the limits of that duty ? I have come to the conclusion that there was a duty on the second defendants in such a case, and the duty was to take reasonable care that the route which they had authorised their employees to use, and consented to their using, was reasonably safe to use. In circumstances such as these there may well be practical difficulties with regard to the precautions which an employer can take, but in this case there were certain precautions which the reasonably prudent employer could have taken.

I have to look at the statement of claim to see what are the heads of negligence which are alleged against the second defendants in respect of this matter. The first one is that

> " they expressly or impliedly assented to the use by the plaintiff of the said route the dangers whereof were or ought to have been known to them."

I interpret that as meaning that the plaintiff is alleging that the second defendants expressly assented to the use by her of this route, the dangers whereof were or ought to have been known to them, without giving a warning to her of such dangers. I think there can be no doubt that they did expressly assent to the use by her of this route, and that they knew the danger. The second head is that " they failed to provide and enforce the use by their servants of a safe route to their premises." I do not think that there is any duty on the employers to provide a safe route to their premises. I think the highest at which the duty could be put is a duty to take reasonable care to provide a reasonably safe route. It seems to me also that there can be no duty on the employers to enforce the use by their servants of the safe route. The highest obligation which would rest on them would be to advise them, I think, to use a route which they pointed out. I cannot see how an employer could enforce a particular route on his employees. Mr. Dear did not tell the plaintiff that she was entitled to use the long route as she liked, but she knew that it was an alternative route. Mr. Dear did not give any advice to the plaintiff as to which of the two routes she should use.

I have come to the conclusion that, in the circumstances of this case, there was a duty on Mr. Dear, having pointed out to the plaintiff the shorter route as one which she was authorised and permitted to use, to warn her of the dangers of using that route, particularly in view of the clause in the second defendants' lease whereby there was an obligation on the first defendants

> " that [they] will during ordinary working hours at least once in a day when the lessees shall reasonably require haul railway wagons and rail tank cars from and to the London, Midland and Scottish Railway."

It seems to me, in all the circumstances, and bearing that in mind, that, if the second defendants pointed out to the plaintiff that she could use the short route, they were under a duty to warn her of the danger of using that route. Mr. Dear did not do that, and I think that, in that respect, there was a failure on the part of the second defendants to use reasonable care for the safety of their employees. I think that the second defendants were negligent in failing to take reasonable care to provide a reasonably safe route, and in advising their employees to use it, and that their negligence was a cause of this accident.

A point of some difficulty arises on the question of causation. It is impossible to say with certainty that, if the second defendants had carried out their duty, the plaintiff might not still have used the short route. Not infrequently employers say that they cannot compel employees to adopt the safety precautions which they recommend. However, I have come to the conclusion that, if the second defendants had pointed out the short route to the plaintiff, had warned her of its dangers, and had advised her to use the long route, she probably would not have used the short route. If she had not used the short route this accident clearly would not have happened in the way in which it did. In those circumstances, I am bound to hold that the negligence of the second defendants was the cause of the plaintiff's accident and injuries.

The further question now arises: Was the plaintiff herself guilty of negligence ? That is to say, did she display such a lack of care for her own safety that she would be precluded from recovering either the whole or part of the damages to which she would otherwise be entitled ? [HIS LORDSHIP, after stating that he was not satisfied that the plaintiff would have been able to see the engine round the curve in the track, continued:] On the other hand, it is plain that, if one were using the short route over an estate like this—intersected as it is by railway

A lines, some of them on a curve, and with many sidings—a very considerable degree of care has to be exercised when one is about to cross a railway line. It is true that these trucks were stationary, that the plaintiff was not able actually to see an engine or any signs of shunting operations, or anybody in charge of the trucks, that she did not hear a whistle, and that this was a route which her employers had consented to her using. Nevertheless, I think that the risks are B obvious if one is crossing a railway line in front of trucks, where shunting operations might take place, and I am satisfied that the plaintiff did know, during the months she was employed by the second defendants, that shunting operations did take place somewhere or other on these lines. I cannot, therefore, altogether acquit her of negligence, but I think it is of a very small character, because, so far as she was concerned, there were three stationary trucks on the line; whereas, C of course, so far as those conducting the shunting operations were concerned, they knew the precise moment at which the shunting operation was going to take place—when the two trucks would run into the other three. Having regard to her culpability and responsibility for the damage, I put her proportion of responsibility at one-fifth, and that of the second defendants at four-fifths.

[HIS LORDSHIP, after stating the extent of the plaintiff's injuries and the history D of her treatment in hospital and of her consequential loss of wages, assessed general damages at £2,500 and special damages at £833, and gave her judgment for £2,666 8s., four-fifths of the total damages.]

Judgment for the first defendants against the plaintiff. Judgment for the plaintiff against the second defendants.

E Solicitors: *Douglas Wiseman & Co.*, Barking (for the plaintiff); *Gardiner & Co.* (for the first defendants); *Blount, Petre & Co.* (for the second defendants).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

F

THE SOYA.

[COURT OF APPEAL (Lord Evershed, M.R., Jenkins and Hodson, L.JJ.), May 4, 7, 1956.]

Shipping—Collision—Damages—Detention in port to repair collision damage—Measure of damages—No charterparty lost—Profits of subsequent voyages not to be taken into account.

G The Dirphys was involved in a collision with the Soya while proceeding to London to load a cargo for carriage under charterparty to Bombay. Because of the collision she was diverted to Rotterdam where she remained under repair for twenty days. In due course she fulfilled the charterparty, earning a net profit at the daily rate of £144 3s. 10d. She then carried cargo from Malaya to Japan earning a net profit at the daily rate of £819 H 17s. 4d. She completed two more voyages in the Far East, earning profits at daily rates of over £800. All engagements to which the ship was committed were in fact carried out.

The plaintiffs, the owners of the Dirphys, claimed against the defendants, the owners of the Soya, the sum of £17,009 8s. 8d., as loss of profit for the period of detention under repair, computed at more than £850 per day based I on the higher rates of profit earned by the Dirphys after the voyage to Bombay. The defendants contended that the loss of profit should be calculated at the average daily rate for the voyage from London to Bombay. The registrar upheld the the defendants' contention and awarded the plaintiffs £2,884 0s. 2d. On objection by the plaintiffs,

Held: it was a matter of speculation what profits at the high rates prevailing in the Far East had been lost and in the circumstances there was nothing wrong in assessing the damages by multiplying the days of detention (twenty) by the daily rate of profit (£144 3s. 10d.) earned by the ship at

the time when the collision occurred; therefore, the Court of Appeal would A
not interfere with the amount of damages.

Dicta of BOWEN, L.J., in *The Argentino* ((1888), 13 P.D. at p. 202), and LORD HERSCHELL ((1889), 14 App. Cas. at p. 523) applied.

Decision of WILLMER, J. ([1955] 3 All E.R. 621) affirmed.

[As to profits under existing contracts lost by detention, see 30 HALSBURY'S LAWS (2nd Edn.) 860, para. 1138; and for a case on the subject, see 41 DIGEST B
802, *6627*.]

Cases referred to:

(1) *The Argentino*, (1888), 13 P.D. 191; 58 L.J.P. 1; 59 L.T. 914; *affd.* H.L. sub nom. *Gracie (Owners)* v. *Argentino (Owners), The Argentino,* (1889), 14 App. Cas. 519; 59 L.J.P. 17; 61 L.T. 706; 41 Digest 802, *6627*. C

(2) *Strathfillan S.S. Owners* v. *Ikala S.S. Owners, The Ikala,* [1929] A.C. 196; 98 L.J.P. 49; 140 L.T. 177; Digest Supp.

Appeal.

Appeal by the plaintiffs from a decision of WILLMER, J., dated Nov. 7, 1955, and reported [1955] 3 All E.R. 621, dismissing the objection to the decision of the registrar assessing damages dated Aug. 24, 1955. D

The plaintiffs were the owners of the Dirphys and the defendants were the owners of the Soya. On Dec. 30, 1950, the two ships collided. The Dirphys was then proceeding to London to fulfil a charterparty dated Oct. 13, 1950, for the carriage of sugar to Bombay, but because of the collision she was diverted to Rotterdam where she remained under repair from Jan. 1 to 20, 1951, an agreed period of twenty days. She then proceeded to London and duly completed E
the voyage to Bombay, for which she earned a net profit of £8,939 16s. 5d., giving a daily net profit of £144 3s. 10d. for sixty-two days. On completion of that voyage, she proceeded to Dungun in Malaya to fulfil a charterparty, dated Jan. 18, 1951, for which the Dirphys had been nominated on Feb. 1, 1951, for the carriage of goods to Japan. For that voyage she earned a net profit of £29,515 3s. 11d., giving a daily net profit of £819 17s. 4d. For two subsequent F
voyages in the Far East she earned profits at the daily rate of £892 1s. 9d. and £830 19s. 5d.

The parties agreed liability for the collision on the basis that the Dirphys was thirty per cent. and the Soya seventy per cent. to blame. All items of the plaintiffs' claim were agreed except the item for loss of profit during the detention for collision repairs, for which the plaintiffs claimed £17,009 8s. 8d., based G
on the enhanced rates of profit earned in the subsequent voyages, which they contended ought to be taken into consideration. This sum was computed on a daily profit exceeding £850. The defendants contended that the plaintiffs were entitled to assess their loss of profit only at the rate for the voyage from London to Bombay. On July 18, 1955, the matter came before the registrar who, by a decision dated Aug. 24, 1955, upheld the defendants' contention H
and allowed the plaintiffs £2,884 0s. 2d., i.e., a sum computed at the daily rate of £144 3s. 10d.

Kenneth Carpmael, Q.C., and *R. F. Stone* for the plaintiffs.

H. V. Brandon and *J. F. Willmer* for the defendants.

LORD EVERSHED, M.R.: These are proceedings for the assessment of I
damages to the plaintiff appellants' vessel Dirphys arising out of a collision between that steamship and the defendants' motor vessel Soya which occurred at the entrance of the Baltic Sea on Dec. 30, 1950. It has now been agreed that both vessels were to blame for the collision, and the proportions have also been agreed—thirty per cent. to the Dirphys, seventy per cent. to the Soya. When the collision occurred, the Dirphys was proceeding in ballast to London, being at the time subject to a voyage charter (which I will hereafter refer to as "Charter No. 3") dated Oct. 13, 1950. By the terms of that charter, the vessel

A Dirphys was to proceed to London and there load a cargo of sugar for transfer to the Indian port of Bombay. The result of the collision was that the Dirphys had to be diverted to the port of Rotterdam and she was there detained for a period, which again has been agreed at twenty days, for the purpose of repairs, the twenty days being the first twenty days of January, 1951. The Dirphys was, however, able to carry out her obligations under Charter No. 3 and she
B was able to earn, and she earned, the full freight of over £8,000 due to her in respect thereof. So far, therefore, as profits were derived from Charter No. 3, no damage or loss whatever was suffered by the Dirphys as a result of the collision; but she arrived at Bombay on Mar. 21, 1951, or thereabouts, later than she would have done had it not been for the collision—though how much later is a matter I will discuss presently. At that time (that is to say, from the
C month of December, 1950) there was a marked and remarkable rise in freights, whether as a result of the Korean war or otherwise, especially in Far Eastern waters. On Jan. 18, 1951, the agents for the owners of the Dirphys made a new fixture for which the Dirphys was later nominated. That also was a voyage charter, and I will refer to it as " Charter No. 4 ", the obligation thereunder being to load at the Malayan port of Dungun a cargo of metal or metal ore
D and take it to a safe port in Japan. The freight under Charter No. 4, expressed in the terms of the daily rate of profit while engaged on the charter, was something like six times the daily rate earned under Charter No. 3. By the terms of Charter No. 4, the ship was expressed to be expected ready to load about Mar. 17, 1951. The Dirphys was in fact ready to load some fourteen days later or thereabouts; but, as in the case of Charter No. 3, again the full benefit, in
E terms of freight, of Charter No. 4 was reaped by the owners. Therefore, again, no damage from the collision can be attributed to any loss in the earnings of the Dirphys under Charter No. 4. According to the evidence, two more charters in immediate succession followed Charter No. 4, and again there was no loss attributable to the collision in respect of either of these two last charters. But, as I have said, the ship spent twenty days at the port of Rotterdam and therefore
F arrived later than she would or could otherwise have done in these very profitable Far Eastern waters.

The case of the plaintiffs before us has been that the damage suffered should be treated as the loss of twenty days of " fishing " in these profitable waters at a rate equivalent to the rate of freight earned under Charter No. 4, or, alternatively,
G at an average, taking all the charters which I have mentioned together. As was said in the courts below, the case of the plaintiffs was attractively simple. On the other side it was said: Since no loss was suffered at all in respect of any of the charters which were proved in evidence, the rule (a rule of practice and convenience) is that the loss ought to be estimated by multiplying the twenty days of detention by a daily rate of profit based on the freight recoverable under
H Charter No. 3, which was in fact the charter operative at the date of the collision and at the date when the repairs were being done at the port of Rotterdam. Put more specifically and arithmetically, what is said is: Had not the collision occurred, sixty-two days would have been occupied in the performance of Charter No. 3 instead of eighty-two, and the freight recoverable under Charter No. 3 being divided by sixty-two gives you a figure of approximately £144 per
I day. The damage, say the defendants, should therefore be arrived at, according to this rule of convenience or practice, by multiplying the sum of £144 odd by twenty. The rule of practice or convenience is said to be based on what fell from BOWEN, L.J., in *The Argentino* (1) ((1888), 13 P.D. 191) in this court and also from LORD HERSCHELL in the same case in the House of Lords ((1889), 14 App. Cas. 519). Alternatively, it is said that any loss which the owners of this vessel suffered is a matter of mere speculation; not a penny piece was lost in respect of any of the Charters 3 to 6 inclusive which I have mentioned,

and to see what profit (if any) was lost, you would have at least to go on examining the commercial history of the ship till the end of her life, a plainly impossible task. It is therefore said, in the terms of WILLMER, J.'s, judgment, that it is at least doubtful whether really any damage was suffered at all. The learned judge said ([1955] 3 All E.R. at p. 623):

> " It may well be true that, but for the collision, the Dirphys would have started her profitable Far Eastern trading twenty days earlier than in fact she did. Whether or not in the long run the plaintiffs would have been any better off has been left, as far as I can follow the evidence, as a matter of complete speculation. If the plaintiffs could have proved that, because of those twenty days' detention, they lost the opportunity of a complete voyage at those enhanced rates, then that would have been a measure of damage which I could well understand. I do not know, on the evidence which has been given, what the ultimate outcome of this loss of twenty days may have been; that loss of twenty days may in fact have cost the plaintiffs nothing at all. All the engagements to which the ship was committed were in fact carried out. There is nothing to show, one way or the other, what would have been the result if the whole programme had been accelerated by twenty days."

Therefore, says counsel for the defendants, as in all cases of estimating damage the court must do the best that it can, and it is certainly not shown that the sum awarded is materially wrong or based on any wrong principle. He also says, as a further alternative, that resort should be had to some averaging.

I should not myself wish to say that there was, on the special facts of this case, some rigid rule binding us and that that rule was laid down for us by what was said in *The Argentino* (1). The rule in marine collisions is, as I understand it, the ordinary rule applicable in all cases of estimating damage. In *The Argentino* (1), BOWEN, L.J., said (13 P.D. at p. 200):

> " The damages recoverable from a wrongdoer in cases of collision at sea must be measured according to the ordinary principles of the common law."

It is, I think, important to have in mind what were the facts in *The Argentino* (1), having regard to the reliance placed on the language used in the case by BOWEN, L.J., and by LORD HERSCHELL. It is stated briefly in the headnote thus (ibid., at p. 191):

> " Previous to a collision between two vessels, the owners of one of them [the Argentino] had made an oral arrangement with a firm of shipbrokers that the vessel upon the completion of the voyage upon which she was then engaged should go to Antwerp, and there load a cargo in turn as one of a line of steamers, and proceed by a particular route to the Black Sea. In consequence of repairs necessitated by the collision, the vessel was not ready to start for Antwerp so as to load in turn, and, by arrangement, another smaller vessel was substituted for the injured vessel, the latter vessel [the Argentino] shortly afterwards taking the place of the substituted vessel on a less remunerative route."

It follows, therefore, that the Argentino, as a result of the collision, lost the opportunity (which was, though not a matter of firm bargain, a matter of virtual certainty) of obtaining a particular profitable venture had she taken her place in the line at Antwerp. Instead of that, she had to undertake, or did undertake, a less profitable venture. On the face of it, therefore, the damage suffered was the difference between the greater profit she would have made had she taken her turn at Antwerp and the actual profit she made from the less remunerative venture. The real point in the case was whether, in estimating the damage, it was right (as this court and the House of Lords said that it was not) to pay regard to the actual profit made, not by the Argentino at all but by the other smaller vessel which took her place in the line at Antwerp. It is in the light of those facts that BOWEN, L.J., used this language (13 P.D. at p. 202):

> "It remains, however, still to be considered what is the value at which this loss of employment [the loss of the Antwerp venture] is to be calculated in the case of a vessel which, but for the accident, would have been serviceably used by her owner in a particular manner. This is a difficult matter to calculate, but the difficulty is only, after all, one of fact. Where there is an actual charterparty such difficulty is reduced to a minimum. Where there is no charterparty but merely a reasonable certainty of employment, the matter is left more at large."

Then in the House of Lords, in reference to the same facts, LORD HERSCHELL used the language also cited (14 App. Cas. at p. 523):

> "Where no claim is made in respect of loss arising from the owner having been deprived of the earnings of a voyage which was in contemplation, and the engagement for which had been secured [as was not the case in the Argentino] it would be right, and is no doubt the usual course, to award damages under the name of demurrage in respect of the loss of earnings which it must reasonably have been anticipated would ensue during the time of detention. But where such a claim is made as in the present case, the owner cannot, I think, be allowed in addition, as a separate item, demurrage in respect of the time the vessel was under repair."

I venture to think that those observations were not made in reference to facts such as we have here. They were plainly made in reference to the special facts of *The Argentino* (1). In this case the facts appear to be unusual, at any rate to this extent, that, as we were informed, there is no case in the books where facts comparable to the facts in this case have ever come before the court. If, however, that rule were a rigid unalterable rule, it would appear to me at any rate that somewhat strange results might follow. Let it be supposed, for example, that Charter No. 3 was a charter under which the owners were obtaining an altogether unusual and extravagant profit, and that at the time freights generally had greatly fallen and that no similar profit could possibly be expected from any other fixture. It would seem strange in such a case if the damages were twenty multiplied by the extravagant daily profit; and counsel for the defendants, as I understood him, when I put the question, somewhat resiled from suggesting that such a result would follow, though the logic of the rule would appear to produce that result. Equally it would appear that if, by some mischance, Charter No. 3 was not profitable at all, it would seem contrary to the ordinary rules of common law to say that therefore necessarily there was no loss of profit at all owing to the collision. But equally I cannot myself accept counsel for the plaintiffs' simple and attractive suggested answer, for that seems to me to be no less artificial. It supposes, so far as I can see, that for the twenty days which I assume have been lost the ship would have been employed in some additional or different fixture at the rate exactly applicable to Charter No. 4 and that everything else for ever after in her life would have been exactly the same as it is. It seems to me that, even if allowance is made for contingencies, that supposition is not in accordance with the facts or the evidence.

What, indeed, are the facts ? Counsel for the defendants says that the learned judge below and the registrar did not find or intend to find that twenty days were in fact lost and that the ship did arrive twenty days late at Dungun. I cannot for myself agree with that submission. I feel, for my own part, no doubt on the evidence that the judges did find and were entitled to find that, if it had not been for the accident, the ship could and would if necessary have arrived at Bombay and at Dungun twenty days earlier than she did in fact arrive; but it is here that the difficulty seems to me to start. You do not, in this matter of making fixtures for ships, make an arrangement on Monday for the vessel to do some work on the following day, on Tuesday. It was no doubt clear in January, 1951, that the Far Eastern market was going to be a very profitable market. It is clear also from the evidence that when Mr. McAdams entered into Charter No. 4 on Jan. 18, 1951, for the Dungun market he was doing what he would in any case have done, whether or not there had been a collision. He waited until the proper time for the opening of the March Dungun market—that is, the proper time for making fixtures for voyages from Dungun in March. It is to be noted that, according to the terms of Charter No. 4, the ship (which was later, on Feb. 1, nominated as the Dirphys) was expressed to be expected ready for loading about Mar. 17. When the contract was made on Jan. 18, the repairs at Rotterdam must have been very nearly completed and the nomination took place some fourteen days later, on Feb. 1. It is not, therefore, to my mind, proved with reasonable certainty that, apart from the collision, this contract of Jan. 18, 1951, would have been different as to loading date or indeed in any other material respect; and, even if the Dirphys could and would have loaded on or about Mar. 10 or 11 at Dungun instead of Mar. 31, it is not proved to my satisfaction what the difference in total profits would have been under Charters Nos. 4, 5 and 6 and all that followed at the end of it all. I refer again to the language of Willmer, J., which I have already read, though I do not take time by repeating it.

In so speculative a matter, what is the court's duty ? It is, as it would be in any case of damages arising at common law, to do the best that it can. It may well be, as Willmer, J., said, that really no damages were proved satisfactorily at all. But there is no cross-appeal before us, and it is sufficient for me to say that I am not satisfied in such circumstances that there was anything wrong or unfair to the plaintiffs in proceeding arithmetically as the registrar and the judge did; that is to say, in giving to the plaintiffs the full benefit for every day of the detention, namely, twenty days, and then applying to that period of time a figure of profit which was derived from the figure of profit which was being earned by the ship at the time when the accident occurred and when in fact the ship was being detained. It might be that a round figure rather more or rather less could fairly have been arrived at by a tribunal of fact; but I cannot think, on general principles which apply when this court is asked to consider matters of damages, that there is anything in the figure which was arrived at or in the approach to that figure and the method adopted which was wrong, or that we should interfere with that figure. I would therefore dismiss the appeal.

JENKINS, L.J.: I agree. This is an appeal from Willmer, J., dated Nov. 7, 1955, dismissing a motion in objection to a decision of the registrar dated Aug. 24, 1955. The action arose out of a collision which took place in the entrance to the Baltic on Dec. 30, 1950, between the plaintiffs' steamship Dirphys, and the defendants' steamship Soya. Liability was settled by agreement as resting as to thirty per cent. on the Dirphys and seventy per cent. on the Soya. The Dirphys was diverted to Rotterdam, where she arrived on Jan. 1, 1951, and was there laid up for 19¾ days (treated for the purpose of the case as twenty days) undergoing repairs which were completed on Jan. 20, 1951. The Dirphys was thus out of action for twenty days; and the sole question in the appeal concerns the figure at which her loss of profit due to this period of immobilisation should be assessed.

At the time of the collision, the Dirphys was on her way to London in ballast under a charterparty dated Oct. 13, 1950, which required her to proceed to London and there load a cargo of sugar for carriage to Bombay. Notwithstanding the twenty days' delay, the Dirphys reached London just in time to prevent cancellation of this charterparty, which was duly performed, but which took twenty days longer to perform than it would have taken if there had been no collision and consequent immobilisation of the vessel for that period. The collision thus did not cause the Dirphys to lose the benefit of the charterparty of Oct. 13, 1950, save in so far as it may be said to have been rendered less beneficial by the addition to the time taken to perform it of the twenty days' immobilisation which the collision imposed. Nor was the Dirphys left idle by reason of the postponement for twenty days of her arrival at Bombay, for immediately after discharging her cargo at that port she set off again under a charterparty concluded on Jan. 18, 1951, for the carriage of iron ore from Dungun in Malaya to a port in Japan.

On the facts as I have so far stated them, it would seem that prima facie, if the Dirphys suffered any loss of profit from the twenty days' delay due to the collision, it could amount to no more than twenty times the daily rate of net profit (agreed at £144 3s. 10d.) which the charterparty of Oct. 13, 1950, would have produced if the voyage under it had been performed in the normal time (agreed at sixty-two days) instead of the eighty-two days actually taken; for, if the collision had not taken place, the Dirphys would during the twenty days in fact spent on repairs have been proceeding on her voyage to Bombay and earning a net daily profit at that rate. On this basis, the damages properly allowable for loss of profit due to the collision amount approximately to £2,884, and that was the sum awarded by the registrar and approved by the learned judge.

Counsel for the plaintiffs contends that this figure of £2,884 is very wide of the mark, and that the sum properly allowable in respect of loss of profit, which he originally put at £17,009, is, according to the revised calculation which he invited us to adopt, of the order of £16,400, though he would, I think, be prepared to concede a reasonable reduction for contingencies. This remarkable divergence is due to an extraordinary rise in freight rates for voyages to and from the Far East which took place from December, 1950, onwards and reached its peak in May, 1951. Figures issued by the Chamber of Shipping of the United Kingdom, taking the rates in 1948 as equal to 100, show in 1950 72.8 for January, 95.8 for October, 97.6 for November and 115.7 for December; and in 1951 151.9 for January, rising to 203.8 for May, with an intermediate drop from 180.6 for March to 176.8 for April. After May, 1951, there was (with certain fluctuations) a downward trend to 168.5 in December of that year. The state of the market is well illustrated by the fact that, as compared with the £144 3s. 10d. net daily profit yielded (apart from the twenty days' delay) by the charterparty of Oct. 13, 1950, the charterparty of Jan. 18, 1951, showed a net daily profit of no less than £819 17s. 4d. The next two engagements, a voyage charter dated Mar. 22, 1951, and a time charter dated June 14, 1951, were even more profitable, showing net daily profits of £892 1s. 9d. and £830 19s. 5d. respectively.

Counsel for the plaintiffs submits that, in these circumstances, the £144 3s. 10d. net daily profit is not the right starting figure for the calculation of damages under this head, and that the figure of £819 17s. 4d., being the daily rate of net profit under the charterparty of Jan. 18, 1951, should be taken. That figure multiplied by twenty gives as the loss of profit for the twenty days' delay a total of approximately £16,400, and counsel for the plaintiffs claims on this basis.

For the principles to be applied in the assessment of damages in a case of this sort, we were referred to the well-known cases of *The Argentino* (1) ((1888), 13 P.D. 191), and in the House of Lords (sub nom. *Gracie* (*Owners*) v. *Argentino* (*Owners*), *The Argentino*) ((1889), 14 App. Cas. 519), and *Strathfillan S.S. Owners* v. *Ikala S.S. Owners, The Ikala* (2) ([1929] A.C. 196).

From *The Argentino* (1) there was cited to us the following celebrated passage in the judgment of Bowen, L.J. (13 P.D. at p. 201):

> "With this single modification or exception, which is one that applies only to cases of breach of contract, the English law only permits the recovery

> of such damages as are produced immediately and naturally by the act complained of. A collision at sea caused by the negligence of an offending vessel is a mere tort, and we have only therefore to consider what has been in the particular case its direct and natural consequence. This consequence (in the case of an innocent ship which is disabled by an accident) is that its owner loses for a time the use which he otherwise would have had of his vessel. There is no difference in principle between such a loss and the loss which the owner of a serviceable threshing-machine suffers from an injury which incapacitates the machine, or the loss which a workman suffers who is prevented from earning money by the wrongful detention of plant which cannot at once be replaced. A ship is a thing by the use of which money may be ordinarily earned, and the only question in case of a collision seems to me to be, what is the use which the shipowner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident, would have earned by the use of her. It is on this principle alone that it is habitual to allow in ordinary cases damages for the time during which the vessel is laid up under repair in addition to the cost of the repairs themselves. But this is merely an application of the general principle, and is not the measure in all cases of the loss. It might conceivably, upon the one hand, be the fact that the damaged ship would not and could not have earned anything at all while laid up for repairs, though such a case must necessarily be exceptional. In such circumstances nothing ought to be allowed for demurrage. Upon the other hand the direct consequence of the accident might be that the injured vessel was necessarily thrown out of her employment, not merely during the period of repair, but for a longer period still. In such a case the loss could not properly be measured by the time taken in repairs alone."

From the same case in the House of Lords there was cited to us the following passage in the speech of Lord Herschell (14 App. Cas. at p. 523):

> " I think that damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act, cannot be regarded as too remote. The loss of the use of a vessel and of the earnings which would ordinarily be derived from its use during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision. But, further than this, I agree with the court below that the damage is not necessarily limited to the money which could have been earned during the time the vessel was actually under repair. It does not appear to me to be out of the ordinary course of things that a steamship, whilst prosecuting her voyage, should have secured employment for another adventure. And if at the time of a collision the damaged vessel had obtained such an engagement for an ordinary maritime adventure, the loss of the fair and ordinary earnings of such a vessel on such an adventure appear to me to be the direct and natural consequence of the collision."

Finally, we were referred to the following passage from Viscount Sumner's speech in *The Ikala* (2) ([1929] A.C. at p. 205):

> " I only wish to say two things. If, as was the case at the previous hearing, the appellants' case is to be that the delay upset the general current of their trade, which had to be maintained in spite of it, I think that the extent and cost of this upset must be proved and must be causally connected with the collision in accordance with the ordinary rules of law as to damage. A ship's day is not like a unit of currency, always good for so many shillings. It has to be proved that, in doing the shipowner the wrong of laying his ship idle at the time in question, work, which she would otherwise have done during the time, went undone to his measurable loss or was only done by resorting to other expedients at a measurable outlay."

A Counsel for the plaintiffs submits that his claim is maintainable in accordance with these principles, and he puts his case in this way: As a direct and natural consequence of the collision, the Dirphys was laid up for repairs for twenty days and accordingly arrived at Bombay twenty days later than she would have done if there had been no collision. Having arrived at Bombay twenty days late, the Dirphys, again as a direct and natural consequence of the collision, left Bombay
B in pursuance of the charterparty of Jan. 18, 1951, and arrived at Dungun, twenty days later than she would have done if there had been no collision. Thus, according to counsel for the plaintiffs' submission, the Dirphys was, as a direct and natural consequence of the collision, twenty days late in beginning to earn the highly remunerative freight rates which the general rise in rates in the Far Eastern trade made it possible to secure for charterparties negotiated in and
C after January, 1951, and which the plaintiffs had in fact secured for the charterparty of Jan. 18, 1951, and thereafter secured in even greater measure for the two subsequent charterparties dated respectively Mar. 22 and June 14, to which I have already referred. In other words, according to counsel's submission, the Dirphys lost, as a direct and natural consequence of the collision, twenty days' employment at a net daily rate of profit of £819 and upwards. Counsel rightly
D observes that the measure of damages in a case of this sort is not necessarily confined to what BOWEN, L.J., called (13 P.D. at p. 201) " the use which the shipowner would, but for the accident, have had of his ship " during the actual period for which the ship is detained for repairs, but may also include (for example) the loss of earnings under any engagement for another voyage which the ship had secured at the time of the collision but was thereby prevented from
E performing: see per LORD HERSCHELL (14 App. Cas. at p. 523), where he observed that the loss of such earnings appeared to him " to be the direct and natural consequence of the collision ".

In the present case, the Dirphys lost no actual engagement existing at the time of the collision under which but for the collision she would have been employed at the daily rate of profit claimed by counsel for the plaintiffs. In his
F submission, however, the state of the market was such that, if the Dirphys had arrived at, and consequently left, Bombay twenty days earlier, it is for practical purposes certain that during the " boom " period, if I may so describe it, she would have been employed at " boom " rates of remuneration for twenty days longer than she was in fact so employed. It is not clear to me on the evidence that the Dirphys did in fact sustain any such loss, or, in other words, that she
G did in fact profit less from the " boom ", to the extent of the equivalent of twenty days' employment at upwards of £819 net profit per day, than she would have done if she had arrived in Bombay twenty days earlier. The charterparty of Jan. 18, 1951, with its net daily profit of £819 17s. 4d. was, as already mentioned, immediately succeeded by that of Mar. 22, 1951, with its net daily profit of £892 1s. 9d., and that of Mar. 22, 1951, was immediately succeeded by that of
H June 14, 1951, with its net daily profit of £830 19s. 5d., which kept the vessel employed down to Oct. 26, 1951. There is no evidence as to any subsequent engagements, but it is difficult to discern any loss so far. If the terms of the last engagement of which we have evidence had been negotiated on May 25, 1951, instead of June 14, 1951, it may be that even better terms could have been secured. If that engagement had been completed on Oct. 6, 1951, instead of
I Oct. 26, 1951, and the terms of the next following engagement had been agreed on a correspondingly earlier date, it may be that such next following engagement would have been on more favourable terms than those in fact obtained, whatever they may have been. But the evidence as it stands seems to me to fall far short of showing that during the period to which it extends the Dirphys earned less by a sum equivalent to the profit of twenty days' employment at upwards of £819 per day than she would have done if she had arrived in Bombay twenty days earlier; and I would point out that the charters brought to the notice of the

court carry the matter down to Oct. 26, 1951, which was several months after the peak of the boom period. Moreover, I cannot relate the loss alleged by counsel for the plaintiffs to any particular period of twenty days. It cannot be said that this loss was sustained during the period of twenty days following the date on which the Dirphys would but for the collision have arrived at Bombay; for the charterparty of Jan. 18, 1951, had already been fixed, and it is not suggested that if its performance had been commenced twenty days earlier it would have produced a greater profit. The only effect of the twenty days' postponement of the arrival of the Dirphys at Bombay thus appears to have been to postpone by twenty days the realisation of the profit on the charterparty of Jan. 18, 1951. Assuming in counsel for the plaintiffs' favour that there was a corresponding and consequential postponement of the performance of each subsequent engagement, I cannot see that the plaintiffs could be said to have thereby sustained the loss he claims on their behalf, or indeed any loss in the event of freight rates remaining constant or continuing to rise. In the event of freight rates falling, a stage might be reached at which the plaintiffs could point to a particular engagement and say: " If this engagement had been negotiated twenty days earlier, we could have had it on better terms ". On the other hand, any fall in rates might have been counteracted by the fixing of the terms of a charterparty for a long voyage while the rates were still high. It is important to remember that the rate for a given voyage is determined at the date (up to perhaps two months in advance) on which the terms of the charterparty are fixed, and not at the date when the voyage is begun. Furthermore, in the event of freights continuing to rise, it might be to the advantage of a shipowner to postpone for a time the conclusion of a charterparty for a given ship in the expectation of an improvement in the terms obtainable. Even if the plaintiffs should be regarded as having made out the loss, in the shape of curtailment of profit, on which they rely, I do not think it can reasonably be held to be a direct and natural consequence of the collision. It was the result of an unpredictable fall in the Far Eastern freight market which did not make itself felt until after the Dirphys had completed at least three highly remunerative voyages since her arrival in Bombay. The contrary view, so far as I can see, must result in the postponement for an indefinite period, perhaps to the end of the ship's career, of the point of time at which the loss, if any, due to the twenty days' detention, could be ascertained, and the ultimate result in terms of profit or loss would necessarily be influenced or indeed determined by causes and factors wholly independent of the collision.

Surveying the position as matters stood on Jan. 20, 1951, when the repairs were completed, would it have been possible to say that, as a direct and natural consequence of the collision and resulting immobilisation of the Dirphys for repairs, she had lost or was bound to lose the equivalent of twenty days' employment at a net daily profit of upwards of £819 ? I do not think so. I think the position then was that she might in the end earn more or less than she would have done or the same amount as she would have done in the way of profit apart from the delay of twenty days, the ultimate result depending on the movements of the market up or down, the freight rates ruling at the dates of any engagements made, and the duration of any such engagements.

The learned judge adverted to Bowen, L.J.'s exclusion, in the passage I have quoted from his judgment in *The Argentino* (1) (13 P.D. at p. 201), of the element of " uncertain and speculative and special profits " and came to the conclusion ([1955] 3 All E.R. at p. 623), as did the learned registrar, that the loss of profit claimed by the plaintiff was

> " too speculative and too remote to be taken into consideration as a consequence in law of the detention in respect of which this claim arises."

I fully agree with that view, and am accordingly of opinion that the plaintiffs' main argument fails.

A subsidiary point was taken to the effect that the net daily profit lost by the Dirphys during the twenty days' detention for repairs should be calculated by averaging the results of several voyages, rather than by taking the £144 3s. 10d. rate of daily profit for the voyage covered by the charterparty of Oct. 13, 1950. The learned judge considered and rejected that contention, and I see no more reason for differing from him in his conclusion on that part of the case than I do for differing from him in his view as to the plaintiffs' main contention. Accordingly, I would dismiss this appeal.

HODSON, L.J.: I agree with the judgment of the learned judge. This appeal concerns only one item of damages, namely, loss of profit during the period when the Dirphys was undergoing repair. Damages were also assessed in respect of the cost of running of the ship, but no question arises except on this one matter, which is, after all, a matter of fact for the learned judge to assess, the injured party having to prove what he has lost by reason of the detention. The learned judge, I think, directed himself correctly by reference to BOWEN, L.J.'s well-known judgment in *The Argentino* (1) ((1888), 13 P.D. at p. 200), which has already been read, and by reference to the speech of LORD HERSCHELL ((1889), 14 App. Cas. at p. 521) in the House of Lords in the same case.

The position in this case was that the loss of profit was calculated by the registrar and by the learned judge by reference to the profits which the ship would have earned during the same period of twenty days under the charterparty to which it was then bound; and it is clearly consistent with the authority which I have quoted to limit the damages to the loss of profit attributable to the particular venture on which the ship was actually engaged for the time being in this case. This is said to be a case which presented unusual features because of the remarkable rise in freight, so that by reason of the delay of twenty days the ship was put behind in getting into the profitable market; but I agree with the learned judge that there is an element of speculation in assessing the damages on that footing, for the reasons which he gave. We have been directed by BOWEN, L.J., to exclude the element of uncertain and speculative and special profits, and I think that that direction was rightly followed by the learned judge in confirming the report of the registrar. Indeed, I agree with him that there is considerable doubt whether this twenty days' delay was proved to have had any certain effect in putting back the ship's programme. As counsel for the defendants pointed out in analysing the evidence which was given on this topic, the dates are not at all clear, and it may be that at the end of all this ship caught up with the number of voyages which it could otherwise have entered into. Whatever way one looks at this matter, it seems to me quite impossible to find any valid criticism in the judgment by which WILLMER, J., arrived at the result he did on this item of damages attributable to loss of profit. I agree, therefore, that this appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Holman, Fenwick & Willan* (for the plaintiffs); *Thomas Cooper & Co.* (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

DAVIES *v.* BRITISH GEON, LTD.

[QUEEN'S BENCH DIVISION (Pearson, J.), May 7, 1956.]

Practice—Appearance—Writ issued in District Registry—Appearance in London—R.S.C., Ord. 12, *r.* 4, *r.* 5.

The plaintiff was employed by the defendants at their works at Barry, Glamorgan. He commenced an action against them by issuing a writ in the Cardiff District Registry. Service of the writ was accepted by the defendants' Cardiff solicitors but appearance was entered in London by the London agents of the defendants' Cardiff solicitors. The defendants' head office and registered office were in London; all board meetings were held in London and the whole of the policy of the company was framed in London. The defendants' factory was at Barry and all their products were manufactured there. On an application by the plaintiff to set aside the appearance on the ground that the defendants carried on business within the district of the Cardiff District Registry within the meaning of R.S.C., Ord. 12, r. 4, and r. 5*, by the former of which a defendant who resided or carried on business within the district of the district registry would be bound to enter appearance in the district registry,

Held: (i) for the purposes of R.S.C., Ord. 12, r. 4, r. 5, a corporation was deemed to have only one place of business, viz., in the circumstances of the present case the place where its head office was; moreover there was no distinction for the purposes of r. 4 and r. 5 between " residing " and " carrying on business " (see p. 414, letter I, post).

(ii) on the facts the defendant company carried on its business in London and the application must be refused.

Keynsham Blue Lias Lime Co., Ltd. v. *Baker* ((1863), 2 H. & C. 729) considered.

Semble: an individual, or a partnership, can carry on business for the purposes of R.S.C., Ord. 12, r. 4, r. 5, in more than one place (see p. 412, letter I, post).

[As to the place for entering an appearance, see 26 HALSBURY'S LAWS (2nd Edn.) 37, para. 54.

For R.S.C., Ord. 12, r. 4, r. 5, see ANNUAL PRACTICE (1956) 134, 135.]

Cases referred to:

(1) *Taylor* v. *Crowland Gas & Coke Co.*, (1855), 11 Exch. 1; 24 L.J.Ex. 233; 25 L.T.O.S. 55; 19 J.P. 295; 156 E.R. 720; 13 Digest 459, *99*.

(2) *Adams* v. *Great Western Ry. Co.*, (1861), 6 H. & N. 404; 30 L.J.Ex. 124; 3 L.T. 631; 158 E.R. 166; 13 Digest 459, *98*.

(3) *Shiels* v. *Great Northern Ry. Co.*, (1861), 30 L.J.Q.B. 331; 4 L.T. 479; 13 Digest 460, *100*.

(4) *Gorslett* v. *Harris*, (1857), 29 L.T.O.S. 75; 1 Saund. & M. 189; 13 Digest 459, *91*.

(5) *Brown* v. *London & North Western Ry. Co.*, (1863), 4 B. & S. 326; 32 L.J.Q.B. 318; 8 L.T. 695; 27 J.P. 711; 122 E.R. 481; 13 Digest 459, *87*.

(6) *Keynsham Blue Lias Lime Co., Ltd.* v. *Baker*, (1863), 2 H. & C. 729; 33 L.J.Ex. 41; 9 L.T. 418; 159 E.R. 302; 13 Digest 460, *106*.

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* R.S.C., Ord. 12, r. 4, provides:

" If any defendant to a writ issued in a District Registry resides or carries on business within the district, he shall appear in the District Registry."

R.S.C., Ord. 12, r. 5, provides:

" (1) If any defendant neither resides nor carries on business in the district, he may appear either in the District Registry or at the Central Office. (2) If an appearance is entered in London by or on behalf of a defendant to a writ issued in a District Registry, the memorandum of appearance required by r. 8 and r. 8A of this Order shall contain a statement that such defendant neither resides nor carries on business within the district of that District Registry."

(7) *Aberystwith Promenade Pier Co., Ltd.* v. *Cooper*, (1865), 35 L.J.Q.B. 44; 13 L.T. 273; 30 J.P. 791; 13 Digest 460, *107*.

(8) *Le Tailleur* v. *South Eastern Ry. Co.*, (1877), 3 C.P.D. 18; 34 Digest 529, *30*.

(9) *Mitchell* v. *Hender*, (1854), 1 Saund. & M. 22; 23 L.J.Q.B. 273; 23 L.T.O.S. 83; 18 J.P. 728; 13 Digest 459, *90*.

(10) *Weatherley* v. *Calder & Co.*, (1889), 61 L.T. 508; 13 Digest 459, *96*.

(11) *Baillie* v. *Goodwin*, (1886), 33 Ch.D. 604; 55 L.J.Ch. 849; 55 L.T. 56; 1 Digest 271, *32*.

(12) *Dunlop Pneumatic Tyre Co.* v. *Act. für Motor und Motorfahrzeugbau vorm. Cudell & Co.*, [1902] 1 K.B. 342; 71 L.J.K.B. 284; 86 L.T. 472; 13 Digest 430, *1532*.

(13) *Newby* v. *Von Oppen & Colt's Patent Firearms Manufacturing Co.*, (1872), L.R. 7 Q.B. 293; 41 L.J.Q.B. 148; 26 L.T. 164; 13 Digest 429, *1526*.

(14) *Swedish Central Ry. Co., Ltd.* v. *Thompson*, [1925] A.C. 495; 94 L.J.K.B. 527; 133 L.T. 97; 9 Tax Cas. 342; 28 Digest 28, *144*.

(15) *New York Life Insurance Co.* v. *Public Trustee*, [1924] 2 Ch. 101; 93 L.J.Ch. 449; 131 L.T. 438; Digest Supp.

Procedure Summons.

The plaintiff, David William Davies, brought an action against the defendants, British Geon, Ltd., in which he alleged that he had contracted dermatitis while employed at their factory at Barry. He issued a writ on Feb. 2, 1956, in the Cardiff District Registry and service was accepted by the defendants' solicitors in Cardiff. On Feb. 9, 1956, appearance was entered in London by the London agents for the defendants' Cardiff solicitors. The memorandum of appearance complied with R.S.C., Ord. 12, r. 5 (2) and stated that the defendant company neither resided nor carried on business within the district of the Cardiff Registry. The plaintiff applied to set aside the appearance on the ground that the defendants did carry on business within the Cardiff District Registry. The application was heard before Master LAWRENCE and was refused. The plaintiff appealed and the appeal was heard by PEARSON, J., in chambers and was adjourned into open court for judgment. Affidavits were filed on behalf of the plaintiff and the defendants regarding the carrying on of the business of the defendants and extracts are given at p. 415, letters B to I, post.

H. W. J. Ap Robert for the plaintiff (appellant).

L. F. Read for the defendants (respondents).

Cur. adv. vult.

May 7. **PEARSON, J.**, after stating the facts of the case and referring to R.S.C., Ord. 12, r. 4, r. 5, continued: If one merely looks at the wording of those rules without guidance from any previous authority one would be strongly inclined to say that different meanings should be given to the word " resides " and the words " carries on business ", which appear in both of the rules. It might be thought, if there were no authority on the point, that the use of these two expressions plainly implied two different meanings. Secondly, it might be said that, as a defendant might be a natural person or a corporation, prima facie the word " resides " and the words " carries on business " must have their separate meanings in relation to a corporation as well as in relation to a natural person. Thirdly, it might be said that a corporation, as well as a natural person, could be carrying on business in a number of different places and that carrying on business could be constituted by manufacturing in a large factory. Those would be the natural reactions to the wording of these rules if there were no guidance from authority, but it is necessary to consider what the authorities are and to trace them historically. In the notes to R.S.C., Ord. 12, r. 4, in the ANNUAL PRACTICE (1956 Edn.), at p. 134, under the heading " Resides or Carries on Business " it states " see CHITTY, ARCHBOLD, 253, where the cases on similar words in other Acts are collected ".

Treating the matter historically, the present Rules of the Supreme Court, in their original form, were issued in 1883 and were called the Rules of the Supreme Court, 1883. For the purposes of the two rules I have mentioned it is possible to go even farther back, not as far as 1873, because I have been unable to find in the Supreme Court of Judicature Act, 1873, any use of the words "resides or carries on business"; but in the Supreme Court of Judicature Act (1873) Amendment Act, 1875, one does find similar words. The Act of 1875 does refer in s. 16 to rules and provides that:

> "The rules of court in Sch. 1 to this Act shall come into operation at the commencement of this Act, and as to all matters to which they extend shall thenceforth regulate the proceedings in the High Court of Justice and Court of Appeal. But such rules of court, and also all such other rules of court (if any) as may be made after the passing and before the commencement of this Act under the authority of the next section, may be annulled or altered by the authority by which new rules of court may be made after the commencement of this Act."

In Sch. 1 to the Act of 1875, Ord. 12, r. 2 is exactly the same as the present R.S.C., Ord. 12, r. 4; and Ord. 12, r. 3 is in terms almost exactly the same as the present R.S.C., Ord. 12, r. 5 (1), so that you have this wording which was used in 1875 and was repeated without substantial alteration in 1883 when the present rules came out and it is still there. I have to consider what the draftsman meant when he used these words in 1883. That is what gives importance to the cases decided before 1875 and to the note in the Annual Practice referring to Chitty's Archbold*.

I will treat this matter historically. I begin with the County Courts Act, 1846 (repealed). Section 60 provided that

> ". . . such summons may issue in any district in which the defendant or one of the defendants shall dwell or carry on his business at the time of the action brought . . ."

and then there were s. 128 and s. 129 which are also relevant. Section 128 is rather difficult for this purpose, because early on in the section it used the expression, "where the plaintiff dwells", and later on used the expression "dwells or carries on his business", but the main provision for the purpose of understanding the decided cases is the earlier part of s. 128, which provided:

> ". . . that all actions and proceedings which before the passing of this Act might have been brought in any of Her Majesty's superior courts of record where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought . . . may be brought and determined in any such superior court . . ."

Section 129 provided:

> ". . . that if any action shall be commenced after the passing of this Act in any of Her Majesty's superior courts of record, for any cause other than those lastly hereinbefore specified, for which a plaint might have been entered in any court holden under this Act, and a verdict shall be found for the plaintiff for a sum less than £20, if the said action is founded on contract, or less than £5 if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs . . ."

Those are the provisions which were being interpreted in the cases which I have to mention.

First there was the case of *Taylor* v. *Crowland Gas & Coke Co.* (1) ((1855), 11 Exch. 1). That was decided with reference to s. 128 of the County Courts

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* Referred to at p. 405, letter I, ante.

Act, 1846. It was decided there that a corporation is to be considered as dwelling at the place where it carries on its business. That is amply confirmed by later cases, so it has to be accepted, at any rate so far as these authorities are concerned, that they establish the proposition, which seems artificial, that in the phrase " dwells or carries on his business " a separate meaning is not given to each of the two expressions in spite of the wording, but " dwells " and " carries on his business " have the same meaning.

Then there was the case of *Adams* v. *Great Western Ry. Co.* (2) ((1861), 30 L.J.Ex. 124). This was under s. 128 of the County Courts Act, 1846, and there the decision was that a railway company dwells for these purposes only at its principal office and not at every station on the line. That was a case in which the plaintiff dwelt and carried on his business at a place in Worcestershire not far from Birmingham, and he lost his luggage on a journey between Oswestry and Chester. The Great Western Railway Company's head office or principal office was at Paddington Station. The question arose whether costs could be recovered, and the plaintiff said that he was entitled to bring his action in the High Court because he dwelt more than twenty miles from the defendants' dwelling, which he alleged was at Paddington. That was held to be right on the ground that the railway company's dwelling was at its head office, Paddington.

It is interesting to see how that decision was arrived at. MARTIN, B., said (30 L.J.Ex. at p. 127):

> " I think the case of *Taylor* v. *Crowland Gas & Coke Co.* (1) has decided that a railway company can ' dwell ' within the meaning of the [County Courts Act, 1846, s. 128.] I think it is a dwelling analogous to that of an individual, and that any other interpretation of the Act would be an unfair one, and would lead to inconvenient practical results. It is clear to me that the place where the business was carried on was the place where the officer [who] was authorised and competent to give an opinion upon such subjects as the present action is to be found, which is at Paddington, and there alone."

That was a decision only on that one word " dwells " in the first part of s. 128; but in the same year, there was a decision in the Queen's Bench Division, in the case of *Shiels* v. *Great Northern Ry. Co.* (3) ((1861), 30 L.J.Q.B. 331), in which a long and careful judgment was given by HILL, J., who was adjudicating on s. 60 of the County Courts Act, 1846, where the wording was " dwells or carries on his business ". In that case the plaintiff, who alleged that his horse had been injured in Newark, sought to sue the railway company in the Lincoln District County Court. The Lincoln District County Court judge declined to hear the case on the ground that he had no jurisdiction. That was disputed, but the county court judge was upheld in the judgment of HILL, J., who said (30 L.J.Q.B. at p. 332):

> " It is true that, in a certain sense, a railway company carries on its business at every station in the kingdom where it makes contracts for the conveyance of, and receives, passengers or goods to be conveyed; and if the words in s. 60 are to be taken in their most extended import, then a railway company against whom a cause of action, within the jurisdiction of the County Courts Act, arose, might be sued in any county court in the kingdom, at the option of the plaintiff, provided the company had a station within the district of such county court; without any regard to the place where the cause of action arose, or to the fact that the officers or servants of the company at such last-mentioned station knew nothing, and had nothing to say to the affairs or business of the company, other than obeying the instructions of the directors, and acting in conformity with the regulations of the company at the particular station where they were employed. Such a manifest inconvenience and injustice could not have been intended by the legislature; and if the words used are capable of a construction which will

> give full effect thereto, without occasioning such inconvenience and working such injustice, I think a court of law is bound so to interpret the enactment. Many illustrations might be put to show that the words 'carry on his business', in s. 60, must receive some limitation, even in the case of private individuals. A builder, whose place of business is in one county court district, takes a contract for the erection of extensive buildings in another district, the completion of which will require a considerable time, and, for the purpose of such buildings, he erects workshops thereat. In one sense the builder carries on his business in the last-mentioned district; but he does not do so within the meaning of the enactment referred to—see *Gorslett* v. *Harris* (4) ((1857), 29 L.T.O.S. 75). Take the case also of a wholesale dealer, whose place of business is in London, and who sells exclusively therein, but also employs travellers, who visit different parts of the country at stated periods, making contracts and selling goods for their principal at the various towns and places which they regularly visit, and also collecting money thereat. In an important sense the wholesale dealer carries on his business at every place where his agents sell his goods; yet I take it to be clear that London is the only place in which he carries on his business within the meaning of s. 60 of the County Courts Act. I do not mean to say that a private trader or firm may not carry on business, within the meaning of the statute, in more than one place. The illustrations which I have used are merely for the purpose of showing that the words 'carry on his business' in the statute are not to be taken in their most extended sense . . ."

Then HILL, J., refers to certain previous cases.

Then there was also the case of *Brown* v. *London & North Western Ry. Co.* (5) ((1863), 32 L.J.Q.B. 318). There the headnote reads:

> "A railway company 'carries on its business' within the meaning of the [County Courts Act, 1846] s. 60, only at the principal station where the general superintendence of the whole concern is centred; and not at any station, however large, where the local management of any portions of the line is conducted subject to the supervision of the general manager at the principal station. Affirming *Shiels* v. *Great Northern Ry. Co.* (3)."

That was a strong court in which COCKBURN, C.J., WIGHTMAN, J., CROMPTON, J. and BLACKBURN, J., were participating. They upheld that decision.

BLACKBURN, J., said (32 L.J.Q.B. at p. 321):

> "I agree with HILL, J., that a railway company carries on its business at the principal station only: in the present case at Euston Square, and that a branch only is carried on and managed at Chester, and that the defendants are not liable to be summoned to the county court there. If the business were to be held to be carried on at Chester, the same principle must apply to every station, however small. In most cases the hardship suggested can be obviated, by obtaining the leave of the judge to sue in the county court of the district in which the cause of action arose."

Earlier he had said (ibid.):

> "But business can only be said to be carried on where it is managed. No doubt there may be cases where a man carries on more businesses than one and in different places, but such cases are quite exceptional; and the place of business, in general, must be the place where the general superintendence and management take place. For instance, Pickfords must have persons through whose means they carry through every county almost in England, and would be liable, if the present defendants can be sued at Chester, to be sued in almost every county court in England."

That is the principle established there.

Then we get the case which is to some extent on the other side, *Keynsham Blue Lias Lime Co., Ltd.* v. *Baker* (6) ((1863), 33 L.J.Ex. 41). That was a case in which the limited company concerned, the Keynsham Blue Lias Lime Co., Ltd., had carried on business within the jurisdiction of the Bristol County Court at their factory there. It was there that they manufactured and sold and delivered their products. It so happened that the defendant in that case, Mr. Baker, bought some quite small quantity of goods from them, and he was being sued for that quite small quantity of goods which had been sold and delivered to him at the works of the company situated in Somersetshire. The company went into liquidation, the liquidator himself carried on business in London, and the head office of the company had been in London. He brought his action in the High Court in London and he succeeded. The question arose whether under s. 128 and s. 129 of the County Courts Act, 1846, he should be allowed to have any costs. It was held that it was not right for him to bring his action there, and that he should have brought it in the Bristol County Court or in the Somersetshire County Court. Pollock, C.B., said (33 L.J.Ex. at p. 42):

> "The authorities cited in reference to railway companies appear to me to be inapplicable. There may be some difficulty in applying the Act to such cases, and, in all probability, when the Act [was] passed such a case as a railway company having a multitude of stations in all directions, some of them many hundred miles from others, was not contemplated; the courts have done the best they could under the circumstances. But that furnishes, in my judgment, no rule whatever, for the plain case of a company having one place of business where they find the material and manufacture it, and where they sell it and deliver it to those who come to buy, as the company in this case did in the neighbourhood of Bristol. Is a man who has so dealt with them there, and bought a few shillings' worth of a certain article, to be told, 'Now you are to be sued in the Courts of Westminster Hall, because the business was not carried on in the country, for the directors meet in Great Winchester Street, London'? It seems to me there is no ground whatever for holding that there is concurrent jurisdiction, where the subject-matter is between a tradesman at Bristol and a company at Keynsham, where alone the article is sold."

Then Bramwell, B., said (ibid.):

> "I am of the same opinion. The question here is, whether the plaintiffs dwell more than twenty miles from the defendant. The plaintiffs are a corporation, and it appears that word has been applied to corporations, by saying they dwell where they carry on their business. The question is, where did this corporation carry on its business? It seems preposterous to suppose they carried it on elsewhere than where they made and sold the article for the price of which the action is brought, and that is at Keynsham. I think London was merely the place where the directors met, but not where the business was carried on. Then, it is said, that the present plaintiff, the liquidator, is now the plaintiff, and that he lives and carries on his business in London: but the plaintiffs on the record are a company, and I do not know that they are not carrying on the business in the same way as they were before."

Channell, B., was of the same opinion. He said (ibid.):

> "I think the decisions as to railways are not applicable to the present case, on the ground stated by the Lord Chief Baron."

Pigott, B.'s judgment is interesting. He said (ibid., at p. 43):

> "I am of the same opinion. Hill, J., in delivering the judgment of the court in *Shiels* v. *Great Northern Ry. Co.* (3), used the expression with respect to a railway company, that in a certain sense it carries on its business at every

> station; but this company carried on their business, in every sense, at Keynsham, and, I think, they carry it on nowhere else."

I think it was quite rightly pointed out that the reasoning by which the decision was arrived at in that case is consistent with the assumption that a corporation carries on business in one place only. I will have to consider at a later stage if it is right to say that for the purposes of the present rule under consideration a corporation carries on business only in one place, and which that place would be for the present purposes. I want to carry this a little further. There was *Keynsham Blue Lias Lime Co., Ltd.* v. *Baker* (6) in 1863. Then in 1865 there was the case of *Aberystwith Promenade Pier Co., Ltd.* v. *Cooper* (7) ((1865), 35 L.J.Q.B. 44). The interest of that is that what may be called the principle of the railway company cases is applied on rather strong facts to another company which was not a railway company; it was a promenade pier company. According to the headnote its objects were the erection and maintenance of a pier and the reception of tolls thereon at Aberystwith, but its registered offices were at Westminster, where the substantial business of the company and their negotiations were carried on. That company was held to " dwell " at Westminster, and not at Aberystwith. In that case in the argument reference was made to the case I have just mentioned, *Keynsham Blue Lias Lime Co., Ltd.* v. *Baker* (6). In answer, COCKBURN, C.J., said (35 L.J.Q.B. at p. 44):

> " There the material was manufactured, and sold and delivered, all at their place of business in the country."

MELLOR, J., said:

> " The reception of the tolls of the pier is not the carrying on of the business of the plaintiffs' company."

COCKBURN, C.J., said:

> " You have not stated in your affidavit that the company had any office at Aberystwith."
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> Giving judgment, COCKBURN, C.J., said (ibid., at p. 45):
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> " The section of the Act we are now considering has already received judicial exposition in point. In the cases of railway and coal companies, they have been deemed to carry on their business where their principal offices were situated. Mr. Underhill's reasoning, if it could prevail, might be applied to railways, and to contracts entered into at the intermediate stations; and if a dispute arose upon such contracts, it might be said, in accordance with such reasoning, that the railway company dwell or carry on business at every one of their intermediate stations; but it has been held that a railway company does not carry on business at any place other than its principal office at which its business is managed. So it cannot be said here that the Aberystwith Promenade Pier Company dwelt on the pier, but it must be taken that they dwelt at the office of the company at Westminster. The affidavit of the plaintiffs states that the only office is in Westminster, and the affidavit on the other side only says that in the belief of the deponent they had no other business than maintaining and keeping in repair the pier, and receiving the tolls in respect thereof at Aberystwith. I think that the company dwell where its representatives are to be found."

MELLOR, J., said (ibid.):

> ". . . where the substantial business of the company is done, and its negotiations entered into, there, I think, the company dwells ",

and SHEE, J., and LUSH, J., concurred.

It was after those decisions had been given that the rules of 1875 were made, and the draftsman of those rules chose to use that phrase, " resides or carries on business ", in regard to the entry of appearance. Shortly afterwards, in 1877, A there was a decision in *Le Tailleur* v. *South Eastern Ry. Co.* (8) ((1877), 3 C.P.D. 18), and the headnote gives the effect of the decision:

> " The South Eastern Railway Company have a station in Cannon Street, City, where a considerable portion of their business is transacted. Their principal station, where the meetings of the directors are held and the general and substantial business of the company is conducted, is without B the city. Held, that the company do not ' carry on business ' within the jurisdiction of the Mayor's Court, within the meaning of s. 12 of the [Mayor's Court of London Procedure Act, 1857.] *Brown* v. *London & North Western Ry. Co.* (5) followed."

Then a footnote sets out the provisions of s. 12 of the Act* which was being C construed, and that says that in certain events no plea to the jurisdiction shall be allowed

> ". . . provided the defendant or one of the defendants shall dwell or carry on business within the City of London or the liberties thereof . . ."

That, therefore, raised the same issue as before, whether the South Eastern Railway Company dwelt and carried on business within the City of London by D virtue of its activities at Cannon Street Station, or whether it dwelt and carried on its business outside the City of London at London Bridge Station, and it was held that it carried on business at London Bridge Station and not at Cannon Street.

GROVE, J., said (3 C.P.D. at p. 19):

> E " I can see no distinction between *Brown* v. *London & North Western Ry. Co.* (5) and the present case. The words in both statutes are precisely the same, so far as this question is concerned, and must receive the same construction in both. I observe that CROMPTON, J., in that case says (32 L.J.Q.B. at p. 321): 'I am quite satisfied that, if a prohibition had been applied for, it ought to have gone; and the question in the present F form is precisely the same.' I feel bound by that case, and I think the decision the Court of Queen's Bench came to there was quite right."

LINDLEY, J., concurred. He said (3 C.P.D. at p. 20):

> " The very same phrase, it seems, was used in an Act of a substantially similar kind, and the conclusion come to was that such a carrying on business as is here described was not within the section. It was there said that G business must mean the general, or as it is sometimes called, the administrative, business carried on at the chief or principal station. Here the general business of the company is not carried on within the city. There being no material distinction between the case cited and the present, the result must be the same."

Then after that decision there came the rules of 1883. Then in the year H 1885 came CHITTY'S ARCHBOLD'S PRACTICE OF THE QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE (14th Edn.): it was in two volumes, and the relevant passage is in Vol. 1 at p. 252. It sets out the provisions of Ord. 12, r. 4 and r. 5, and then it says:

> " There does not appear to have been any reported decision as to what is I ' residing or carrying on business ' within the meaning of these rules; but it may be useful to refer to the cases decided on similar words, ' dwelling or carrying on business ', contained in several other statutes."

Then it refers to statutes, including s. 128 of the County Courts Act, 1846, and s. 12 of the Mayor's Court of London Procedure Act, 1857. Then it mentions matters of various individuals, and goes on to say this (ibid., at p. 253):

> " A distinction is established by the cases between the ' carrying on

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* 20 & 21 Vict. c. clvii.

> business ' by a corporation or company and by an individual. A corporation can only ' carry on business ' in one place, and that place is, the place where its principal business is transacted. In the case of a railway company, such place is that where the general business of the line is carried on, and not necessarily the terminal station. Other companies ' carry on business ' not necessarily at their registered office, even though the directors meet there, but at their chief place of carrying on their business, whatever it may be. So no company can be said to carry on business at a place where they have only a receiving agent."

It says (ibid., at p. 254):

> " An individual, on the other hand, is held to ' carry on business ' at any places where he habitually and personally works. But it has been held, that the business must be his own independent business—he must not be merely in the employment of some other person. A builder who was employed to fit up certain houses at one place, and who for the purpose of performing that contract had set up workshops and counting-houses there, but whose permanent residence was elsewhere, was held not to carry on business at the former place. But a surgeon who resided at C., but who daily attended patients at B., was held to carry on business at B."

There is a work of authority stating (ibid., at p. 253):

> " A distinction is established by the cases between the ' carrying on business ' by a corporation or company and by an individual. A corporation can only ' carry on business ' in one place, and that place is, the place where its principal business is transacted."

Therefore, so far there are two points. The first is that before the rules of 1875 were drafted* there had been these decisions under the County Courts Act, 1846, as to the meaning of the expression " dwells or carries on business " in that Act, and the draftsman of the rules of 1875 used the phrase "resides or carries on business ". It is certainly reasonable to suppose that the draftsman of these rules had in mind the decisions on those words with regard to the previous Acts. It is true that the subject-matter of R.S.C., Ord. 12, is not quite the same as the subject-matter of ss. 60, 128 and 129 of the County Courts Act, 1846, but there is some similarity. The County Courts Act, 1846, was concerned with the right county court in which to bring an action or whether the action should be brought in a county court rather than the High Court.

In this appeal we are concerned with the question what is the right place in which the interlocutory proceedings in the action shall take place. It is agreed, I think, that that is the real issue here. If the appearance is allowed to be entered in the District Registry, then the interlocutory proceedings go on in the District Registry. If the appearance is entered in London at the Central Office, then the interlocutory proceedings take place in London†. I think it is right to say that those decisions, although they are not exactly the same, are in pari materia with the subject-matter of r. 4 and r. 5 [of R.S.C., Ord. 12] with which we are concerned. The second point is that considerable weight should be given, as I think, to that passage in Chitty's Archbold which I have read.

What is there on the other side? Quite a number of decided cases have been mentioned which show that for some purposes a corporation can have more than one residence and certainly can carry on business in more than one place. It has also been shown that even under the County Courts Acts an individual at any rate can apparently carry on business in more than one place, and a firm, in the proper sense of a partnership, can apparently carry on business in more than one place.

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* Referred to on p. 406, letter D, ante.

† See R.S.C., Ord. 12, r. 7.

A With regard to those latter points, there is the case of *Mitchell* v. *Hender* (9) ((1854), 23 L.J.Q.B. 273). It was not expressly decided that the defendant could carry on business in more than one place, but that seems to be reasonably inferable from the decision, because it says there in the headnote:

> " H. was a surgeon, apothecary and accoucheur, residing at C, in the district of county court A. He daily attended to patients requiring his B advice residing in the district of county court B.:—Held, that he carried on his business within the jurisdiction of county court B. within the meaning of s. 128 of the [County Courts Act, 1846]."

There is the case of *Weatherley* v. *Calder & Co.* (10) ((1889), 61 L.T. 508) where there was a Scottish firm carrying on business in Scotland with a branch office C situated within the jurisdiction of an English county court, the Middlesbrough County Court. It was held that " the firm ' carried on business ' within the jurisdiction, that the service was good, and that the county court judge was wrong in declining to exercise jurisdiction ". That was decided under the County Courts Act, 1888. Section 74 of that Act contained similar words:

> ". . . every action or matter may be commenced in the court within D the district of which the defendant or one of the defendants shall dwell, or carry on his business at the time of commencing the action or matter."

In addition to that, reference was made to decisions on other matters showing that a corporation may for some purpose reside in different countries. There is the case of *Baillie* v. *Goodwin* (11) ((1886), 33 Ch.D. 604). That was cited solely for the purpose of showing that it would be possible for a corporation E very simply to have two places of business. It was cited for the one or two sentences in the judgment of NORTH, J., where he said (33 Ch.D. at p. 608):

> "A second case cited, *Keynsham Blue Lias Lime Co.* v. *Baker* (6), seems very much in point, as it shows that the place of business must be where either manufacture or sale takes place. Here those things take place in Scotland and do not take place within the jurisdiction."

F The actual decision there was, therefore, that there was no carrying on of business within the jurisdiction on the facts of that case.

Then there was a case reported in 1902, *Dunlop Pneumatic Tyre Co.* v. *Act. für Motor und Motorfahrzeugbau vorm. Cudell & Co.* (12) ([1902] 1 K.B. 342). The headnote reads:

> G " The defendants, a foreign corporation, who were manufacturers of motor cars abroad, hired a ' stand ' at the Crystal Palace for the exhibition of articles of their manufacture at a cycle show, and exhibited at the show, which lasted for nine days, among other articles, a motor car fitted with tyres, which were alleged by the plaintiffs to be an infringement of their patent. The defendants' ' stand ' was in charge of a person employed by H them as their representative, whose duty it was to explain the working of the articles exhibited, and to take orders for and press the sale of the defendants' goods:—Held, that, during the continuance of the show, the defendants were carrying on business so as to be resident at a place within the jurisdiction, and therefore could be served there with a writ in an action by the plaintiffs for infringement of their patent under Ord. 9, r. 8."

I That takes one back to *Newby* v. *Von Oppen & Colt's Patent Firearms Manufacturing Co.* (13) ((1872), L.R. 7 Q.B. 293) which is well known in this connection, and there it was held that

> " A foreign corporation, carrying on business in England, although not incorporated according to English law, may be sued as defendants in an English court, in respect of a cause of action which arose within the jurisdiction. So held, on motion to set aside service of writ. Service of a writ of summons on the head officer of an English branch of a foreign corporation

> carrying on business in England is good service, and it is not necessary to serve the process on the officer at the head office abroad."

Therefore, at any rate for the purpose of holding a foreign corporation amenable to the jurisdiction of the English court, undoubtedly a wider meaning has been given to the concept of business being carried on by the corporation.

Then also reference was made to certain income tax decisions, and I think the strongest of them was one which was referred to by counsel for the defendants, which shows that for income tax purposes it is possible for a corporation to have two places of business. That was a 1925 case, *Swedish Central Ry. Co., Ltd.* v. *Thompson* (14) ([1925] A.C. 495). There it was decided by a majority of the House of Lords that a registered company can have more than one residence for the purposes of the Income Tax Acts. That was perhaps going rather beyond certain earlier decisions which appear to have taken a somewhat different view; but that is now the authoritative decision on the point.

Reference was also made to the case of *New York Life Insurance Co.* v. *Public Trustee* (15) ([1924] 2 Ch. 101). This was a question arising under a peace treaty as to property, rights and interests of German nationals within His Majesty's dominions. The plaintiff company, the New York Life Insurance Co., was incorporated in New York and had its central office and the bulk of its assets in New York. It had a branch in London and in other capitals. The general manager of the London branch had no general authority to issue policies in this country, but certain life policies were issued in London to German nationals before the outbreak of the war. It was held that

> " inasmuch as a corporation might have a dual residence, and there was evidence that the plaintiffs were resident both in New York and in London carrying on business in both places and in both places being subject to the jurisdiction of the courts, it was permissible and necessary to look at the terms of the contracts and to determine from them at what place the debts would be recoverable. Applying that test in the present case, the debts were recoverable in London where they were expressed to be payable, and, that being so, they were situate within His Majesty's dominions and became subject to the charge."

Therefore, I think it must be taken that for many purposes it is possible for a corporation to be carrying on business in more places than one, and even to be residing in more places than one; but here we have these rules, enacted initially in 1875 and repeated in 1883, which have remained in force ever since, and in addition great weight should be given to the view taken in CHITTY'S ARCHBOLD in 1885. It is reasonable also to suppose that the draftsman of the 1875 rules must have had in mind the previous decisions, and the matters are sufficiently in pari materia. Therefore I hold that notwithstanding the recent authorities, it is right to say that for the purposes of these rules a corporation is deemed to have only one place of business.

A further point I think would be a correct inference. As the learned master has decided to refuse the order in the present case, and as the ANNUAL PRACTICE in its notes to R.S.C., Ord. 12, r. 4, refers to CHITTY'S ARCHBOLD, p. 253, it is reasonable to infer that existing practice in the Central Office is on that side. Therefore, I think that I am bound to hold, in spite of what would naturally have been thought on merely reading the words, that there is no distinction between " residing " and " carrying on business " when dealing with a corporation, and that a corporation has only one place of business, and that is its principal place of business.

There still remains the question of fact where this particular corporation resides and carries on business, and for that I look at the affidavit, bearing in mind the decided cases, particularly the railway company cases and the case to which I have already referred, *Keynsham Blue Lias Lime Co., Ltd.* v. *Baker* (6).

There was an affidavit of the plaintiff stating shortly that he was employed as a labourer with the defendants, who carry on business, as he says, at Hayes Road, Sully, in the county of Glamorgan which is within the district of the Cardiff Registry of the High Court of Justice. He says that the factory of the defendants is approximately seven miles from Cardiff, and that he was employed at the factory. He was engaged on his employment at the factory. Then he says:

> "I am aware that labouring staff is engaged locally by application to the labour officer at the said factory and to the best of my knowledge information and belief clerical staff are engaged in the same manner. To the best of my knowledge information and belief there are between four and five hundred persons employed by the defendants at the said factory. The defendants manufacture, amongst other products a powder for making plastics. The greater portion of the powder is exported to foreign countries and the British Commonwealth. The powder is placed in very thick waterproof bags, weighing 56 lb. and despatched by lorries to Liverpool and other ports for despatch overseas."

Then there is a fuller affidavit from the defendants. Mr. Douglas Hungerford Smith, who makes the affidavit, says that he is the secretary of the company, whose registered office is in Piccadilly, London. Then he says:

> "All board meetings of the directors of the company are held at 20/21 St. James' Square, London; the prices of the company's products are fixed in London; the whole of the policy of the company is framed in London; the final trading accounts of the company are prepared and issued from London. The purpose of the company is to manufacture raw materials and in particular Polyvinylchloride which is manufactured at its only factory which is at Barry. In addition to the said factory at Barry and the registered office in London the company has a branch sales office at Manchester. The head office of the company is at its said registered office. The meetings of the company's shareholders are held at 20/21 St. James' Square aforesaid. The chief executive officers of the company are the chairman, the acting managing director and the sales director all of whom have their offices in London, and also the director in charge of research who has his office at the said factory at Barry. I am the person authorised by the company and competent to control the course of this action. I have my office at Devonshire House aforesaid. The general administration of the said factory at Barry is under the control of an officer of the company who is down at Barry, but he is, however, subject to the control of the company's directors and officers in London. In particular the said officer at Barry who is not a director, has nothing to do with either the sales or financial policy of the company. The two basic raw materials which are required for the manufacture of the company's said products at Barry are carbide and chlorine. The contracts for the purchase of these raw materials are entered into in London. The said products of the factory are sold all over England and twenty per cent. to twenty-five per cent. of the said products are exported. The responsibility for the sale of the said products lies with the sales director whose office is in London. No employee or officer of the company at Barry has anything to do with the sale of the said products. With regard to the engagement of employees of the company working at the said factory at Barry, I am responsible for the engagement of those employees with a basic wage of more than £650 per annum, and the personnel officer at Barry is responsible for the engagement of those employees with a basic wage of less than £650 per annum."

Those are the facts, and having regard to the railway company cases and the case of *Keynsham Blue Lias Lime Co., Ltd.* v. *Baker* (6), I think the right finding is that the company carries on business at its head office, which is in Piccadilly, A London, and that for the purposes of these rules it does not carry on business in the district of the Cardiff District Registry. Therefore, this appeal fails.

It has been a matter of considerable interest, and I am much indebted to learned counsel for their assistance. As I have said, if there had been no previous authority I should have arrived at a different conclusion here. I should have thought that the right general principle is that you give the ordinary meaning B to the words " carries on business ", and if in an ordinary reasonable sense you find a company is established and is carrying on one of its principal activities at that establishment within the area of the District Registry, it should have been said at any rate that its business was carried on partly within that District Registry. If that created hardship on the defendant in some case, as it might, then an application could be made under R.S.C., Ord. 35, r. 16, to have it transferred C to the Central Office. In spite of those feelings, however, I feel overborne by the authority of the decided cases, and that old and high authority, namely CHITTY'S ARCHBOLD, which is referred to in the ANNUAL PRACTICE. For that reason this appeal fails.

Appeal dismissed.

Solicitors: *Manser, Phillips & Co.*, agents for *Myer Cohen & Co.*, Barry (for D the plaintiff); *Rhys Roberts & Co.*, agents for *C. James Hardwicke & Co.*, Cardiff (for the defendants).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

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PRACTICE NOTE.

Legal Aid—Certificate—Inspection.

Regulation 15 (7)* of the Legal Aid (General) Regulations provides that no document and no extract from a document filed or exhibited under paragraphs (5) and (6) of that regulation shall be disclosed save by leave of the court.

G The effect of this regulation is that except by leave of a judge or registrar no civil aid certificate is open to inspection by anyone other than the party who filed the same, and its contents cannot be disclosed to any other party to the suit.

B. LONG,
Senior Registrar.

May 14, 1956.

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* Amended by the Legal Aid (General) (Amendment No. 1) Regulations, 1954 (S.I. 1954 No. 166) and the Legal Aid (General) (Amendment No. 2) Regulations, 1955 (S.I. 1955 No. 1829).

O'CONNOR *v.* ISAACS AND OTHERS.

[COURT OF APPEAL (Singleton, Morris and Romer, L.JJ.), April 19, 20, 23, 24, 25, 26, 27, 30, 1956.]

Justices—Jurisdiction—Acting without jurisdiction—Maintenance order—Wife's allegation of cruelty not proved but consent order for maintenance made—Husband committed to prison for failure to comply with order—Order discharged by Divisional Court—Action against justices for damages for false imprisonment and for sums paid to wife under order—Justices Protection Act, 1848 (11 *&* 12 *Vict. c.* 44), *s.* 2.

Public Authority—Limitation of action—Action against justices for false imprisonment—Plaintiff committed to prison for failure to comply with maintenance order—Order made without jurisdiction—Last period of imprisonment ending in 1945*—Order discharged in October,* 1954*—Action commenced in December,* 1954*—Justices Protection Act,* 1848 (11 *&* 12 *Vict. c.* 44), *s.* 2*—Limitation Act,* 1939 (2 *&* 3 *Geo.* 6 *c.* 21), *s.* 21 (1).

Statute—Construction—Implication of words—No sufficient reason to imply words—Justices Protection Act, 1848 (11 *&* 12 *Vict. c.* 44), *s.* 2.

In August, 1941, the plaintiff's wife issued a summons against him under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, alleging that he had been guilty of persistent cruelty to her. The summons was heard by three justices of the Petty Sessional Division of Kingston-on-Thames who made an order, dated Aug. 18, 1941, whereby, after stating that persistent cruelty had not been proved but that the plaintiff had consented to an order, they ordered that the plaintiff should pay £1 5s. a week to the collecting officer for the use of the wife. The justices, having found that persistent cruelty was not proved, had no jurisdiction to make the order even by consent; and the order was bad on the face of it. The order was subsequently varied on several occasions between 1942 and January, 1954, by orders of the same and other justices of the same court. These orders also were made without jurisdiction. The plaintiff fell into arrears in respect of the payments to be made under the order and under some variations of the order, and was committed to prison for non-payment on three different occasions in the years 1942 to 1945 by justices of the Kingston bench. He was released from the third and last period of imprisonment on Oct. 19, 1945. On Oct. 6, 1954, the Divisional Court of the Probate, Divorce and Admiralty Division discharged the original order and the orders of variation, on the ground that they were made without jurisdiction. The plaintiff had made many payments under the orders before they were discharged, and of these payments it was agreed that payments aggregating £125 5s. 6d. would not be barred by any statute of limitation in force at the date of the writ next mentioned if an action lay against the defendants or any of them for recovery of payments made by the plaintiff under the orders. On Dec. 21, 1954, the plaintiff issued a writ against all the justices of the Petty Sessional Division of Kingston-on-Thames who had sat on the bench when the original order, the orders of variation or the committal orders were made, claiming damages for false imprisonment and for acts done by the defendants without jurisdiction while sitting as justices. The damages were of two categories, viz., (a) general damages and loss of wages during the time of his imprisonment and money paid to secure release from imprisonment, and (b) damages for payments made by him pursuant to the orders made without jurisdiction. The justices relied, among other defences, on the Justices Protection Act, 1848, and s. 21 (1) of the Limitation Act, 1939. It was common ground between the parties that as against some of

the defendants there had arisen in the plaintiff causes of action for damages A
for false imprisonment.

Held: (i) the plaintiff's right of action for damages for false imprisonment
was barred by the Limitation Act, 1939, s. 21 (1), because the last period of
his imprisonment was in 1945 and the proviso to s. 2 of the Justices Protection
Act, 1848, did not postpone the accrual of the plaintiff's cause of action
until the time (Oct. 6, 1954) when the order of Aug. 18, 1941, and subsequent B
variation orders were quashed.

Haylock v. *Sparke* ((1853), 1 E. & B. 471) approved and followed.

(ii) the plaintiff was not entitled to recover damages from any of the
defendants in respect of the sums paid by him under the order of Aug. 18,
1941, and subsequent variation orders because

(a) no cause of action lay against any of the defendants to recover the C
amount of sums so paid but (per Morris and Romer, L.JJ.) the remedy
of a party aggrieved by an order made without jurisdiction was, in a case
where appeal was appropriate, by appeal, and

(b) the payment of each of these sums by the plaintiff was not an "act done"
within s. 2 of the Justices Protection Act, 1848, since those words referred
to an act done by someone other than the person aggrieved, and accordingly D
that section neither preserved to nor conferred on the plaintiff any right
of action for the recovery of the sums so paid by him.

Polley v. *Fordham* ([1904] 2 K.B. 345) considered.

(iii) (Romer, L.J., not concurring) in the proviso to s. 2 of the Justices
Protection Act, 1948, which enacts that "no such action shall be brought for
any thing done under such conviction or order until after such conviction E
shall have been quashed", the words "or order" would not be implied
after the word "conviction" where it appeared for the second time.

Per Singleton, L.J.: a collecting officer when receiving money paid
periodically pursuant to a maintenance order, or order such as a maintenance
order, of a magistrates' court is not the agent of the justices (cf.,
p. 434, letter I, post.) F

Decision of Diplock, J. ([1956] 1 All E.R. 513) affirmed.

[As to the protection afforded to justices acting without jurisdiction, see 26
Halsbury's Laws (2nd Edn.) 282, para. 599; and for cases on the subject,
see 38 Digest 88, 89, *647-655*.

As to the liability of a justice for false imprisonment, see 33 Halsbury's G
Laws (2nd Edn.) 41, para. 72.

For the Justices Protection Act, 1848, see 14 Halsbury's Statutes (2nd
Edn.) 801; for the Limitation Act, 1939, s. 21, see 13 Halsbury's Statutes
(2nd Edn.) 1180.]

Cases referred to:

(1) *Douglas* v. *Forrest*, (1828), 4 Bing. 686; 1 Moo. & P. 663; 6 L.J.O.S.C.P. H
157; 130 E.R. 933; 32 Digest 328, *140*.

(2) *Read* v. *Brown*, (1888), 22 Q.B.D. 128; 58 L.J.Q.B. 120; 60 L.T. 250;
1 Digest 13, *107*.

(3) *Cooke* (*Cook*) v. *Gill*, (1873), L.R. 8 C.P. 107; 42 L.J.C.P. 98; 28 L.T.
32; 1 Digest 13, *106*.

(4) *Board of Trade* v. *Cayzer, Irvine & Co.*, [1927] A.C. 610; 96 L.J.K.B. I
872; 137 L.T. 419; Digest Supp.

(5) *Scott* v. *Avery*, (1856), 5 H.L. Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207;
10 E.R. 1121; 2 Digest 350, *263*.

(6) *Caledonian Insurance Co.* v. *Gilmour*, [1893] A.C. 85; 57 J.P. 228; 2
Digest 358, *300*.

(7) *Haylock* v. *Sparke*, (1853), 1 E. & B. 471; 22 L.J.M.C. 67; 20 L.T.O.S.
276; 17 J.P. 262; 118 E.R. 512; 38 Digest 86, *629*.

(8) *West Riding of Yorkshire Rivers Board* v. *Robinson Brothers*, [1907] 1 K.B. 431; 76 L.J.K.B. 426; 96 L.T. 162; 71 J.P. 137; 1 Digest 52, *419*.

(9) *Sommerville* v. *Mirehouse*, (1860), 1 B. & S. 652; 121 E.R. 857; sub nom. *Somerville* v. *Mirehouse*, 3 L.T. 294; 25 J.P. 21; 38 Digest 94, *696*.

(10) *Coburn* v. *Colledge*, [1897] 1 Q.B. 702; 66 L.J.Q.B. 462; 76 L.T. 608; 32 Digest 339, *229*.

(11) *R.* v. *Ely JJ., Ex p. Gilling*, (1855), 4 W.R. 13.

(12) *Polley* v. *Fordham*, [1904] 2 K.B. 345; 73 L.J.K.B. 687; 90 L.T. 755; 68 J.P. 321; 38 Digest 127, *930*.

(13) *Hodson* v. *Cooke*, (1683), 1 Vent. 369; 86 E.R. 237; sub nom. *Hudson* v. *Cooke*, 2 Show. 328; Skin. 131; 38 Digest 69, *457*.

(14) *Beaurain* v. *Scott*, (1813), 3 Camp. 388; 170 E.R. 1420; 38 Digest 83, *607*.

(15) *Ackerley* v. *Parkinson*, (1815), 3 M. & S. 411; 105 E.R. 665; 38 Digest 82, *594*.

(16) *Clark* v. *Woods*, (1848), 2 Exch. 395; 17 L.J.M.C. 189; 11 L.T.O.S. 225; 12 J.P. 489; 154 E.R. 545; 38 Digest 90, *667*.

(17) *Norton* v. *Monckton*, (1895), 43 W.R. 350; 38 Digest 91, *670*.

(18) *Abbott* v. *Sullivan*, [1952] 1 All E.R. 226; [1952] 1 K.B. 189; 3rd Digest Supp.

(19) *Tinkham* v. *Perry*, [1951] 1 All E.R. 249; [1951] 1 K.B. 547; 2nd Digest Supp.

(20) *Musurus Bey* v. *Gadban*, [1894] 2 Q.B. 352; 63 L.J.Q.B. 621; 71 L.T. 51; 32 Digest 347, *306*.

Appeal.

The plaintiff appealed from an order of Diplock, J., dated Jan. 24, 1956, and reported [1956] 1 All E.R. 513, whereby the plaintiff's claim for damages against such defendants as were before the court at the hearing of the action, all of whom were or had been justices of the Petty Sessional Division of Kingston-on-Thames, for false imprisonment and damages for payments made by him pursuant to orders made without jurisdiction, was dismissed.

The facts appear in the judgment of Singleton, L.J.

N. R. Fox-Andrews, Q.C., and *R. L. Bayne-Powell* for the plaintiff.

G. G. Baker, Q.C., and *D. M. Wacher* for the defendants.

Cur. adv. vult.

Apr. 30. **SINGLETON, L.J.**: This is an appeal by the plaintiff from a judgment of Diplock, J., dated Jan. 24, 1956. The claim of the plaintiff was against fourteen justices of the peace for the Petty Sessional Division of Kingston-on-Thames for damages for false imprisonment and for acts done by the defendants without jurisdiction while sitting as justices of the peace. The facts on which the plaintiff relies are set out in the statement of claim.

> "(1) On Aug. 18, 1941, the defendants Isaacs, McGhee and Hale, sitting as justices of the peace for the Petty Sessional Division of Kingston-on-Thames, in the county of Surrey, heard a summons by Annie O'Connor, the wife of the plaintiff, on the ground of the persistent cruelty of the plaintiff. The said defendants duly found the plaintiff not guilty of persistent cruelty. Thereupon the said defendants without jurisdiction purported to order by consent that the plaintiff should pay his said wife the weekly sum of £1 5s. and purported to insert a non-cohabitation clause into the said order and further to order the plaintiff to pay 10s. 6d., the costs of the said summons.
>
> "(2) The plaintiff made some payments under the said purported order but fell into arrear. On Apr. 27, 1942, the defendants Isaacs and Wagner, sitting as justices of the peace for the petty sessional division aforesaid heard a summons by the said wife of the plaintiff to vary the said purported

> order and without jurisdiction purported to increase the said weekly payment to £1 15s., 10s. thereof being expressed to be for the child of the marriage for the custody of whom, however, no order was made. On the same day a court of the said petty sessional division committed the plaintiff to prison for one month on the ground of his having neglected or refused to pay all the amounts purported to have been ordered by the purported order dated Aug. 18, 1941.
>
> "(3) By reason of the said committal order the plaintiff was imprisoned in Brixton prison, in the county of Surrey, from June 18, 1942, to June 29, 1942.
>
> "(4) The plaintiff fell into arrears with payments under the purported order dated Apr. 27, 1942, and on Mar. 7, 1944, the said court of summary jurisdiction committed him to prison for three months. By reason of the said committal order the plaintiff was imprisoned in Brixton prison aforesaid from July 28, 1944, to Oct. 27, 1944.
>
> "(5) After his release from prison on Oct. 27, 1944, the plaintiff again fell into arrears with payments under the purported order dated Apr. 27, 1942, and on May 23, 1945, the said court of summary jurisdiction committed him to prison for three months. By reason of the said committal order the plaintiff was imprisoned in Brixton prison aforesaid from July 20, 1945, to Oct. 19, 1945."

The next four paragraphs cover variations in the order made from time to time, sometimes increasing and sometimes reducing the amount, and apparently are meant to provide the reason for adding other justices as defendants.

The plaintiff went to gaol on three occasions, and he claimed damages for false imprisonment in respect of the periods which he spent in gaol. The last of those periods was from July 20, 1945, to Oct. 19, 1945. He paid the collecting officer, for his wife and child, the sums set out in para. 11 of the statement of claim, and he claims those sums from the justices (or from some of them) as damages suffered by him. He had no legal advice in the early stages, although he consulted welfare officers. In 1954 he consulted a solicitor, and on Apr. 5, 1954, he applied by counsel to the Kingston magistrates for a discharge of the order of Aug. 18, 1941. They held that they had no jurisdiction to grant his application. On Oct. 5, 1954, he applied to the Divisional Court of the Probate, Divorce and Admiralty Division, and on Oct. 6 that court granted him leave to appeal out of time and set aside the order and the variation orders. The order of the Divisional Court reads:

> "Upon reading the notice of appeal dated Apr. 9, 1954, filed on behalf of the appellant, the husband, by way of appeal from the orders of the justices of the Petty Sessional Division of Kingston-on-Thames . . . dated Aug. 18, 1941, Apr. 27, 1942, July 9, 1951, Aug. 13, 1951, Jan. 4, 1954, and Apr. 5, 1954, and upon hearing counsel on behalf of the parties, the appellant by leave withdrawing the appeal against the order dated Apr. 5, 1954, and having extended the time in which to appeal against all other orders, the husband undertaking not to reopen matter as to any payments made thereunder, it is ordered on Oct. 6, 1954, that the appeal be and the same is hereby allowed the said orders dated Aug. 18, 1941, Apr. 27, 1942, July 9, 1951, Aug. 13, 1951, and Jan. 4, 1954, discharged."

I shall refer later to the undertaking which was given and which was embraced in the order. It is to be observed that the justices, who are respondents in the appeal now before us, were not parties to the proceeding before the Divisional Court. We were informed that the position of the justices was not mentioned on the hearing before LORD MERRIMAN, P., and WILLMER, J., as counsel had not then in mind the question of bringing an action against them. The writ in this action was issued on Dec. 21, 1954.

The order of the justices of Aug. 18, 1941, which was produced before the Divisional Court, is clearly bad on the face of it. A document headed " Reasons for judgment ", which was also produced, reads:

> "Persistent cruelty. The reasons for judgment in this case are that both the complainant and the defendant have consented to the order."

That is signed by the first defendant, Mr. Isaacs. It is clear that an order could not be made on the ground of persistent cruelty if, as appears from the order of the justices, the complaint of persistent cruelty was not found to be proved. Precisely what took place on the hearing on Aug. 18, 1941, cannot be proved after all these years. No doubt the justices were satisfied that the plaintiff consented to something, but Diplock, J., did not consider that he consented to an order involving the consequences which it did. No one has questioned the fact that the order, being bad on the face of it, could not stand if the plaintiff were given leave to appeal out of time. In the course of his judgment the learned President said:

> " I now come to what, in my opinion, is the only real issue in this case, and that is, how to get rid of the order of Aug. 18, 1941, for it must be got rid of somehow. The husband manifestly is at mercy after this long lapse of time in asking us to give leave to appeal against that order, worded as it is, and very properly, in my opinion, [counsel] has told us that he had already anticipated that particular difficulty and had obtained instructions to give an undertaking on the part of the husband, as one of the terms for granting leave to appeal out of time, that the book should remain closed as regards any payments made under such order down to date, and that there would be no question, if the original order was set aside, of any attempt to obtain repayment of any payment that had been made. That seems to me to be a most proper suggestion, and one that relieves us from imposing it as a term, because it is quite clear, whatever else is not clear in this case, that there never has been any practical doubt that the husband was paying to the collecting officer of the court under some form of compulsion, albeit he may have consented to the compulsion in some shape or another in the first instance. So at the end of it all I think that the proper way to deal with this case is to give leave to appeal now against the original order, on the basis that the husband undertakes not to reopen any payments made under that order or the various orders by which the original order has purported to be varied, and, having given leave to appeal, to discharge the order. On that, the whole bag of orders, so to speak, falls. All the variations fall with the original order, and it is open to either party to start de novo, but not retrospectively."

Willmer, J., said:

> " Our power to grant that leave is, of course, discretionary, and, taking the view that it ought to be exercised in this case, I, like my Lord, am impressed for one thing by the fact that an undertaking has been given on behalf of the husband not to seek to recover hereafter any of the payments which have been made under the original order, an undertaking which relieves us from imposing any terms."

On the hearing before Diplock, J., Mr. Isaacs, who was chairman of the justices on Aug. 18, 1941, gave evidence. I refer to some questions and answers which are recorded in the transcript of the evidence. Counsel for the plaintiff asked Mr. Isaacs:

> " Q.—Was this case dismissed ? A.—It is seventeen years ago, and from

> my recollection I am under the impression there must have been a mistake in that register, because I do not think we should have dismissed the case and then gone on to say: 'How much a week are you going to pay to your wife ?' Q.—What is it we are trying to decide in this case ? Are you now saying in fact you found the complaint proved ? A.—I am saying all those years ago I cannot remember it. I am putting before his Lordship and the court that I cannot understand how it was that we went on and asked this man and negotiated and made an order for payment if we had dismissed this case. It is my own personal impression that we found the case was proved, and that there must have been some mistake in the entering of the book. That is my own recollection about it, and I can only be honest and say that is my recollection."

Diplock, J., interposed during the cross-examination and said:

> "Mr. Isaacs has said very fairly and quite understandably: 'I simply cannot remember what happened'. I should have been surprised if he had said anything else. (Counsel): That of course I follow, but are you trying to excuse this muddle in some way ? A.—Trying to excuse it ? No, I am not trying to excuse any muddle. I am trying to give you the facts as I know them, as I can remember them."

No one can challenge the good faith of Mr. Isaacs. The difficulty in which he and his fellow magistrates were placed was that the case arose so many years after the order was made, and no one could have a clear recollection of what had happened. The matter before the justices was under the Summary Jurisdiction (Married Women) Act, 1895; and whether questions other than that embraced in the summons were mentioned or not, no one has any idea after this lapse of time.

It is pleaded in para. 10 of the statement of claim :

> "On Oct. 6, 1954, the Divisional Court of the Probate, Divorce and Admiralty Division on the hearing of an appeal out of time by the plaintiff against the purported maintenance order and variation orders aforesaid (but not against the adjudication that the plaintiff was not guilty of persistent cruelty) set aside the said purported order and variation orders and adjudged them to have been made without jurisdiction."

It was said on the hearing before us that the imprisonment of the plaintiff was unlawful in that the original order of the justices was made in excess of jurisdiction and that he had paid sums which he ought not to have been ordered to pay and consequently the defendants (or some of them) were responsible in damages.

The defendants had pleaded as a bar to the action, s. 21 (1)* of the Limitation Act, 1939, which (so far as material) reads:

> "No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued."

I draw attention to the words "from the date on which the cause of action accrued". Each of the terms of imprisonment of which complaint was made had ended many years before action was brought. To overcome this difficulty, counsel for the plaintiff sought to show that the cause of action did not arise until the order of the justices had been quashed. This point arises on the Justices Protection Act, 1848, s. 2, which I must now read:

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* The Limitation Act, 1939, s. 21, was repealed as from June 4, 1954, by the Law Reform (Limitation of Actions, etc.) Act, 1954, s. 1, s. 8 (3) and Schedule, but by s. 7 (3) of the Act of 1954 nothing in that Act affected any action or proceeding when no cause of action arose before that date.

> "For any act done by a justice of the peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction or order made or warrant issued by such justice in any such matter, may maintain an action against such justice in the same form and in the same case as he might have done before the passing of this Act, without making any allegation in his declaration that the act complained of was done maliciously, and without reasonable and probable cause: Provided nevertheless, that no such action shall be brought for any thing done under such conviction or order until after such conviction shall have been quashed, either upon appeal, or upon application to Her Majesty's Court of Queen's Bench; nor shall any such action be brought for any thing done under any such warrant which shall have been issued by such justice to procure the appearance of such party, and which shall have been followed by a conviction or order in the same matter, until after such conviction or order shall have been so quashed as aforesaid . . ."

The first three lines of the section appear to deal with an act done by a justice himself. The next part of the section preserves a right of action for any act done under an order made by a justice in a matter in which he exceeded his jurisdiction and any person injured thereby may maintain an action against such justice in the same form and in the same case as he might have done before the passing of the Act and without alleging malice, subject to the proviso.

Counsel's submission involves two points: first, that there should be read into s. 2 the words "or order" after the word "conviction" in the tenth line; and secondly, in a case such as this that it was essential for the plaintiff to prove that the order of the justices had been quashed before he could bring an action against the justices. Thus, he claimed that the cause of action for false imprisonment was not barred as the order was not quashed until Oct. 6, 1954. I propose to deal with the second point first.

In an ordinary case of false imprisonment one would assume that the cause of action was the imprisonment. The submission on behalf of the plaintiff is that the quashing of the order was a necessary ingredient of the cause of action. The first authority cited to us was *Douglas* v. *Forrest* (1) ((1828), 4 Bing. 686), in which BEST, C.J., said (ibid., at p. 704):

> "Cause of action is the right to prosecute an action with effect; no one has a complete cause of action until there is someone that he can sue."

The case most helpful to the plaintiff is *Read* v. *Brown* (2) ((1888), 22 Q.B.D. 128). That was a case in contract, and it will be seen that the plaintiff could have no cause of action until the debt in respect of which the action was brought had been assigned to him.

> "The plaintiff brought an action in the Mayor's Court as assignee of a debt alleged to be due in respect of the price of goods sold and delivered to the defendant by the assignor. The sale and delivery had taken place without the city of London, but the debt had been assigned in writing to the plaintiff pursuant to s. 25 (6) of the Judicature Act, 1873, within the city of London:—Held, that the assignment of the debt was part of the cause of action, and that the cause of action having arisen in part within the city of London there was no ground for a prohibition."

It appears obvious that the plaintiff could have no right of action until the debt had been assigned to him. LORD ESHER, M.R., said (ibid., at p. 131):

> "The question which we have to decide is whether any part of the cause

> of action arose in the city; if it did, then upon the proper construction of the Mayor's Court Act, the Mayor's Court had jurisdiction to try the case. What is the real meaning of the phrase 'a cause of action arising in the city'? It has been defined in *Cooke* (*Cook*) v. *Gill* (3) ((1873), L.R. 8 C.P. 107) to be this: every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. It has been suggested today in argument that this definition is too broad, but I cannot assent to this, and I think that the definition is right. If that is so, the question arises whether the plaintiff, in order to be entitled to succeed in his action, would not be bound to prove the assignment to him of the debt; not merely whether he would be bound to prove it in an action in the Mayor's Court, but whether he would be bound to prove it in any court in which he might sue, and whether an allegation of the assignment might not have been traversed by the defendant. I cannot bring myself to entertain a doubt that the assignment is a fact which the defendant might traverse; and if that be so, the plaintiff would be bound to prove it."

Fry, L.J., said (22 Q.B.D. at p. 132):

> "I am of the same opinion. Everything which, if not proved, gives the defendant an immediate right to judgment, must be part of the cause of action. If the plaintiff in the present case were to fail at the trial to prove the assignment he could not succeed; therefore part of his cause of action did arise in the city."

Lopes, L.J., said (ibid., at p. 133):

> "I agree with the definition given by the Master of the Rolls of a cause of action, and that it includes every fact which it would be necessary to prove, if traversed, in order to enable a plaintiff to sustain his action."

The appeal in that case depended on the plaintiff proving the assignment of the debt on which he sued.

Reliance was also placed on a passage in Viscount Dunedin's speech in *Board of Trade* v. *Cayzer, Irvine & Co.* (4) ([1927] A.C. 610 at p. 617). The passage on which counsel relied reads:

> "The Solicitor-General contended that 'cause of action' in this sentence was not the same thing as cause of action in the statute of James, but really only meant right of action, which he would differentiate from cause of action. Here, again, I think his contention fails. The expression is, I think, deliberately chosen, and it may not be out of place to remark that the same expression is used by two of the consulted judges whose opinion was upheld—namely, Crowder and Coleridge, JJ. Cause of action in the statute of James means that which makes action possible; and in the present case that is the award of the arbitrator, for until it is in being no action is possible."

It is, however, impossible to take this one passage without reference to the facts of the case and to other parts of Lord Dunedin's speech. The facts were these:

> "In May, 1917, the Crown requisitioned the claimants' steamship under the conditions of the T.99 form of charterparty. By those conditions the Crown undertook liability for war risks only. Clause 31 provided that any dispute under the charter should be referred to arbitration under the provisions of the Arbitration Act, 1889, and it concluded as follows: 'and it is further mutually agreed that such arbitration shall be a condition

precedent to the commencement of any action at law.' In July, 1917, the steamship was lost, as the claimants alleged, by war risks, but the claimants did not proceed to arbitration until December, 1923. The Crown contended that, as the arbitration was not commenced within six years of the loss, the claim was barred by the Limitation Act, 1623. The arbitrator, by an award made in the form of a special case, found that the steamship was lost by war risks (as to which there was no appeal), and that the claim was not barred by the Limitation Act, 1623. Held, that under the form of arbitration clause in question no cause of action arose until the award was made, and that consequently time did not run under the Limitation Act, 1623, until the making of the award, and the claim was not barred."

Viscount Cave, L.C., said (ibid., at p. 615):

"My Lords, it appears to me that the decision given in *Scott* v. *Avery* (5) ((1856), 5 H.L. Cas. 811) disposes of the present appeal. Under the statute of James, which applies to this case, time runs from the cause of action; and it seems to me to follow beyond question that under the clause which we are considering, and having regard to the case cited, time runs not from the date of the loss of the steamship but only from the making of the award. If this be so, then the arbitrator, however willing he may have been to give effect to all legal defences, could not properly have found that time had run against the claimants. It is argued that on this view of the law claimants under a document containing an arbitration clause in the *Scott* v. *Avery* (5) form might delay their proceedings indefinitely, and a claim might be made ten or twenty years after the damage had arisen. This may be so, but, if so, it is a feature which results from the form of contract which the parties have chosen to adopt; and it may be noted that it is at any time open to either party to expedite a decision of the matter by himself instituting proceedings for arbitration."

Lord Dunedin said ([1927] A.C. at p. 616):

"It has, I think, to be kept steadily in view that the liability which is here in question is not a liability in respect of tort. If a ship were sunk by a collision occasioned by the fault of another ship there is an immediate liability which springs into existence when the collision occurs. But here there was not any liability arising from the collision as against the government, except the liability that sprang from contract. One goes, therefore, to the contract, and then one finds that there is not undertaken by the government any liability unless there has been found to be such a liability by the award of an arbitrator. It cannot be more forcibly put than it was by Cranworth, L.C., in *Scott* v. *Avery* (5) (5 H.L. Cas. at p. 848): 'If I covenant with A.B. that if I do or omit to do a certain act, then I will pay to him such a sum as J.S. shall award as the amount of damage sustained by him, then until J.S. has made his award, and I have omitted to pay the sum awarded, my covenant has not been broken, and no right of action has arisen'; or again by Lord Herschell in *Caledonian Insurance Co.* v. *Gilmour* (6) ([1893] A.C. 85 at p. 90): '. . . under the policy, the only contract on the part of the appellants to make any payment at all is a contract to pay the sum ascertained in a particular manner, viz., by the arbitration provided for by . . . the policy.' The Solicitor-General made a strenuous effort to distinguish the clause in *Scott* v. *Avery* (5) from the present clause. In that I think he was quite unsuccessful. The two clauses are practically the same. The arbitrator in each is to be the judge, both of the existence of the liability and of the sum to be paid if he finds

> liability established; and it is that sum and that sum alone that the government has contracted to pay. The question here raised is what is the application to these facts of the expression ‘ cause of action ’ in the statute of James ? Now Lord Campbell, in *Scott* v. *Avery* (5), said (5 H.L. Cas. at p. 854)—and it is the sentence of his judgment which Lord Watson quotes in *Caledonian Insurance Co.* v. *Gilmour* (6), stating that it is the main ground of judgment—that ‘ in this contract . . . it is stipulated, in the most express terms, that until the arbitrators have determined, no action shall lie in any court whatsoever. That is not ousting the courts of their jurisdiction, because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrators have determined ’.”

Then follows the passage relied on by counsel for the plaintiff which I have read. I do not regard the decision in *Board of Trade* v. *Cayzer, Irvine & Co.* (4) as supporting the argument for the plaintiff on this part of the case.

On behalf of the defendants, we were referred to *Haylock* v. *Sparke* (7) ((1853), 1 E. & B. 471), which was a case under the Justices Protection Act, 1848.

> “ The notice . . . of action against a justice of the peace for an act done by him in execution of his office, under an order, in a matter of which he has not jurisdiction, may be given before the quashing of the order; the act itself being the cause of action, and such cause of action being complete before the quashing, although the action itself, by s. 2, cannot be brought until after the quashing.”

Various points were taken in that case in the court of first instance; and Pollock, C.B., held the fourth objection fatal, and directed a verdict to be entered for the defendant. The fourth point was that under the same statute, s. 9*, the notice of action was insufficient, not having been given after the cause of action was completed. In the course of the argument Coleridge, J., asked counsel (ibid., at p. 475):

> “ Do you say that no cause of action existed here until the warrant was quashed ? ”

The reply was:

> “ The cause of action was at any rate suspended; there was no cause of action within the statute, so as to allow of notice being given.”

Lord Campbell, C.J., said:

> “ The quashing of the warrant can scarcely be called ‘ the act complained of ’ ”;

to which counsel said:

> “ It is one of the elements which makes the entire transaction an act capable of being complained of.”

In the course of delivering the judgment of the court, Lord Campbell, C.J., said (ibid., at p. 484):

> “ In this case we are of opinion that the notice of action was sufficient, [that is, notice under s. 9] although given before the warrant of commitment was quashed. Supposing this warrant to be in the nature of a conviction, so that the action could not have been maintained unless the warrant had been quashed, we think that the notice of action was regularly given on May 18. The quashing of the warrant was no part of the cause of action;

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* Section 9 of the Justices Protection Act, 1848, has since been repealed by the Statute Law Revision Act, 1894.

> and, before the warrant was quashed, all the requisites of the notice of action enumerated in s. 9 of [the Justices Protection Act, 1848] might be and were complied with. If, in the case of a conviction, the magistrate receives such a notice before the conviction is quashed, he may at his peril rely upon the validity of the conviction, and abstain from tendering amends: but, if he does so, and the conviction is quashed, the action may be commenced against him one calendar month after the service of the notice. Were not this so, the party injured might be barred of his remedy altogether; for, by s. 8* of the same statute, the action must be commenced 'within six calendar months next after the act complained of shall have been committed'. In argument it was contended that the six months might be construed to run from the quashing of the conviction; but the commitment is the act complained of, not the quashing of the conviction on the application of the party imprisoned. The quashing of the conviction is only a condition to the prosecution of the action like the delivery of an attorney's bill, or the giving a notice of action: and there is nothing to determine in what order the conditions shall be complied with."

If the judgment of the court, given by Lord Campbell, C.J., was right, it seems to me that the plaintiff's submission on this head must fail. It is not without interest to notice that Lord Campbell, C.J., was a party to the decision in *Scott* v. *Avery* (5), to which reference was made in the speeches in the House of Lords in *Board of Trade* v. *Cayzer, Irvine & Co.* (4). The difference between a case in contract and one in tort appears clearly from both reports.

In *West Riding of Yorkshire Rivers Board* v. *Robinson Brothers* (8) ([1907] 1 K.B. 431) *Haylock* v. *Sparke* (7) was cited and accepted by the Court of Appeal. I refer in particular to a passage in the judgment of Sir Gorell Barnes, P. (ibid., at p. 438) and to a passage in the judgment of Farwell, L.J. (ibid., at p. 441) in which he said:

> "To my mind the principle of the case of *Haylock* v. *Sparke* (7) is really an authority in favour of the view which we are expressing";

and also to a passage in the judgment of Buckley, L.J. (ibid., at p. 444). *Sommerville* v. *Mirehouse* (9) ((1860), 1 B. & S. 652) is interesting as showing the view of Hill, J. That, again, was an action against justices, and the question arose under s. 11 of the Act of 1848†. In that case the order had been quashed by a court consisting of Cockburn, C.J., and Hill, J., and in the course of the argument questions of interest were raised by counsel. The Chief Justice said (ibid., at p. 657):

> "They [the justices] made a judicial mistake in deciding that a sufficient complaint was made within the time limited by s. 11 of [the Summary Jurisdiction Act, 1848]."

Hill, J., said (ibid.):

> "If anything had been done under the order it might be different: as soon as an invalid order is acted upon a trespass is committed";

to which counsel replied:

> "The point as to jurisdiction is the same whether the order is acted upon or not."

Hill, J., said:

> "There is no injuria until a seizure of the plaintiff's goods is made in execution of the order."

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* Section 8 of the Justices Protection Act, 1848, has been repealed by the Statute Law Revision Act, 1894.

† Since repealed by the Public Authorities Protection Act, 1893, which has been repealed subsequently itself.

Cockburn, C.J., said:

> "There was a good cause of complaint before the justices, but a statute of limitations prevented it from being proceeded upon."

Counsel then said:

> "If justices decide wrongly as to their jurisdiction they are liable to an action for an act which they do in consequence."

Coburn v. *Colledge* (10) ([1897] 1 Q.B. 702) which was also cited to us, is a case on an attorney's bill of costs, in which it was held that

> "In the case of a solicitor's costs the cause of action arises when the work is completed, and therefore the Statute of Limitations begins to run from that time, and not from the expiration of a month from the delivery of the bill of costs."

Lord Esher, M.R., said (ibid., at p. 705):

> "It is admitted that, if the cause of action in this case must be considered to have arisen when the work was completed, the defendant must succeed; but, if it must be considered as having arisen only at the expiration of the period of one month from the delivery of the signed bill of costs, the plaintiff must succeed. It does not appear to me that there is any question as to the construction of the Statutes of Limitation. It is plain that under them the action must be brought within six years after the cause of action arises, unless the defendant is beyond the seas when the cause of action arises, in which case it must be brought within six years of his return. The question is when in such a case as this the cause of action arises. The action is brought by the plaintiff in respect of work done by him as a solicitor. In the case of a person who is not a solicitor, and who does work for another person at his request on the terms that he is to be paid for it, unless there is some special term of the agreement to the contrary, his right to payment arises as soon as the work is done; and thereupon he can at once bring his action. Before any enactment existed with regard to actions by solicitors for their costs, a solicitor stood in the same position as any other person who has done work for another at his request, and could sue as soon as the work which he was retained to do was finished, without having delivered any signed bill of costs or waiting for any time after the delivery of such a bill. Then to what extent does the statute alter the right of the solicitor in such a case, and does the alteration made by it affect or alter the cause of action? It takes away, no doubt, the right of the solicitor to bring an action directly the work is done, but it does not take away his right to payment for it, which is the cause of action. The Statute of Limitations itself does not affect the right to payment, but only affects the procedure for enforcing it in the event of dispute or refusal to pay. Similarly, I think s. 37 of the Solicitors Act, 1843*, deals, not with the right of the solicitor, but with the procedure to enforce that right. It does not provide that no solicitor shall have any cause of action in respect of his costs or any right to be paid till the expiration of a month from his delivering a signed bill of costs, but merely that he shall not commence or maintain any action for the recovery of fees, charges, or disbursements until then. It assumes that he has a right to be paid the fees, charges, and disbursements, but provides that he shall not bring an action to enforce that right until certain preliminary requirements have been satisfied. If the solicitor has any other mode of enforcing his right than by action, the section does not seem to interfere with it. For instance, if he has money of the client in his hands not entrusted to him for any specific purpose, there is nothing in the section to prevent his retaining the amount due to him out of that money. If that

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* Repealed; replaced by the Solicitors Act, 1932, s. 65 (1).

> A be the true construction of the section, it does not touch the cause of action, but only the remedy for enforcing it. The definition of 'cause of action' which I gave in *Read* v. *Brown* (2) has been cited. I there said that it is (22 Q.B.D. at p. 131) 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court' . . . For these reasons I think that the cause of action in B this case, to use the language of the statute of Anne*, was 'given, or accrued, fallen or come' the moment that the work which the plaintiff was retained to do was completed."

LOPES and CHITTY, L.JJ., agreed.

The plaintiff is faced with further difficulties in other sections of the Act of C 1848, some of which are now repealed. I refer in particular to s. 9 and s. 12†, in each of which the words "cause of action" appear, and from which one gains added support for the opinion of LORD CAMPBELL, C.J., in *Haylock* v. *Sparke* (7) (1 E. & B. at p. 484). DIPLOCK, J. said ([1956] 1 All E.R. at p. 533):

> "It is plain that the draftsman of the Act of 1848 regarded the cause of action as having accrued, but the requirement of notice was a procedural D requirement before the action could be brought."

I am satisfied that the cause of action for false imprisonment arose not later than the time of the imprisonment in each case. This makes it unnecessary to consider the first point raised‡, although in deference to the argument I must say something on it. There is much to be said for the argument that one cannot make sense of the proviso unless one reads the words "or order" after the word E "conviction" in the tenth§ line of s. 2 of the Justices Protection Act, 1848. Support is given to the argument by the inclusion of the words in the Act covering Ireland passed in the following year‖. The words may have been omitted by inadvertence. On the other hand, it appears to me to be more likely that the draftsman was endeavouring to preserve the position that a conviction ought to be set aside in the proper place before it can be questioned in a civil court, while an F order is in a different category. MORRIS, L.J., drew my attention to the report of an application to the Divisional Court in *R.* v. *Ely JJ.*, *Ex p. Gilling* (11) ((1855), 4 W.R. 13). It is right to say that there was no argument, but it is interesting to see the view then taken. No good reason is shown for reading any words into the section, and the court ought not to do so. In my opinion, the claims for damages for false imprisonment are statute-barred and must G fail, as DIPLOCK, J., held.

The claim for damages in respect of money paid to the collecting officer is made in para. 11 of the statement of claim, which reads:

> "By reason of the said purported order for maintenance and the said purported orders of variation the plaintiff paid to his said wife and for his said child the sums hereinunder set out."

H The sums are set out; para. 12 follows, and the statement of claim ends: "And the plaintiff claims damages". On the basis that the quashing of the order does not form an essential ingredient of the cause of action, the cause of action, if there be one, arose at the time each payment was made. The defendants in para. 5 of the defence plead s. 21¶ of the Limitation Act, 1939, as a bar to the action, wholly or in part. Regard must now be had to the Law Reform (Limitation of Actions, etc.) Act, 1954. It is agreed between counsel that the effect of I those two Acts is that the plaintiff cannot go further back than one year before the passing of the later Act, which was June 4, 1954, and that on that footing the amount of payments not barred by statute is £125 5s. 6d. Furthermore, figures have been agreed as to the extent in amount to which each of the eight justices named on the record is claimed to be responsible. The plaintiff concedes that on this hypothesis the defendants Reynolds, Thomas and Haldane are entitled to judgment. The claim of the plaintiff is put in this way:

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* I.e., the Administration of Justice Act, 1705 (4 & 5 Anne c. 3), s. 19.

† See footnote p. 426, ante, for the repeal of s. 9; s. 12 was repealed by the Public Authorities Protection Act, 1893, which has been repealed itself.

‡ See p. 423, letter E, ante.

§ As printed p. 423, letters A to D, ante.

‖ The Justices Protection (Ireland) Act, 1849 (12 & 13 Vict. c. 16).

¶ See footnote, p. 422, ante.

> " In all cases where a man has a temporal loss or damage by the wrong of another he may have an action on the case repaired in damages."

(see Comyns' Digest, vol. 1, p. 278). The Act of 1848 did not take away that right: indeed, it preserved it, by enacting in s. 2 that, if a justice of the peace exceeded his jurisdiction and a person was injured

> " by any act done under any conviction or order made or warrant issued by such justice in any such matter [that person] may maintain an action against such justice in the same form and in the same case as he might have done before the passing of this Act."

It appears to me that in s. 1 and s. 2 an effort is made to cover the kinds of action which a person might have had before the passing of the Act, and that those are preserved. The justices are given protection by the proviso to s. 2 and by certain other sections, such as s. 6, s. 7 and s. 3 (in regard to those who only grant a warrant of distress or commitment) and justices were given protection by s. 9, s. 11 and s. 12.

The first question for consideration is whether there was, prior to 1848, a cause of action against justices of the peace to recover payments such as were made by the plaintiff in this case, i.e., payments made to his wife under an order of the justices, that order being bad on the face of it and made in excess of jurisdiction. There is, we are informed by counsel on both sides, no record in the books of any such case. In *Polley* v. *Fordham* (12) ([1904] 2 K.B. 345) Wills, J., said (ibid., at p. 348):

> " No such thing was ever heard of as an action for making an order against a person without jurisdiction. If the order is not followed by consequences against the individual, it comes to nothing. Actions for illegal distress of one sort or another were at one time very common, but such actions were always actions of trespass."

There are, as I shall show, cases of trespass to goods or trespass to the person in which a sum paid afterwards to secure release has been held to be recoverable as part of the damages, but no case of the kind now put forward has been discovered. In support of his argument that such a cause of action was recognised under the common law, counsel for the plaintiff cited *Hodson* v. *Cooke* (13) ((1683), 1 Vent. 369) which I read:

> " In an action upon the case for commencing of an action against him in an inferior court, where the cause of action did arise out of the jurisdiction. After a verdict for the plaintiff, upon not guilty, it was moved in arrest of judgment, that it was not set forth that the defendant did know, that the place where the action arose was out of the jurisdiction, which it would be hard to put the plaintiff to take notice of. On the other side it was said, that the party ought to have a recompence for the inconvenience he is put to, by being put to bail perhaps in a case where bail is not required above, and such like disadvantages which are not in a suit brought here; and the plaintiff ought at his peril to take notice of the place. And of that opinion were Jeffreys, C.J., Holloway and Walcot, JJ.; but Withens, J. contra."

The case is not very fully reported, and I do not think that much, if any, help is

A gained from it. The next case cited was *Beaurain* v. *Scott* (14) ((1813), 3 Camp. 388):

> "An action on the case may be maintained against a judge of the ecclesiastical court who excommunicates a party for refusing to obey an order which the court has not authority to make, or where the party has not been B previously served with a citation or monition, nor had due notice of the order. The practice of the ecclesiastical court is matter of fact to be proved by evidence, and left to the jury. This was an action on the case, for unlawfully excommunicating the plaintiff. The declaration stated that, at the time of committing the grievance complained of, the defendant [SIR WILLIAM SCOTT] was Vicar General and Official Principal of the Consistorial C and Episcopal Court of Beilby, by divine permission then Lord Bishop of London; that the plaintiff was a person of good fame, and a practising attorney; that a cause of separation from bed and board and mutual cohabitation was then depending in the said court, in which a minor son of the plaintiff was cited to appear before the defendant, to answer Anne Beaurain his lawful wife in the said cause, but to which the plaintiff was no D party; yet that the defendant required the plaintiff to take upon himself the burthen of guardian to his said infant son, and appear in such suit as guardian ad litem; which burthen the plaintiff wholly refused to take upon himself, as he lawfully might; that the defendant afterwards signed with his name and published a certain instrument, purporting to be a schedule of excommunication; by which said instrument the said defendant, as Vicar E General of the said Bishop of London, and Official Principal of his Consistorial and Episcopal Court, pretending to be armed with legal authority, and pretending that justice so required, unjustly and unlawfully decreed the said plaintiff to be excommunicated for certain alleged contempts and contumacy in not appearing at a certain day and place as the guardian assigned to his said infant son; whereas the plaintiff was not legally F appointed the guardian ad litem for his said son; that the said schedule of excommunication was signed and published without the plaintiff's having been served with any citation, monition, decree, or legal notice whatsoever to take upon himself the burthen of the said guardianship; that such excommunication was afterwards read during divine service in the parish church of St. Botolph, Bishopsgate, the same being the parish where the G plaintiff resided; and he was then and there openly and publicly declared and denounced excommunicated by the minister of the said parish; by means whereof the plaintiff had suffered in his good name, been injured in his profession, sued by his creditors, and reduced with his family to great distress, poverty, and ruin.—Plea, the general issue.
>
> "It appeared that SIR WILLIAM SCOTT, as Vicar General and Official H Principal of the Consistorial Court of the Bishop of London, had required the plaintiff to appear as guardian ad litem to his son; and ordered him to be excommunicated for refusing to do so. On appeal to SIR JOHN NICHOLL, as Dean of the Arches, that learned judge held that Mr. Beaurain was compelled to become guardian ad litem to his son, and that the excommunication was regular. The matter being referred back to the Consistorial I Court, the schedule of excommunication issued, and was published in the parish church of St. Botolph, Bishopsgate.
>
> "The plaintiff's counsel contended, that the action was maintainable on two grounds: 1st, Because the ecclesiastical court had no authority to compel Mr. Beaurain to become guardian to his son against his will, but ought either to have appointed one of its own officers guardian, as is done in the courts of equity, or allowed a guardian to be appointed by the plaintiff in the suit, as is done in the courts of common law; and, 2ndly, Because no regular citation or monition had been served upon Mr. Beaurain before the

> excommunication was directed. It was allowed that he had previously made an affidavit in the suit respecting the appointment of a guardian, and that he had verbal notice of the order to appear as guardian; but it was insisted that, till a regular citation or monition was served upon him, he was not properly before the court, and the judge could have no authority to proceed to excommunication.
>
> " On the other side, they did not deny that the action might be maintained, if the ecclesiastical court had exceeded its jurisdiction; but they called witnesses to prove that the plaintiff was bound to become guardian for his son, and that the proceedings against him were perfectly regular. Among these was SIR JOHN NICHOLL, who stated, that he continued of the same opinion as when he dismissed the appeal.—It was proved that the plaintiff might have done all that was required of him with hardly any trouble, and no expence; and that, in point of fact, he was acquainted with the order to become guardian ad litem as soon as it was pronounced. It further appeared, that after the excommunication SIR WILLIAM SCOTT had behaved with great generosity to the plaintiff, amidst the misfortunes which then overtook him; and that he had expressed the most unbounded gratitude for the kindness he experienced.
>
> " LORD ELLENBOROUGH left it to the jury to decide upon the effect of the evidence, stating, that he himself did not perceive anything unreasonable in the plaintiff being required to become guardian ad litem in the manner described; and that the plaintiff seemed to have had sufficient notice of the appointment according to the practice of the ecclesiastical court.
>
> " The jury found a verdict for the plaintiff, with 40s. damages; observing, at the same time, that they did not mean to throw the slightest reflection upon the highly respectable character of SIR WILLIAM SCOTT.
>
> " No motion was made for a new trial, or in arrest of judgment."

There is an interesting footnote.

That case is interesting for several reasons one of which, I notice, is that the defendant in the case, SIR WILLIAM SCOTT, did not raise or cause to be raised the point of law which is taken in this case. It may be that he preferred to have a decision on the facts and instructed counsel (the Solicitor-General) appearing on his behalf not to take the point. It is to be noticed that in that case everyone assumed that damage or injury was caused on the issue of the decree of excommunication. That appears from the next case cited, *Ackerley* v. *Parkinson* (15) ((1815), 3 M. & S. 411).

> " An action upon the case was held not to lie against the vicar-general of the bishop for excommunicating plaintiff with the greater excommunication, for contumacy in not taking upon him administration of an intestate's effects, to whom plaintiff was next of kin, and had intermeddled with the goods, &c. although the citation by which plaintiff was cited was void, by reason that it required him to appear and take administration, &c. without leaving him an option to renounce it, and the proceedings thereupon had been set aside upon appeal; for the vicar-general had jurisdiction over the subject-matter, namely, the granting administration, and there was no malice."

In the course of the argument for the plaintiff appear these words (3 M. & S. at p. 415):

> " ' . . . and the reason is, that by the excommunication the party is disabled to sue any action or to have any remedy for any wrong done to him, so long as he remains excommunicate. And also the party grieved may have his action on the case against the bishop, in like manner as he may when the bishop doth excommunicate him for a matter which belongeth not to ecclesiastical cognizance.' "

A *Beaurain* v. *Scott* (14) was cited and LE BLANC, J., dealing with the facts of that case, said (ibid., at p. 427):

> " The whole fallacy of the argument lies in considering every step taken in the cause as an excess of jurisdiction, because some steps have been erroneously taken; whereas the distinction is, that where the subject-matter is within the jurisdiction, and the conclusion is erroneous, although B the party shall, by reason of the error, be entitled to set it aside, and to be restored to his former rights, yet he shall not be entitled afterwards by action to claim a compensation in damages for the injury done by such erroneous conclusion, as if, because of the error, the court had proceeded without any jurisdiction."

C It appears that the learned judge was of opinion that in a case of that character the plaintiff, if he succeeded in establishing his case, would be entitled to recover damages. That may well be because of the fact that damage flowed immediately on the issue of the order of excommunication.

The next case to which reference was made by counsel was *Clark* v. *Woods* (16) ((1848), 17 L.J.M.C. 189):

D

> " At the trial, before POLLOCK, C.B., at the London sittings after Michaelmas term, 1847, it appeared that the plaintiff, who was a householder residing at South Bersted in the county of Sussex, being unable to pay his poor-rates and costs in respect of the same, and there being no sufficient distress upon his premises, a warrant for his apprehension was granted by two of the defendants, being magistrates for that county."

E

The form of the warrant is set out.

> " After reciting the making of the rate, the assessment of Richard Clark, the plaintiff, in the sum of £17 19s. 6d. thereto, and his refusal to pay the same, and that . . . two justices, &c., had issued their warrant to levy the said sum of £17 19s. 6d., and the further sum of 6s. for costs incurred in the F premises, making in the whole the sum of £18 5s. 6d. by distress and sale of the goods and chattels of the plaintiff, &c., it proceeded as follows . . . Upon these facts, it was contended at the trial, on behalf of the plaintiff, that the warrant was bad, inasmuch as no power is given by the 43 Eliz. c. 2 s. 4, to arrest for the non-payment of costs; and that the defendants were therefore liable to repay, by way of damages, to the plaintiff the sum of £18 5s. 6d., G which he had paid under protest."

The plaintiff in that case had been arrested for non-payment of the amount, which included 6s. costs, which led the plaintiff to claim that the warrant was bad. POLLOCK, C.B., said (ibid., at p. 193):

> " With respect to the amount of damages, I wish the law would allow H us to give the defendants the benefit of the amount which was rightfully due from the plaintiff; but we cannot escape from the position that if a debtor be wrongfully arrested and under the duress of such imprisonment compelled to pay a debt justly due from him, such amount may be recovered back by action. Here the warrant was bad altogether; the plaintiff, therefore, was entitled to recover all the money which he was compelled to pay by reason I of the arrest and imprisonment under it."

ROLFE, B., said (ibid.):

> " The imprisonment of which the plaintiff complains was the act of the three defendants, and they are one and all responsible for it, unless they can shew that they were justified in making the arrest . . . With respect to the amount of damages, I should be very glad if we had the power to reduce them; but it appears to me that in point of law the plaintiff was entitled to recover back as damages the full amount he was compelled to pay in order

> to escape further imprisonment under a warrant which turns out to be altogether bad." A

PLATT, B., said (ibid., at p. 194):

> "The law is clear that if by an unlawful act a party extracts from another a sum of money, whether legally due or not, he must pay back the full amount so extracted. Upon the other points in the case I entirely concur with the observations which have fallen from the other members of the court." B

That, it should be made clear, was a case of trespass to the person. The amount which was awarded as damages was the amount which the plaintiff had to pay in order to put an end to his arrest, which had been held to be wrongful. For all I know, the damages might have been larger. C

The next case is *Norton* v. *Monckton* (17) ((1895), 43 W.R. 350):

> "The plaintiff was arrested under a committal warrant signed and issued by the defendant, a justice of the peace, for non-payment of a debt made up of a certain sum of money alleged to be due from the plaintiff to the local sanitary authority, under an order made at quarter sessions . . ." D

Counsel for the plaintiff claimed that his client was

> "entitled to recover the whole of the sum of £49 6s. 10d. by way of special damage. He was compelled to pay that sum in order to obtain his release."

He pointed out that 43 Eliz. c. 2, s. 4, did not extend to costs and that the warrant, as was admitted, was altogether bad. WILLS, J., said (ibid., at p. 351): E

> "In this case the committal warrant was issued without jurisdiction, and therefore the plaintiff is entitled to recover the money he had to pay to obtain his release from prison. We are bound by the decision in *Clark* v. *Woods* (16), cited for the plaintiff's case, and we direct that the arbitrator must award the plaintiff the sum of £49 6s. 10d., as claimed, by way of special damage." F

That case again was a case of trespass to the person.

In *Polley* v. *Fordham* (12) ([1904] 2 K.B. 345):

> "A magistrate, having convicted and fined the plaintiff for an offence under the Vaccination Acts, issued a distress warrant in default of payment G of the fine, and a distress was put in on the plaintiff's premises accordingly. Subsequently the conviction of the plaintiff was quashed for want of jurisdiction. In an action by the plaintiff against the magistrate for illegal distress:—Held that the period limited by s. 1 of the Public Authorities Protection Act, 1893, began to run from the entry on the plaintiff's premises, and not from the date of the conviction." H

There are certain words of WILLS, J., in that case to which I referred supra. One other case to which we were referred was *Abbott* v. *Sullivan* (18) ([1952] 1 All E.R. 226) which came before SIR RAYMOND EVERSHED, M.R., DENNING and MORRIS, L.JJ., in which damages were claimed against certain officials of a trade union. That case was considered by the Court of Appeal on the basis of a contract I between the parties. I do not think that it helps towards a decision on the case now before the court. Counsel for the plaintiff relied on certain passages in the judgment of DENNING, L.J. In so far as they can be applied to this case they were not relevant (as I see it) to the decision of the Court of Appeal in that case.

Counsel for the plaintiff submitted that the money was paid by the plaintiff to the agent of the defendants. This should be made clear: the collecting officer is not the agent of the justices when he receives payment under an order such as this. That appears if reference is made to s. 5 (c) of the Summary Jurisdiction

(Married Women) Act, 1895; to s. 1 (3) of the Affiliation Orders Act, 1914* (the procedure which covered collection of sums under the Summary Jurisdiction (Married Women) Act, 1895); and also to s. 4 of the Married Women (Maintenance) Act, 1949. The learned counsel added that the plaintiff did not owe the money to his wife. He was ordered to pay, and he paid because he had been sent to prison for non-payment and was afraid of being sent to prison again. There is the element of compulsion. Counsel, on behalf of the defendants, pointed out that there is no record of an action of this kind in the books, and that on the facts shown there was no cause of action under the common law. Furthermore, he said that there was no need for the plaintiff to pay under a bad order and that the money was paid to the collecting officer under a mistake of law. DIPLOCK, J., expressed his view on this part of the case in these terms ([1956] 1 All E.R. 524):

> " I hold, therefore, that at common law an action for trespass would lie against justices acting without jurisdiction. Therefore, it would lie in respect of false imprisonment and in respect of distress for goods. Counsel for the plaintiff asks me to hold that it would also lie for money paid by the plaintiff pursuant to an order of the court although no steps had been taken to enforce that order by distress or by commitment. That is to say, counsel submits that a cause of action lies in respect of moneys which the plaintiff paid to his wife under the order of Aug. 18, 1941, and the subsequent variations. At common law one cannot find in the reported cases any trace of an action of this kind lying in the absence of malice. I think one must ask oneself: What is the nature of the cause of action ? Plainly it cannot be indebitatus assumpsit as money had and received, because the money was not received by the justices, it was paid to their collecting officer for the use of the wife, and it was money which was paid under a pure mistake of law, namely, that the order was a valid order, a mistake of law which was shared by the justices and by the plaintiff. The action, therefore, must be (to use the old phraseology, and I am looking at the old common law position) an action on the case in tort."

Having cited the authorities the learned judge said (ibid., at p. 526):

> " I therefore take the view that at common law the right of action in trespass for false imprisonment existed, but no right of action existed for the money paid."

I agree with the learned judge. There is, however, a further point on the reading of the section, part of which I take to be declaratory of the common law. It gives, or preserves, a right of action against a justice for any act done under any order made by such justice in any such matter if the person suing is injured thereby. The words " act done " contemplate an act done by someone other than the plaintiff—e.g., trespass. They are not intended to cover the case of a person himself paying money, which is the subject-matter of the claim on this part of the case. The injury suffered by the plaintiff in respect of which he seeks damages is the payment of money by him. That was not an " act " within the meaning of the word in the third† line of s. 2. This claim, too, fails.

There are two other matters to which I should draw attention. In his judgment DIPLOCK, J. said ([1956] 1 All E.R. at p. 516):

> " It is conceded that on that finding that persistent cruelty had not been proved the justices had no jurisdiction to make an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, it being a condition precedent to their right to make an order that the husband should

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* Repealed by the Magistrates' Courts Act, 1952, s. 132 and Sch. 6; see now s. 52 of the latter Act, but it seems that not all of s. 1 of the Affiliation Orders Act, 1914, is reproduced in the Act of 1952.

† As printed p. 423, letters A to D, ante.

> have been guilty of one of the matrimonial offences which are set out in s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, one of which is persistent cruelty, and that being the one that was relied on. The order in itself shows that there was no jurisdiction. It is an order that is bad on its face, and where an order is bad on the face of it, it ceases to have the advantage which orders, although made without jurisdiction but good on their face, have, namely, that they are valid and are to be treated as valid until they have been set aside."

Counsel for the defendants told us that he had conducted the case on the basis that it was not open to him to say that the act of the justices was not without jurisdiction. That may well be so, on the facts of this case, but it should not be taken that every order which is bad on its face is an order made without jurisdiction. The difficulty here arose in part because so many years had elapsed before the validity of the order was called in question and no one could say precisely what had happened at the time of the making of the order. On the face of it it appeared to have been made without jurisdiction, and no explanation was given. By s. 3 of the Justices Protection Act, 1848, the action (if any) lies only against the justices who made the original order, and not against a justice who issued a warrant of commitment thereon. If there had been a practice of referring to the original order on application for a committal order, it is probable that the error would have been observed many years ago, for, as I have said, the order was bad on the face of it. Unfortunately, this was not the practice. The question of protection for justices of the peace acting in good faith is worthy of consideration by the legislature.

The other matter arises on the undertaking given to the Divisional Court. In the order it is in these words,

> "the husband undertaking not to reopen matter as to any payments thereunder."

It was not pleaded, or suggested, that this was a bar to the action against the justices for damages in respect of the money payments. The question was not mentioned in the Divisional Court. If it had been, it may well be that the court would not have exercised its discretion to give leave to appeal so many years out of time, for the order was bad and no court could well pay attention to it once it was examined. As an alternative, an undertaking in wider terms might have been required before leave to appeal out of time was granted, so that the justices would have been protected. After all, there was no allegation of malice or bad faith on the part of the justices. They cannot be expected to check in each case the order which is drawn up. They must rely to a large extent on their clerk. This action, brought against fourteen justices, eleven of whom did no more than make variations of the original order, must have been a source of worry to them. I recognise the importance of the claim for damages for false imprisonment, but at the same time I regret that it was thought necessary to include a claim in respect of the money payments, in view of the undertaking which was given before the Divisional Court. The appeal should be dismissed.

MORRIS, L.J.: The hearing of this appeal, and likewise the hearing before the learned judge, proceeded on the basis that it was not being challenged that the order made by the magistrates on Aug. 18, 1941, was made without jurisdiction. The same applies to the later variations of the order and also to the committal orders. We have not, therefore, been concerned in this case with any controversy as to jurisdiction and we have heard no argument on that subject. It follows from the undisputed facts that the plaintiff was wrongly detained on each of the three occasions when he was sent to prison. The last of these occasions terminated in October, 1945. It has been common ground that as against some of the defendants there had arisen causes of action in the plaintiff for damages for false imprisonment. The plaintiff issued his writ on Dec. 21, 1954.

He was met by a plea based on s. 21 of the Limitation Act, 1939*. So far as concerns the claims of the plaintiff which relate to the sums of money paid by him pursuant to the orders made, the position is affected by the Law Reform (Limitation of Actions, etc.) Act, 1954, and it appears to be common ground between the parties that if there are causes of action they are barred if and to the extent that they accrued before June 4, 1953. The total claim referable to the period since that date is just over £125. It has been agreed that the defendants concerned with the claims for damages for false imprisonment are within the protection afforded by the words of s. 21 of the Limitation Act, 1939, if the plaintiff's action was commenced after the expiration of one year from the date on which the causes of action accrued. Two main points have therefore been raised in the appeal: (1) when causes of action based on trespass or false imprisonment accrued to the plaintiff, it being conceded that as against some of the defendants such causes of action did arise at some time; and (2) whether there was ever in the plaintiff a cause of action against some of the defendants based on the fact that the plaintiff paid money under orders made without jurisdiction, it being conceded that no statutory limitation period bars the recovery of sums paid since June 4, 1953, if any action for their recovery lies.

I will deal with these issues separately. As to the first: the imprisonments of the plaintiff were all long before the period of one year before the issue of the writ. They were periods in 1942, 1944 and 1945, and amounted to 193 days in total. The plea of the statute must therefore succeed unless it be that the causes of action did not accrue until later. On Oct. 6, 1954, the Divisional Court made an order that the order of Aug. 18, 1941, and the variation orders, be discharged. Counsel for the plaintiff submits, in reliance on s. 2 of the Justices Protection Act, 1848, that the cause of action in the plaintiff based on false imprisonment only accrued when the Divisional Court made its order—that is to say, on Oct. 6, 1954. As the defendants have not, in this litigation, challenged that the various orders were made without jurisdiction and that the orders of committal constituted and resulted in the false imprisonment of the plaintiff, it follows that he must succeed if his cause of action arose only when the various orders were quashed by the Divisional Court. On the other hand, it is clear that the claims for damages for false imprisonment are all barred if the causes of action arose at the times of the respective false imprisonments. As a necessary preliminary to advancing his submission, counsel invites the court to construe the wording of s. 2 so as to add certain words to it. He relies on the words which are a proviso to s. 2 (which has been read by my Lord). It seems to me that the false imprisonment claim made in the present action is probably covered by the words in the third† line beginning " or by any act done under any conviction or order made ". Following the opening words come the words of the proviso which my Lord has read. The submission which is made is that the words " or order " were by mistake omitted. This view is supported by the facts (a) that later in the section occur the words

> " until after such conviction or order shall have been so quashed as aforesaid ";

(b) that the section reads very strangely if the words " or order " are not included after the word " conviction "; and (c) that when, in the next year, 1849, a similar enactment was passed which concerned Ireland, the corresponding wording included the words " or order ".

Although these submissions have great force, I am not satisfied that they can be accepted. Parliament may have intended to enact that a conviction must be quashed before an action is brought but may not have intended to enact that an order must be quashed. In CRAIES ON THE INTERPRETATION OF STATUTE LAW

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* See footnote, p. 422, ante.

† As printed p. 423, letters A to D, ante.

(5th Edn.), p. 103, mention is made of the general principle that words are not to be imported into statutes which are not found there; and in *Tinkham* v. *Perry* (19) ([1951] 1 All E.R. 249), Sir Raymond Evershed, M.R., said (ibid., at p. 250):

> " Plainly, words should not be added by implication to the language of a statute unless it is necessary to do so to give the enactment sense and meaning in its context . . ."

Reference may be made to *R.* v. *Ely JJ., Ex p. Gilling* (11) ((1855), 4 W.R. 13). One Gilling had been taken into custody by railway officials on a charge of having travelled with a false ticket. The following morning he was brought up before the magistrates and was remanded by them in custody until a later day. On that later day it appeared that the charge was groundless and Gilling was discharged. A motion was made in the Queen's Bench Division for a certiorari to the justices to bring up the warrant under which Gilling had been remanded into custody. The object of the application for a certiorari was to have the warrant quashed preliminary to bringing actions against the railway company and against the magistrates. The court (which presumably included Lord Campbell, C.J.) refused the rule; that was on the ground that whatever protection was afforded to the railway company by the warrant ought not to be taken from them, and that in the action against the justices the validity of the warrant was the very thing to be tried; and that s. 2 of the Act of 1848, which provides that a conviction shall be quashed before an action can be brought against the committing magistrate, only applied to cases where there had been a conviction. Although the construction of the section presents much difficulty, it seems to me that it cannot be postulated that there was a statutory enactment which had the effect that the orders made by the justices had to be quashed before action could be brought. On this basis the result is that the proviso to s. 2 of the Act of 1848 did not debar the plaintiff from suing before the orders were quashed and the plaintiff was long debarred by the Limitation Act, 1939, from claiming damages in respect of his periods of imprisonment.

If the contrary view were sustained, however, and it were held that no action could be brought until the orders had been quashed, would the result be any different ? Section 2 provides that for any act done under an order made by justices in matters of which they have not jurisdiction or in which they shall have exceeded their jurisdiction there may be an action " in the same form and in the same case " as might have been maintained before the passing of the Act. Then follows the proviso. If the proviso could be read so as to include the quashing of orders, does the cause of action exist though the right to begin an action is delayed until the orders are quashed, or does the cause of action only arise if and when the orders are quashed ? In deciding this issue it is necessary to consider certain other sections of the Act. Section 8* used the same expression, " no action shall be brought ", as is found in s. 2, and enacted that no action should be brought for anything done by a justice of the peace in the execution of his office unless commenced within six months after the act complained of should have been committed. Section 21 of the Limitation Act, 1939, ultimately took the place of this section and, therefore, so far as concerns this case, the words to be considered (until the Act of 1954 applied) are the words " the date on which the cause of action accrued ". Section 9* provided that no action should be commenced until at least one month after a notice in writing of the intended action should have been given. In such notice the cause of action and the court in which it was intended to be brought was required to be clearly and explicitly stated. That section was repealed in 1894, but it is necessary to consider it when dealing with some of the issues which are before us. If it were assumed that the Act required the quashing of an order before an action is brought, ought such

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* Sections 8, 9, of the Justices Protection Act, 1848, were repealed by the Statute Law Revision Act, 1894.

A quashing to have taken place before any notice under s. 9—that is to say, a notice stating the cause of action—could have been given ? This very question arose in *Haylock* v. *Sparke* (7) ((1853), 1 E. & B. 471). Mr. Haylock was brought before the magistrates and it was charged against him that he had written offensive words on pavements which, it was said, reflected on the character of Mr. Watt, the stationmaster at Ely. Mr. Haylock had written " Donkey Watt, the railway B jackass ", and Mr. Haylock had continued for some time so to write. It was said that Mr. Haylock's pavement literary efforts were calculated to provoke a breach of the peace. The magistrate ordered Mr. Haylock to enter into a recognizance and to find sureties to keep the peace for three months. Mr. Haylock, having refused to do this, was committed to prison for a period of three months or until he did as ordered. That was on Apr. 30, 1852. On May 6 C he was brought up before COLERIDGE, J., by habeas corpus and was discharged. On May 18 Mr. Haylock served a notice under s. 9 of the Act of 1848 of his intention to commence an action after one month. On June 12 the warrant of committal issued by the magistrate was brought up by certiorari and was quashed by the Court of Queen's Bench. On June 19 the writ was issued against the magistrate; the claim was for damages for false imprisonment. The action D was heard at the summer assizes at Cambridge, 1852. One of the points taken on behalf of the defendant magistrate was that the notice under s. 9 was insufficient because it was not given after the cause of action was completed. POLLOCK, C.B., upheld this contention and a verdict was directed to be entered for the defendant. On the argument on a rule nisi to enter a verdict for the plaintiff for damages which had been assessed, it was argued on behalf of the defendant that E it was the intention to give to a justice a month's time for the purpose of tendering amends before the action could be brought, that this intention would be defeated if notice of action could be given before the cause of action was complete and that the cause of action was not complete until the warrant was quashed. Other issues were involved in the case, but as to this issue the reserved judgment of the court, delivered by LORD CAMPBELL, C.J., included the passage to which my Lord has F already referred (1 E. & B. at p. 484*). In the second sentence LORD CAMPBELL said this (ibid.):

> " Supposing this warrant to be in the nature of a conviction, so that the action could not have been maintained unless the warrant had been quashed, we think that the notice of action was regularly given on May 18."

G It seems to me that LORD CAMPBELL in saying this was indicating his view that quashing was only necessary if there were a conviction. This also seems to be implicit in the remainder of the passage of the judgment dealing with this matter, which has been read. It concludes with these sentences (ibid.):

> " In argument it was contended that the six months might be construed to run from the quashing of the conviction; but the commitment is the act H complained of, not the quashing of the conviction on the application of the party imprisoned. The quashing of the conviction is only a condition to the prosecution of the action like the delivery of an attorney's bill, or the giving a notice of action: and there is nothing to determine in what order the conditions shall be complied with."

I consider that that judgment and its reasoning should be followed. It was I referred to in this court in *West Riding of Yorkshire Rivers Board* v. *Robinson Brothers* (8) ([1907] 1 K.B. 431) where its correctness was not challenged. LORD CAMPBELL, C.J., had referred to the quashing of a conviction as only a condition to the prosecution of an action comparable with the delivery of an attorney's bill. In *Coburn* v. *Colledge* (10) ([1897] 1 Q.B. 702) in this court, it was held that in the case of a solicitor's costs the cause of action arose when the work was completed and that the period of limitation began to run from that time although there was a statutory provision that no action should be commenced or maintained until the expiration of a month after the delivery of a bill of costs. It was held that that provision dealt, not with the right of the solicitor, but with the procedure to enforce that right. Lord Esher, M.R., said ([1897] 1 Q.B. at p. 706):

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* See pp. 426, letter 427, ante,

> " It does not provide that no solicitor shall have any cause of action in respect of his costs or any right to be paid till the expiration of a month from his delivering a signed bill of costs, but merely that he shall not commence or maintain any action for the recovery of fees, charges, or disbursements until then."

So in the present case the proviso is that no action shall be brought until after a conviction shall have been quashed.

Some reliance was placed, on behalf of the plaintiff, on the language of s. 12. That section was repealed in 1893*, but it is valid to have regard to it when considering the question when a cause of action arose. It was argued that a cause of action consists of every fact which it would be necessary for a plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Reference was made to the definition given by Lord Esher, M.R., in *Read* v. *Brown* (2) ((1888), 22 Q.B.D. 128 at p. 131) and to which he adhered in his judgment in *Coburn* v. *Colledge* (10). Section 12 of the Act of 1848 was, in my judgment, a procedural section. The requirements of proof which were referred to were not " facts " of the kind referred to by Lord Esher. Furthermore, the section used the phrase

> " or if he shall not prove the cause of action referred to in the notice."

This, as I think, distinguished the procedural requirements from the cause of action itself. Furthermore, the Act of 1848 was an Act designed (as its title states) to protect justices from vexatious actions for acts done by them in the execution of their office; and s. 2 was not creating new causes of action. The purpose of the Act was to assist justices by enacting that certain steps should be taken before commencing actions and by fixing a time limit within which such actions should be brought. It seems to me, therefore, that it cannot be said that causes of action accrued only when the Divisional Court on Oct. 6, 1954, discharged the original order and the variation orders. It is to be noted that the orders of committal were not in terms quashed or discharged. Further it seems doubtful whether, since there was nothing that could be called a conviction, the orders need have been discharged before an action was brought. Even if, however, it was necessary to have discharged the original order and the variation orders, and even if, by their discharge, the committal orders (which were spent orders in the sense that the periods of committal which they ordered were long past), could be said also to have been discharged, the causes of action for damages for false imprisonment were not dependent for their existence on the quashing or discharge of any order. I consider, therefore, that all causes of action which accrued before June, 1953, are barred as a result of the application of the provisions of the Limitation Act, 1939.

This brings me to the remaining issue raised in the appeal, if any causes of action later accrued, that is to say, after June 3, 1953, they are not barred. It has, therefore, to be considered whether there were any causes of action which accrued. The only suggested causes of action referable to this later period relate to the fact that the plaintiff paid money to his wife. It is contended that he paid to her money because he was wrongly ordered to do so by the defendants, who had acted outside their powers, and that he paid in this period because, having previously been sent to prison for non-payment, he knew that he would again be sent to prison if he did not pay. It is submitted, therefore, that he paid under the fear or threat of what would happen to him if he did not pay. It is further submitted that he can recover what he paid by way of damages from the defendants who irregularly ordered him to pay.

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* By the Public Authorities Protection Act, 1893, which has been repealed.

The claim is advanced either under the wording of s. 2 of the Act of 1848 or independently of that wording. The opening wording refers either to " any act done by a justice of the peace " or to " any act done under any conviction or order made or warrant issued by such justice." The wording suggests that an act done is something separate and different from a conviction or from an order or from a warrant. In the present case the complaint relates to the order or orders made by the defendants. It does not seem to me, however, that the mere making of an order caused injury to the plaintiff. In *Polley* v. *Fordham* (12) ([1904] 2 K.B. 345), the plaintiff had been convicted by a metropolitan police magistrate of an offence on Feb. 11, 1903, and fined. He failed to pay the fines and the magistrate issued a warrant of distress against his goods. Distress was put in on Apr. 17. The plaintiff, under protest, paid out the distress on Apr. 29. On July 8 the conviction was quashed, on the ground that the information had been out of time. The plaintiff brought an action in the county court against the magistrate on Aug. 26, claiming damages for illegal distress. The question being considered on appeal from the county court judge was whether the time limit for the purposes of the Public Authorities Protection Act, 1893, ran from the date of conviction (Feb. 11, 1903) or from the date of entry on the plaintiff's premises. It was held that time ran from only the latter date. In argument, counsel for the defendant (the respondent) submitted that it was the conviction which was the act complained of, and it was in reference to that submission that WILLS, J., in his judgment said ([1904] 2 K.B. at p. 348):

> " It seems to me the act complained of is the distress and nothing else. No such thing was ever heard of as an action for making an order against a person without jurisdiction. If the order is not followed by consequences against the individual, it comes to nothing. Actions for illegal distress of one sort or another were at one time very common, but such actions were always actions of trespass . . . But the action itself was not for erroneous exercise of jurisdiction, but was for making a distress and breaking and entering a man's premises where there was no right to do so. No such action as that suggested by the respondent will be found in BULLEN AND LEAKE; in CHITTY ON PLEADING; or in any of the books of precedents."

So here, when the original order was made, or when the variation orders were made, no injury to the plaintiff was then caused. If the first payment had become due on a date later than the date of the order, no immediate injury to him was caused by the order itself. His loss or injury came when he paid; but the payment by him was not an " act done by " the defendant justices; nor does it seem to me that it was within the words " any act done under any . . . order made." The wording of the Justices Protection Act, 1848, s. 2, seems to me to refer either to something directly done by justices or to something directly done by others as against the person complaining. I do not think that the words are apt to refer to a payment made by a person against whom an order has been wrongly made. The wording refers rather to some such acts as trespass to person or trespass to goods done either by justices or by others who derive their authority, or purport to derive it, under any conviction or order made or warrant issued by justices. This is, I think, only reasonable. The whole case of the plaintiff is that the orders made were nullities and that he need not have paid. Payments made by him in these circumstances do not readily fit in to the notion of acts done by justices. The defendants may not have realised that the orders they made were beyond their powers; but any ignorance on their part is of no account. From the point of view of the plaintiff he too may not have realised that the orders were irregular; but he in fact had remedies open to him by availing himself whereof he could have set aside the orders. The fact that he for the most part went on paying does not convert his payments into acts done within the wording of the section.

The matter, however, falls to be considered apart from the precise wording of s. 2 of the Act. Although the Act is one giving protection to justices and is not one that (at least in s. 2) is giving new remedies against justices, it is correct to say that in circumstances where, before 1848, there could have been a cause of action against justices, that cause of action would continue, subject to complying with any requirements laid down by the Act. Actions could be maintained (as s. 2 states) " in the same form and in the same case " as might have been before the passing of the Act. Although new causes of action are not given by s. 2, neither in my view are causes of action denied which might theretofore have lain; but certain defined conditions must be met with compliance. If, however, in the circumstances of this case, a right of action would have existed before 1848 against justices in respect not of any false imprisonment but merely because money was paid as ordered, then such a right of action would at later times and at the present time also exist. If there was and is such a cause of action known to English law, then the plaintiff in the present case could avail himself of it. The claim made in the writ, apart from that for damages for false imprisonment, was for damages for acts done by the defendants without jurisdiction while sitting as justices of the peace. The statement of claim pleaded the facts and by the prayer claimed damages. It is said that if justices made an order requiring the payment of money to a third party and made such order in excess of their jurisdiction, an action on the case would lie against the justices for the amount of any sums actually paid. No precedent for any such action was cited. In *Sommerville* v. *Mirehouse* (9) ((1860), 1 B. & S. 652), the plaintiff complained in an action against magistrates that he had been summoned before them for non-payment of a church rate, and he complained that though he had proved that the rate had been demanded at a date more than six months before he was summoned and that he was by statute protected from having an order made against him, yet an order for payment had been made. That order was later quashed by the Queen's Bench. In his action the plaintiff said that the magistrates had made the order without jurisdiction and that he had been put to inconvenience and annoyance and had incurred expense in applying for a writ of certiorari. The magistrates said that there had been evidence of a later demand on the plaintiff. The headnote of the case states (1 B. & S. 652) that, on demurrer, it was held

> " that it was within the duty of the defendants, as justices, to determine the question whether a complaint was made within the time limited; and therefore, by s. 1 [of the Act of 1848] the action was not maintainable without proof of malice and want of reasonable and probable cause."

Counsel had said (ibid., at p. 656):

> " The costs of bringing up the order for the purpose of quashing it constitute a damnum absque injuria."

Cockburn, C.J., in the course of the argument, said (ibid., at p. 657):

> " It was within the duty of the justices to determine the question which was raised in this case before them: indeed that question was a matter which they were bound to decide ";

whereupon Hill, J., said:

> " If anything had been done under the order it might be different: as soon as an invalid order is acted upon a trespass is committed ";

and later Hill, J., said (ibid.):

> " There is no injuria until a seizure of the plaintiff's goods is made in execution of the order."

There are many cases in the books where actions have been brought against justices, but they have been brought because a plaintiff has been detained or because his goods have been seized or in similar circumstances. If a man is imprisoned, then lawful authority for his detention must be forthcoming; if it is not, then justices who have wrongly ordered his detention may be liable. Where a man is wrongly imprisoned and has to make payments before he can be released, then the amount of such payments may be recovered as part of his damages (see *Clark* v. *Woods* (16) ((1848), 17 L.J.M.C. 189); *Norton* v. *Monckton* (17) ((1895), 43 W.R. 350), and see s. 13 of the Act of 1848). The right of action arises by reason of the trespass to the person: the wrongful or abortive order is of no avail to justify what has been done. It is not the mere making of the order that constitutes the cause of action. If the order is one for the payment of money and if it is made without jurisdiction, then it need not be obeyed. Appropriate steps can be taken to quash it or to reverse it on appeal; but if these steps are omitted a claim for damages cannot later be presented against justices based merely on the fact that they made an order requiring payments to be effected. I would dismiss the appeal.

ROMER, L.J.: The date of the last of the three orders for the committal of the plaintiff to prison was May 23, 1945, and I understand that under that order he was imprisoned on July 20, 1945, and was released in the following October. In these circumstances, it is clear that his cause of action for damages for false imprisonment was defeated by s. 21 of the Limitation Act, 1939, years before he issued his writ, unless he is right in the contention which counsel submitted on his behalf that his right to sue did not arise until the Divisional Court quashed the original and subsequent orders of the defendants on Oct. 6, 1954. This argument is founded on the proviso to s. 2 of the Justices Protection Act, 1848, which my Lord has read and which I will not read again. In considering counsel's contention as to the effect of this proviso, it is necessary to bear in mind that there is a real distinction between having a cause of action on the one hand and being able to obtain judgment on it on the other; for the right to judgment may well involve some element which is additional to the vesting of the cause of action itself. For example, A sues B for money lent: B pleads the Limitation Act: A has a perfectly good cause of action, but he will not recover judgment unless he can prove at the trial some circumstance which takes the case out of the operation of the Act. The distinction was put quite clearly by LORD ESHER, M.R., in his judgment in *Coburn* v. *Colledge* (10) ([1897] 1 Q.B. 702 at p. 705). The question, therefore, arises in the present case whether the quashing of an invalid order under s. 2 of the Act of 1848 constitutes an essential part or ingredient of an action against the magistrates who made it, so that no cause of action arises until such quashing has been effected, or whether a complete cause of action arises when the consequences of the order are felt and the quashing is a mere condition precedent to the plaintiff's right to judgment. It is not permissible to construe the proviso to s. 2 in the light only of its immediate context; its meaning and effect must be ascertained both with regard to that context and with regard to the provisions of the Act as a whole. The Court of Queen's Bench in *Haylock* v. *Sparke* (7) ((1853), 1 E. & B. 471) rejected the view that no cause of action arises under the Act of 1848 in respect of a conviction made without jurisdiction until the conviction has been quashed; and I have no reason to doubt the accuracy of that decision. It was considered in this court in *West Riding of Yorkshire Rivers Board* v. *Robinson Brothers* (8) ([1907] 1 K.B. 431), and none of the members of the court expressed any doubt or disapproval of the decision. FARWELL, L.J., indicated that LORD CAMPBELL, C.J., and his brethren decided the case mainly by reason of the limitation section of the Act of 1848, s. 8; and this would certainly seem to emerge from the language of LORD CAMPBELL'S observations. I think that additional support for the decision in *Haylock* v.

Sparke (7) is to be found in the provisions of s. 7 of the Act. Section 7 is in the A following terms:

> " In all cases where by this Act it is enacted that no action shall be brought under particular circumstances, if any such action shall be brought it shall be lawful for a judge of the court in which the same shall be brought, upon application of the defendant, and upon an affidavit of facts, to set aside the B proceedings in such action, with or without costs, as to him shall seem meet."

The effect of that section on s. 2 would appear to be that an action can properly be commenced in respect of an invalid conviction before the conviction has been quashed, but a judge can—not " must ", be it noted—set aside the proceedings on application by the defendant if the plaintiff does not obtain the quashing of the conviction. This seems to show that in the contemplation of Parliament the C right of action—that is, the right to sue—precedes the setting aside of the conviction. The position in this respect may be contrasted with that which arises under the statute of 7 Anne c. 12 s. 3 (the Diplomatic Privileges Act, 1708), which was considered in *Musurus Bey* v. *Gadban* (20) ([1894] 2 Q.B. 352). That section provides that:

> D " . . . all writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambassador . . . authorized and received as such by Her Majesty her heirs or successors . . . may be arrested or imprisoned or his . . . goods or chattels may be distrained seized or attached shall be deemed and adjudged to be utterly null and void to all intents constructions and purposes whatsoever."

E If s. 7 of the Justices Protection Act, 1848, had been couched in language similar to that of the statute of Anne, considerable support would be afforded to counsel's contention. The section, however, in its enacted form, seems to me to be very much opposed to it. I am accordingly unable to accept counsel's argument on this part of the case, for *Haylock* v. *Sparke* (7), which is fatal to it, was, in my opinion, rightly decided. F

In these circumstances, it becomes unnecessary to express any concluded opinion on counsel's further point that the words " or order " in the proviso to s. 2 were omitted by mistake. For myself, however, I am inclined to accept counsel's submission on this point. Section 2 is concerned not only with acts done by justices in their criminal jurisdiction but also with acts done in the exercise of their civil jurisdiction. It is further to be observed that the words " conviction " and " order " in the section are used disjunctively wherever they appear. G In these circumstances, I think it is difficult to avoid an absurdity in the operation of the section unless the words " or order " are implied after the words " until after such conviction " in the proviso. In the absence of such implication the proviso would read (in relation to an order made where no question of any conviction arises at all) H

> " Provided nevertheless, that no such action shall be brought for anything done under such order until after such conviction shall have been quashed ",

which does not, as it seems to me, make any sort of sense. Moreover, the phrase which appears later in the section,

> " until after such conviction or order shall have been so quashed as I aforesaid "

indicates that the earlier reference to quashing was intended to cover orders as well as convictions. As I say, therefore, my provisional view is that there is sufficient justification for the assumption that the words " or order " were omitted from the proviso through inadvertence; and some support for that is to be found in the corresponding section of the Justices Protection (Ireland) Act, 1849, to which my Lord has referred.

The next issue is whether the plaintiff can recover from the defendants, or some of them, the whole or any part of the money which he paid to his wife in compliance with the orders which were made against him. So far as s. 2 of the Justices Protection Act, 1848, is concerned, the question arises: Was the plaintiff a person injured (a) by any act of the justices done without jurisdiction or (b) by any act done under an order made by the justices without jurisdiction? If so, and subject to the Limitation Act, 1939, he could sue the justices

> " in the same form and in the same case as he might have done before "

1848, without alleging malice or absence of reasonable and probable cause. The actual injury or detriment which the plaintiff sustained was the payment to his wife, over a period of years, of money which in fact he was under no liability to pay. There can be no doubt that he made these payments as a consequence of the original order of Aug. 18, 1941, and of the various orders which succeeded it. On analysis, however, it seems to me that the payments resulted from at least three different factors, namely: (1) the making of the orders; (2) the plaintiff's ignorance of the invalidity of the orders; and (3) his consequent failure to apply to a higher court to have them set aside. Of these three elements the only one which can fairly be described as an " act done by a justice " without jurisdiction, or as an " act done under any order made by " a justice without jurisdiction is the first, videlicet the making of the orders. The making of the orders, however, did not in itself deprive the plaintiff of any moneys at all; and indeed in *Polley* v. *Fordham* (12) WILLS, J., said ([1904] 2 K.B. 345 at p. 348):

> " No such thing was ever heard of as an action for making an order against a person without jurisdiction. If the order is not followed by consequences against the individual, it comes to nothing."

One therefore finds that the only contributory cause of the plaintiff's loss which can be regarded as an act of the justices done without jurisdiction was one which, in itself, took no money from his pocket and gave the plaintiff no cause of action. On the other hand, the other contributory causes which I have mentioned cannot, as it seems to me, give such a cause of action because they were not acts of the justices at all. Moreover, I cannot help feeling that the plaintiff's ignorance of the invalidity of the orders and his resulting compliance with them are matters in respect of which he cannot excuse himself from blame; for the original order, of which he was given a copy, stated on its face that it was made with his consent and he knew perfectly well that in fact he never had consented. This fact in itself would surely have conveyed to the mind of most reasonable men that there was something wrong with the order, although this did not apparently occur to the plaintiff himself. I accordingly cannot think that the aggregate of causes which led to the plaintiff making these payments to his wife can reasonably be regarded as constituting an act done by the justices without jurisdiction; and if I am right in this the plaintiff has no cause of action such as was envisaged by s. 2 of the Justices Protection Act, 1848.

It is true that s. 2 of the Act did not confer rights of action against magistrates who acted without or in excess of jurisdiction, for such rights existed already; and counsel for the plaintiff, whilst invoking the section in an effort to escape the effect of s. 21 of the Limitation Act, 1939, said that the plaintiff's claim to pursue the defendants for the money that he had paid to his wife was founded on the common law. The kind of principle on which he relied is stated in COMYNS' DIGEST (ACTION UPON THE CASE), vol. 1, p. 278, in the following way:

> " In all cases where a man has a temporal loss or damage by the wrong of another he may have an action upon the case to be repaired in damages."

What I have already said, however, with regard to causation applies equally to this proposition as to the language of s. 2 of the Act; and for the reasons I have stated, the loss which the plaintiff suffered was not in my opinion occasioned by the wrong of the justices, although the invalid order which they made was undoubtedly one of the causes which contributed to the loss. If it be objected that the views which I have expressed on this issue are too narrow in relation to cause and effect, the answer is that I do not think that a man who is aggrieved by an invalid order of justices was intended, either at common law or under the Act of 1848, to have the option either of appealing or of obeying it and then suing the justices for damages; and if (as in the present case) an aggrieved person can obviate all damage by appealing, then his remedy is to appeal.

Apart from the question of causation, a further difficulty in the way of the plaintiff's money claim against the defendants arises from the reference or provision in s. 2 to the form in which actions against magistrates might be brought. By reason of that provision it would seem that after 1848 magistrates who acted without jurisdiction could only be sued under forms of action which existed before the Act. These forms would presumably include actions on the case, but, notwithstanding the extreme diligence of counsel, no report of an action against magistrates comparable or even analogous to the present money claim is to be found in the books. This is the more significant in that a number of actions in trespass against justices are reported previous to 1848; and I think it is a reasonable inference that the reason why no claims such as the present were reported is that there were none to report. The nearest case to which our attention was drawn was *Beaurain* v. *Scott* (14) ((1813), 3 Camp. 388) in which an action on the case was successfully brought for damages against a judge of the ecclesiastical court for wrongful excommunication. In that case, however, the injury done to the plaintiff was immediately due to the issue of the decree of excommunication and could not be remedied by appeal, and that element, as it seems to me, makes a very considerable difference. It is, however, perhaps sufficient to say that in my judgment counsel for the plaintiff has not established that a claim against justices such as the plaintiff has now brought would have been entertained before the passing of the Justices Protection Act, 1848, and, accordingly, in my judgment, such a claim ought not to be entertained now. For these reasons, and those stated by my brethren, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *George C. Carter & Co.* (for the plaintiff); *Wilkinson, Howlett & Moorhouse* (for the defendants).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

A

CROOK *v.* DERBYSHIRE STONE, LTD. AND ANOTHER.

[DERBY ASSIZES (Pilcher, J.), February 17, 20, 1956.]

Master and Servant—Liability of master—Liability to third person for acts of servant—Act authorised but not an act in discharge of duty to master—Lorry B *driver permitted to stop for refreshment during long journeys—Collision with motor cyclist while lorry driver walking across road to reach café.*

T., a lorry driver, was permitted by his employer to stop during long journeys to obtain refreshment. One morning, having drawn up the lorry on the side of a road, he proceeded to walk across the road to reach a café. While crossing the road, he was involved, partly through his own negligence, in a C collision with the plaintiff, who was driving a motor cycle. The plaintiff, who was injured in the accident, claimed damages against T.'s employer on the ground that, at the time of the accident, T. was acting in the course of his employment.

Held: T.'s employer was not liable to the plaintiff for the consequences of T.'s negligence because, although T. was employed at the time of the accident D and was permitted to obtain refreshment, yet the obtaining of refreshment was not something that he was employed to do and, therefore, he was not discharging his duty to his employer when the accident occurred.

Century Insurance Co., Ltd. v. *Northern Ireland Road Transport Board* ([1942] 1 All E.R. 491) distinguished.

[As to the liability of a master in tort for acts of servant in the course of E employment, see 22 HALSBURY'S LAWS (2nd Edn.) 226, para. 405; and for cases on the subject, see 34 DIGEST 127-129, *981-991.*]

Cases referred to:

(1) *Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board*, [1942] 1 All E.R. 491; [1942] A.C. 509; 111 L.J.P.C. 138; 167 L.T. 404; 2nd Digest Supp.

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(2) *Jefferson* v. *Derbyshire Farmers, Ltd.*, [1921] 2 K.B. 281; 90 L.J.K.B. 1361; 124 L.T. 775; 34 Digest 144, *1134.*

(3) *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716; 81 L.J.K.B. 1140; 107 L.T. 531; 34 Digest 129, *991.*

Action.

G The plaintiff, John Crook, claimed damages against the first defendants, Derbyshire Stone, Ltd., and the second defendant, Bertie Thorpe, a lorry driver employed by the first defendants, for personal injuries and consequential losses and expenses occasioned to the plaintiff by an accident caused by the negligence of the second defendant in the course of his employment.

During June, 1952, the first defendants were engaged in fulfilling a contract H with builders for the supply of stone from their quarries, which were in the neighbourhood of Matlock, to a building site at Longbridge, near Birmingham. The second defendant was one of the first defendants' regular drivers and, on occasions, did what was called "the early run" from Matlock to Longbridge. On this run, it was his duty to arrive at his destination at Longbridge at 8 a.m., which involved his starting from Matlock at about 4 a.m., and it was his practice I to stop at a certain café on the Bristol Road South which was about six or seven minutes distant by lorry from his destination. On June 30, 1952, shortly before 8 a.m., the second defendant drew up his lorry by the kerb almost exactly opposite this café, and facing towards Longbridge. The Bristol Road South there has a dual carriage-way and a central reservation in the middle. To reach the café the second defendant had to cross the first section of the dual carriage-way, the central reservation, and then the other section of the dual carriage-way. After stepping out of his lorry on the off-side, the second defendant started to cross the first half of the dual carriage-way. When he reached the central reservation, he remembered that he had left his ignition key in the switch, and, accordingly, turned back to his lorry. He re-crossed the first half of the dual carriage-way, put his hand through the window of the lorry, took out the ignition key, put it in his pocket, and proceeded to cross for a second time towards the central reservation. He had his back slightly turned to on-coming traffic and, when he had got within three or four feet of the central reservation, he collided with the plaintiff who was riding a motor cycle. As a result of the collision, both the plaintiff and the second defendant were injured. The plaintiff's fifth, sixth and seventh left ribs were fractured, and he had a severe comminuted fracture of one of the bones of his left elbow. He also suffered general shock and abrasions. He was a sheet metal worker; he sustained no loss of earnings, but had a continuing disability of the left elbow which could not be bent fully and could not be rotated in some directions. It was agreed by counsel that the blame for the accident rested, in equal proportions, on the plaintiff and the second defendant.

The plaintiff contended that, in the circumstances of the case, the second defendant was acting in the course of his employment, in that, at the time of the accident, he was performing an act permitted by his employers, the first defendants, and incidental to his employment, and that, therefore, the first defendants were responsible to the plaintiff for the second defendant's negligence.

A. E. James for the plaintiff, John Crook.
P. Bennett for the first defendants, Derbyshire Stone, Ltd.
A. J. Flint for the second defendant, Bertie Thorpe.

Cur. adv. vult.

Feb. 20. **PILCHER, J.,** stated the facts and, having found that the first defendants both knew that their drivers who did not provide themselves with tea and other refreshment on a long run were in the habit of stopping at convenient cafés to refresh themselves and impliedly authorised them to do so, continued: I do not think that the first defendants gave express authority to the second defendant to stop at wayside cafés to procure refreshment, but they had never forbidden their lorry drivers to do so, and I am assuming for the purposes of this case that this practice of the lorry drivers, and it is a necessary practice, was well-known to the first defendants and was sanctioned by them impliedly. I am quite satisfied that, if the second defendant had said to the first defendants' manager: " May I, when I require, after a long run, stop my lorry and go across the road to procure refreshment ? ", the answer would most certainly have been: " Of course ". It was common ground that the accident occurred during the second defendant's working hours, in the ordinary sense of the term, and counsel for the plaintiff contended that the second defendant, in walking across the road as he did and for the purpose which he did, was doing something which his employers knew that their drivers did, and did reasonably. Counsel contended that the second defendant, in so crossing the road to get refreshment for his own purposes, was doing an act which was incidental to his employment, and that, in those circumstances, in law the first defendants, as his employers, were vicariously responsible for any act of negligence which he might commit while engaged in this incidental act.

While an employer is, no doubt, vicariously responsible for the negligent acts of his servants committed in the course of their employment, he is not, in my view, necessarily responsible for the consequences of acts committed by his servants during their period of employment, unless the particular act which is negligently performed was an act which the servant was employed to perform. If the second defendant had been employed by the first defendants to deliver some goods at the café and had, through his own negligence, sustained exactly the type of accident which he did sustain and had done the injuries to the plaintiff which he did do, the contention of counsel for the plaintiff in this case would, no doubt, be almost bound to succeed. Assuming that it was reasonable for the second defendant to draw up his lorry where he did and to cross the road at the place where he did, if he had done that negligently in the course of delivering goods to their destination, his employer would, no doubt, have to answer for the consequences of his negligence, because he was actually engaged in doing what he was employed to do. In the present case, the second defendant was not, in any sense of the word, " employed " to cross the road. He did it primarily for his own purposes, although, no doubt, with the complete approval of the first defendants. He had left his lorry and was no longer engaged, in the ordinary sense of the term, on his employers' business.

Counsel for the plaintiff cited, and counsel for the first defendants relied on, *Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board* (1) ([1942] 1 All E.R. 491). In that case a number of matters came up for decision, but I need refer only to one particular point which was dealt with by the noble Lords. A lorry driver employed to drive a petrol lorry and to deliver petrol from the lorry into the underground tank of a garage, while so transferring the petrol from the lorry to the tank, having opened the tap in the lorry and put the nozzle down into the tank, struck a match to light a cigarette and threw the match on the floor, as a result of which there was a conflagration and explosion and a great deal of damage was done. Claims were made on the lorry driver's employers on the ground that the lorry driver, in doing the negligent act, was acting in the course of his employment, and, therefore, his employers were vicariously responsible for the consequences of his negligence. The case came before the House of Lords on appeal from the Court of Appeal in Northern Ireland, who held that the employers, in the circumstances of the case, were responsible for their driver's negligence in relation to the cigarette and the match. The House of Lords affirmed the decision of the Court of Appeal in Northern Ireland.

In the course of his speech Viscount Simon, L.C., said ([1942] 1 All E.R. at p. 494):

> ". . . every judge who has had to consider the matter in Northern Ireland agrees with the arbitrator in holding that Davison's careless act which caused the conflagration and explosion was an act done in the course of his employment. Admittedly, he was serving his master when he put the nozzle into the tank and turned on the tap. Admittedly, he would be serving his master when he turned off the tap and withdrew the nozzle from the tank. In the interval, spirit was flowing from the tanker to the tank, and this was the very delivery which the respondents were required under their contract to effect. Davison's duty was to watch over the delivery of the spirit into the tank, to see that it did not overflow, and to turn off the tap when the proper quantity had passed from the tanker. In circumstances like these, ' they also serve who only stand and wait '. He was presumably close to the apparatus, and his negligence in starting smoking and in throwing away a lighted match at that moment is plainly negligence in the discharge of the duties upon which he was employed by the respondents. This conclusion is reached on principle and on the evidence, and does not depend upon finding a decided case which closely resembles the present facts."

Viscount Simon went on to deal with *Jefferson* v. *Derbyshire Farmers, Ltd.* (2) ([1921] 2 K.B. 281), a case to which I do not find it necessary to refer, because it was considered by the noble Lords in *Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board* (1).

Lord Wright said ([1942] 1 All E.R. at p. 497):

> " On the other question, namely, whether Davison's negligence was in the course of his employment, all the decisions below have been against the appellants. I agree with them and need add little. The act of a workman in lighting his pipe or cigarette is an act done for his own comfort and convenience and at least, generally speaking, not for his employer's benefit. That last condition, however, is no longer essential to fix liability on the employer . . . "

Lord Wright referred to *Lloyd* v. *Grace, Smith & Co.* (3) ([1912] A.C. 716), the well-known case in this line of cases which decides that the tortious act of the servant need not be an act done by the servant for the benefit of his employers. Lord Wright continued ([1942] 1 All E.R. at p. 497):

> " Nor is such an act prima facie negligent. It is in itself both innocent and harmless. The negligence is to be found by considering the time when and the circumstances in which the match is struck and thrown down. The duty of the workman to his employer is so to conduct himself in doing his work as not negligently to cause damage either to the employer himself or his property or to third persons or their property, and thus to impose the same liability on the employer as if he had been doing the work himself and committed the negligent act. This may seem too obvious as a matter of common sense to require either argument or authority. I think that what plausibility the contrary argument might seem to possess results from treating the act of lighting the cigarette in abstraction from the circumstances as a separate act."

In the present case, although the second defendant was permitted to stop for refreshment and, if necessary, to cross the road for that purpose, he was not, as I have said, employed to do this. Even though employed at the time on his master's business and permitted to do what he did in crossing the road to get refreshment, he was, in my view, a stranger to his master from the moment when he left the lorry. He had no further duty to perform on his master's account until he returned to the lorry and resumed his journey. In this respect his position was, in my view, completely different from that of Davison, the driver in *Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board* (2), because, when Davison negligently threw down the match, he was engaged on his master's business, namely, supervising the discharge of the petrol. No doubt, it is difficult on the particular facts of each individual case to draw the line between the circumstances in which it may be proper to say that a servant is discharging his duty as a servant, and circumstances in which he is, with the permission of his employer, doing some act incidental to his employment.

Examples are seldom helpful, but perhaps one may be permitted to consider two or three cases which might have to be determined on facts almost similar to the facts of this case. It is interesting to inquire (and the question might be difficult to resolve) what the position would be if a lorry driver in the second defendant's position crossed the road to ask the way or to get a tin of petrol to put into his lorry; or, indeed, what the position might have been if, returning from the café, the second defendant had seen someone getting into his lorry and about to drive it off, had hurried across the road to stop him, and had been involved in a collision. Those are all matters which may fall on one side of the line or the other. In this case, on the admitted facts, although the second defendant was permitted to do what he did, I am not satisfied that he was, in fact, discharging his duty to his employer at the time when the accident occurred. I think that he was not. I think that, at that moment of time, he was a stranger to his employer and that, therefore, the first defendants were not vicariously responsible for the consequences of the second defendant's negligence.

I conclude what I have to say by quoting a passage from Clerk and Lindsell on Torts (10th Edn.) (1947), p. 122*:

> " A master will not usually be responsible for the servant's negligence in doing something which he is merely permitted to do or does for his own purposes, but is not employed to do. If a servant does an act for his own pleasure, quoad that act he is a stranger to his master, although he may be in other respects engaged at the time upon the master's business, and the

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* The same passage appears in the 11th Edn. (1954), at p. 133.

mere fact that the master does not prohibit the doing of the act ought not to render him liable."

On that principle, and for the reasons which I have given, I find, on the facts of this case, that the first defendants are not responsible for the consequences of the negligence of their servant, the second defendant.

[HIS LORDSHIP assessed the plaintiff's damages at £1,100, which included the agreed sum of £382 15s. as special damages, and, after deducting fifty per cent. in respect of the plaintiff's contributory negligence, gave judgment for the plaintiff for £550 against the second defendant, and judgment for the first defendants against the plaintiff.]

Judgment for the plaintiff against the second defendant, and judgment for the first defendants against the plaintiff.

Solicitors: *T. H. Ekins & Son*, Birmingham (for the plaintiff); *Hewitt, Woollacott & Chown* (for the first defendants); *John Whittle, Robinson & Bailey*, Manchester (for the second defendant).

[*Reported by* GWYNEDD LEWIS, *Barrister-at-Law.*]

Re CALLAWAY (*deceased*).
CALLAWAY *v.* TREASURY SOLICITOR.

[CHANCERY DIVISION (Vaisey, J.), May 4, 8, 16, 1956.]

Intestacy—Descent and distribution—Felonious killing of deceased—Exclusion of killer from class entitled on intestacy—Interest of Crown—Bona vacantia —Administration of Estates Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 23), *s.* 46 (1).

By her will dated Sept. 8, 1949, E.F.C. appointed her daughter S. sole executrix and gave her the whole estate absolutely. On Mar. 8, 1954, E.F.C., her daughter S., and the latter's infant child, were all found dead in a gas-filled room in such circumstances as to lead irresistibly to the conclusion that S. had feloniously killed E.F.C. and the infant and had then committed suicide. S. was presumed to have survived E.F.C., but she was precluded from taking any benefit in the estate of E.F.C. by having feloniously killed E.F.C. The persons prima facie entitled by virtue of the Administration of Estates Act, 1925, s. 46 (1) on E.F.C.'s intestacy, were S. and a son of E.F.C. On the question whether the son was entitled to the whole estate, or whether the Crown was entitled to half as bona vacantia,

Held: the son was entitled to the whole estate and no part passed to the Crown as bona vacantia because S. must be excluded from the class of issue entitled by virtue of s. 46 (1), leaving the son as the only member of that class qualified to take.

Cleaver v. *Mutual Reserve Fund Life Assocn.* ([1892] 1 Q.B. 147) applied.

[As to the incapacity of a murderer to benefit under the will or intestacy of the murdered person, see 1 HALSBURY'S LAWS (3rd Edn.) 10, 11, para. 15 and 34 HALSBURY'S LAWS (2nd Edn.) 45, para. 51; and for cases on the subject, see 44 DIGEST 226, *504-510*.

For the Administration of Estates Act, 1925, s. 46 (1), as amended by the Intestates' Estates Act, 1952, Part 1, see 32 HALSBURY'S STATUTES (2nd Edn.) 123.]

Cases referred to:

(1) *Re Tucker*, (1920), N.S.W.R. 175; 21 S.R.N.S.W. 175; 18 Digest 18, *170i*.

(2) *Cleaver* v. *Mutual Reserve Fund Life Assocn.*, [1892] 1 Q.B. 147; 61 L.J.Q.B. 128; 66 L.T. 220; 56 J.P. 180; 44 Digest 226, *504*.

(3) *Re Sigsworth, Bedford* v. *Bedford*, [1935] Ch. 89; 104 L.J.Ch. 46; 152 L.T. 329; Digest Supp.

(4) *Riggs* v. *Palmer*, (1889), 12 American St. Rep. 819.

(5) *Ellison* v. *Westcott,* (1896), New York Rep. 149.
(6) *Re Sangal,* [1921] V.L.R. 355; 18 Digest 18, *170ii.*
(7) *In the Estate of Crippen,* [1911] P. 108; 80 L.J.P. 47; 104 L.T. 224; 22 Digest (Repl.) 274, *2772.*
(8) *Re Merrett's Settlement Trusts,* (Nov. 2, 1955), The Times.
(9) *Beresford* v. *Royal Insurance Co., Ltd.,* [1938] 2 All E.R. 602; [1938] A.C. 586; 107 L.J.K.B. 464; 158 L.T. 459; Digest Supp.
(10) *In the Estate of Hall, Hall* v. *Knight & Baxter,* [1914] P.1; 83 L.J.P. 1; 109 L.T. 587; 44 Digest 226, *505.*

Adjourned Summons.

The plaintiff, Albert Frank Callaway, as administrator of the estate of Emily Frances Callaway, deceased, applied to the court by originating summons for a declaration that on the true construction of the Administration of Estates Act, 1925, and in the events which had happened the plaintiff was beneficially entitled to the estate of Emily Frances Callaway, deceased, to the exclusion of any beneficial interest of the Crown therein.

J. L. Arnold for the plaintiff.
Denys B. Buckley for the Crown.

Cur. adv. vult.

May 16. **VAISEY, J.,** read the following judgment: I can state the facts of this case quite shortly. On Mar. 8, 1954, the dead bodies of three persons were found in a gas-filled room in a house in the City of Bristol. They were Emily Frances Callaway, a widow aged seventy-three; her daughter Jeanette Kathleen Stone, a married woman aged forty-four; and a son of Mrs. Stone, aged thirteen. The relevant evidence led irresistibly to the conclusion that Mrs. Stone had feloniously killed Mrs. Callaway, her mother, and also her son, and had then committed suicide. There was no evidence that Mrs. Stone was otherwise than of sound mind at the time when she committed the acts which I have mentioned. I have come to the conclusion, and the parties are agreed, that it is quite unnecessary for me to direct an inquiry or otherwise further to investigate the facts of the case, which are, indeed, quite plain. I am also satisfied that Mrs. Stone survived Mrs. Callaway, or must be presumed to have survived her under s. 184 of the Law of Property Act, 1925.

Mrs. Callaway left a will dated Sept. 8, 1949, appointing Mrs. Stone to be sole executrix and giving the whole of her estate to Mrs. Stone absolutely. The property of which Mrs. Callaway died possessed consisted both of realty and personalty and was of the value of about £4,000. Under the rule based on public policy, to which I must presently refer, Mrs. Stone was undoubtedly precluded from taking any benefit under Mrs. Callaway's will, and on that assumption the plaintiff, Albert Frank Callaway, who was the only child of Mrs. Callaway other than Mrs. Stone, applied for a grant of letters of administration to her estate. On Jan. 11, 1955, KARMINSKI, J., ordered that the grant should be made to him " on the footing that he was beneficially entitled to the net estate of Mrs. Callaway on her intestacy ". On Mar. 15, 1955, a grant was made to the plaintiff expressly on the before-mentioned footing. Although it has no direct relevance to the case, I may observe that Mrs. Stone herself had made a will in favour of the plaintiff, which he proved on Apr. 5, 1954. The statutory next of kin of Mrs. Callaway were her two children, viz., the plaintiff and Mrs. Stone, taking equally.

This rule based on public policy is that no person is allowed to take any benefit arising out of a death brought about by the agency of that person acting feloniously, whether it be a case of murder or of manslaughter. So much is plain; but there appears to be no satisfactory or complete authority as to the consequences arising from an application of that rule. The best exposition of the problem and of the difficulties which it involves is, I think, to be found in an Australian case, i.e., in the judgment of HARVEY, J., in *Re Tucker* (1) ((1920), 21 S.R.N.S.W. 175). After calling attention to the provisions of the civil law and referring also to the French law on the subject, he points out that the effect of the deprivation occasioned by the application of the rule was that in Roman law the property went to the state, while under the French law it went to the person who had a right to succeed next after the " heir " who lost his interest. It must be remembered that the civil law was applied in the ecclesiastical courts, and there is some reason to regard it as still governing such a point as the present. The common law appears to be silent on the matter and to create no such disability except possibly in the case of a traitor. It would seem, surprisingly, that so far as can be found there is little trace of this doctrine in English law until it arose in the case of Mrs. Maybrick, i.e., in *Cleaver* v. *Mutual Reserve Fund Life Assocn.* (2) ([1892] 1 Q.B. 147). From that authority I infer that the rule in this country is that the interest of the criminal passes as if there had been a " lapse ", and in other cases it has been said that the name of the wrongdoer must be treated as " struck out ". There might be cases in which the consequence of such " striking out " would be very uncertain, as, for instance, where the criminal had been entitled under his victim's will to a life interest with remainder to his own issue, so that the question might at once arise whether subsequently born issue of the struck-out wrongdoer would be excluded or not; and, indeed, this difficulty might arise on any possible view of the matter. It is, I think, unfortunate that in none of the cases to which I have been referred was the Crown represented to present the case which has been put forward here by the defendant, who is the Treasury Solicitor sued on behalf of the Crown. His case amounts to this, that the rule, properly understood, does no more than exclude the culprit and, while it may accelerate subsequently existing interests, it cannot create any new interests, with the consequence that the forfeited interest is one to which nobody is entitled and therefore goes to the Crown as bona vacantia.

It has not been argued, but I think that it might be a tenable view of the matter, that the application of the rule merely involved the transfer to the Crown of Mrs. Stone's interest under Mrs. Callaway's will, and that such transfer took precedence of and altogether excluded any intestacy or any rights arising under an intestacy. Why should Mrs. Stone's crime endow the plaintiff even to the extent of half of Mrs. Callaway's estate ? Seeing that her crime was against the Queen's peace, why should not the Crown, rather than the plaintiff, get the benefit from it ? I am bound to say that there seems to me to be great force in such an argument, as I will state presently; but, however logical it may be, I can find no authority in English law which justifies me in giving effect to it in such a case as the present. The point did arise in *Re Sigsworth, Bedford* v. *Bedford* (3) ([1935] Ch. 89), where the facts were not dissimilar to those in the present case, and CLAUSON, J., after deciding that the rule precluded a sane murderer from taking any benefit under his victim's intestacy, stated that the further question might arise whether the effect of the decision was that the guilty son should be treated as struck out of the Administration of Estates Act, 1925, with the result of letting in the persons entitled under that Act, or whether the estate or the interest therein passed as bona vacantia to the Crown. He thought that, in the absence of the Attorney-General, the question could not be decided, but he ordered that the plaintiff might add the Attorney-General as a defendant for the purpose of enabling him to claim the estate on behalf of the Crown. It appears that advantage was not taken of this permission, and the point now falls to me to decide.

The plaintiff and Mrs. Stone being the persons entitled equally under Mrs. Callaway's intestacy, and Mrs. Stone being disentitled by the rule, I have, I suppose, to choose between two views, which are, first, that the plaintiff is alone qualified to take under the intestacy and, accordingly, is entitled to the whole estate, and, second, that Mrs. Stone's half is forfeited and goes to the Crown.

In the present state of the authorities, which is far from satisfactory, I feel bound to adopt the former view. I do not consider the metaphorical expression " struck out " as being particularly happy or helpful, but it is difficult to suggest a more appropriate expression, although in a simple case such as the present it would be sufficient to say that the plaintiff must be treated as being the only qualified member of the class of Mrs. Callaway's issue, Mrs. Stone being wholly disqualified and therefore not to be reckoned or counted as a member of the class at all.

I have looked at one or two of the American cases, such as *Riggs* v. *Palmer* (4) ((1889), 12 American St. Rep. 819), and *Ellison* v. *Westcott* (5) ((1896), New York Rep. 149), but I do not think that there is any clear guidance to be got from any of them. Other cases may be referred to, such as *Re Sangal* (6) ([1921] V.L.R. 355), and, of course, *In the Estate of Crippen* (7) ([1911] P. 108). There is also *Re Merrett's Settlement Trusts* (8) (" The Times " Nov. 3, 1955). I get no real help either from *Beresford* v. *Royal Insurance Co., Ltd.* (9) ([1938] 2 All E.R. 602), or *In the Estate of Hall, Hall* v. *Knight & Baxter* (10) ([1914] P. 1).

As this point may hereafter be raised in a higher court, I venture with diffidence to say how, in the absence of authority, I should myself have desired to deal with it. First, as Mrs. Stone was not entitled to take the whole of Mrs. Callaway's estate according to the intention of Mrs. Callaway as expressed in her will, I would have treated that estate as wholly undisposed of and passing to the Crown as bona vacantia. Secondly, and in the alternative, on the footing that the Administration of Estates Act, 1925, comes into operation, I would have treated Mrs. Stone's moiety as undisposed of and passing to the Crown as bona vacantia, the plaintiff taking only the other moiety. That the plaintiff should take the whole seems to me both illogical and unmeritorious. For why, as I have already asked, should he be the person to profit by his sister's crime and the consequent frustration of his mother's testamentary intentions ?

In the result, however, I must declare, in the terms suggested in the summons, that on the true construction of the Administration of Estates Act, 1925, and in the events which have happened, the plaintiff is beneficially entitled to the estate of Mrs. Callaway to the exclusion of any beneficial interest of the Crown therein. The defendant's costs as between solicitor and client must be paid out of the estate.

Order accordingly.

Solicitors: *Rider, Heaton, Meredith & Mills*, agents for *Sibley, Clough & Gibb*, Bristol (for the plaintiff); *Treasury Solicitor*.

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

TAYLOR (formerly KRÄUPL) *v.* NATIONAL ASSISTANCE BOARD AND LAW SOCIETY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), April 19, 23, 24, 25, May 14, 1956.]

Legal Aid—Assessment of resources—Exclusion of subject-matter of the dispute—Date at which computation to be determined—Divorce—Application by wife for legal aid to defend petition, to cross-petition and to claim maintenance—Alimony pending suit ordered subsequently—Whether alimony taken into account in computing wife's disposable income—Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6 *c.* 51), *s.* 4 (3)—*Legal Aid* (*Assessment of Resources*) *Regulations,* 1950 (*S.I.* 1950 *No.* 1358), *reg.* 2.

The wife applied to the local committee for a civil aid certificate to defend proceedings for divorce, to cross-petition and to claim maintenance. She had no capital assets and her only income was a weekly allowance received from her husband. After the date of her application for legal aid, but before her disposable income had been computed by the National Assistance Board, she obtained an order for alimony pending suit. The wife was then offered a civil aid certificate in which her disposable income and maximum contribution had been assessed by the board after taking into account the amount of alimony which she would receive for the twelve months ensuing after the date of her application for legal aid. The wife now applied under R.S.C., Ord. 54A, r. 1A, for a declaration that, by virtue of the Legal Aid (Assessment of Resources) Regulations, 1950, reg. 2*, the amount of alimony should have been excluded by the board when computing the rate of her income. The board took the preliminary objection that their decision was, by virtue of reg. 9 (2), final and, although it could be challenged if contrary to statute or the regulations, could be challenged only by way of certiorari and not by applying by originating summons for a declaration.

Held: the court had power on the present application by originating summons to make the declaration sought (observations of DENNING, L.J., in *Barnard* v. *National Dock Labour Board* ([1953] 1 All E.R. at p. 1119) applied), and would, in the circumstances, do so since the date at which the wife's disposable income was to be computed was the date of her application for legal aid and at that date her claim for alimony was a subject-matter in dispute which should accordingly have been excluded by virtue of reg. 2 of the Legal Aid (Assessment of Resources) Regulations, 1950.

[For the Legal Aid and Advice Act, 1949, s. 3 (4), s. 4 (3), see 18 HALSBURY'S STATUTES (2nd Edn.) 537, 538.

For the Legal Aid (Assessment of Resources) Regulations, 1950, reg. 1 (2), reg. 2, reg. 4, see 5 HALSBURY'S STATUTORY INSTRUMENTS 194, 195.

For the Legal Aid (General) Regulations, 1950, as amended by S.I. 1954 No. 166 and S.I. 1955 No. 1829, see 5 HALSBURY'S STATUTORY INSTRUMENTS 203, 208, 216 and SUPPLEMENT.]

Cases referred to:

(1) *Re Carnarvon Harbour Acts, 1793 to 1903, Thomas* v. *A.-G.*, [1936] 2 All E.R. 1325; [1937] Ch. 72; 106 L.J.Ch. 11; 155 L.T. 312; Digest Supp.

(2) *Barnard* v. *National Dock Labour Board*, [1953] 1 All E.R. 1113; [1953] 2 Q.B. 18; 3rd Digest Supp.

(3) *Bagettes, Ltd.* v. *G.P. Estates Co., Ltd.*, [1956] 1 All E.R. 729.

(4) *Thorogood* v. *Thorogood* (Oct. 19, 1955), The Times.

(5) *Walls (J.), Ltd.* v. *Legge*, [1923] 2 K.B. 240; 92 L.J.K.B. 717; 129 L.T. 129; 27 Digest (Repl.) 255, *2052*.

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* The terms of the regulation are printed at p. 463, letter D, post.

(6) *Paquine* v. *Snary*, [1909] 1 K.B. 688; 78 L.J.K.B. 361; 100 L.T. 220; 27 Digest (Repl.) 255, *2051*.
(7) *Re Robinson*, (1884), 27 Ch.D. 160; 53 L.J.Ch. 986; 51 L.T. 737; 33 Digest 195, *969*.
(8) *Re Landau, Ex p. Trustee*, [1934] Ch. 549; 103 L.J.Ch. 294; 151 L.T. 190; Digest Supp.
(9) *Hollinshead* v. *Hazleton*, [1916] 1 A.C. 428; 85 L.J.P.C. 60; 114 L.T. 292; 5 Digest 928, *7599*.
(10) *Hood Barrs* v. *Heriot*, [1896] A.C. 174.
(11) *Re Tennant's Application*, [1956] 1 All E.R. 425.

Summons.

The wife, who had applied for a civil aid certificate in connection with divorce proceedings instituted against her by her husband, applied by originating summons under R.S.C., Ord. 54A, r. 1A, for the determination of the question whether on the proper construction of the Legal Aid and Advice Act, 1949, s. 4 and regulations thereunder, the amount of alimony pending suit should be taken into account in assessing her disposable income, and for a declaration that it should not have been so taken into account. The facts appear in the judgment.

J. E. S. Simon, Q.C., and *R. F. G. Ormrod* for the wife.
Rodger Winn for the National Assistance Board.
John Latey and *B. H. Anns* for the Law Society.

Cur. adv. vult.

May 14. **LORD MERRIMAN, P.**, read the following judgment: This is an application made by originating summons under R.S.C., Ord. 54A, r. 1A, by Millicent Alexander Taylor (married woman), as plaintiff, against the National Assistance Board as defendants, for the determination of the question whether, on the proper construction of the Legal Aid and Advice Act, 1949, s. 4, and the regulations made thereunder, namely, the Legal Aid (Assessment of Resources) Regulations, 1950, as amended, the sum of £450 per annum less tax payable monthly to the plaintiff pursuant to an interim order for alimony pending suit made by Mr. Registrar FORBES on June 27, 1955, is to be taken into account in assessing the disposable income of the plaintiff under the Act; and for a declaration that in an application by the plaintiff pursuant to the Legal Aid and Advice Act, 1949, for a civil aid certificate to enable her to defend and cross-petition in a suit for divorce any sum payable to her under an order for alimony pending suit in such suit is not to be taken into account in assessing her disposable income for the purposes of the said Act. A further application for a declaration that the determination of the board, whereby they determined the disposable income of the plaintiff at £370 was ultra vires, was abandoned. The Law Society, being the body charged with the administration of the Act, were properly served with notice of the application, and have been separately represented at the hearing. As is apparent from the form of the question for determination, the plaintiff (hereinafter referred to as the wife) is the respondent to a petition for divorce, presented by her husband, Frederick Kraupel Taylor, on Mar. 11, 1955. On May 16, 1955, an emergency certificate, under reg. 10 of the Legal Aid (General) Regulations, 1950, as amended*, was issued to the wife to defend her husband's petition, and to present a cross-petition. This certificate was expressed, as prescribed by reg. 10 (9), to remain in force for a period of six weeks from its date, or such other period, not exceeding three months, as the local committee might allow, unless previously revoked or replaced by a civil aid certificate. The same clause provides that unless within that period a certificate is issued in respect of the same proceedings, the emergency certificate is to be deemed to have been revoked. The emergency certificate was filed on May 19, and on the same day her solicitors entered a general appearance on her behalf, and gave notice of application for alimony pending suit.

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* See S.I. 1955 No. 1829: Supplement to 5 HALSBURY'S STATUTORY INSTRUMENTS 210.

Applications for civil aid certificates are governed by reg. 3 of the Legal Aid (General) Regulations, 1950, which provides:

> "(2) Every application shall be made in writing, on a form approved by the Law Society . . . and shall be lodged with the secretary of the local committee. (3) Every application shall contain such information and shall be accompanied by such documents as may be requisite to enable—(a) a local committee to determine—(i) the nature of the proceedings in relation to which legal aid is sought and the circumstances in which legal aid is required; and (ii) the question whether it is reasonable that a certificate should be granted; and [to enable] (b) the board to determine the disposable income and disposable capital of the applicant, for which purpose the applicant shall undertake to furnish the board with such further information as they may require in the circumstances of the case."

Accordingly, on June 14, 1955, the wife applied for a civil aid certificate on the prescribed form. In para. 8 of part 1 she stated that it was required (a) to defend the proceedings, (b) to resist the claim made in the petition for custody, (c) to cross-petition for divorce, (d) to claim maintenance from her husband for herself and the child of the marriage, and (e) to claim the custody of the child. Incidentally, it is within my official knowledge that, for the purpose of legal aid taxation, in the principal divorce registry, the invariable practice, whether ancillary reliefs are specifically mentioned or not, is to treat a wife's civil aid certificate to conduct a divorce suit as covering the final ascertainment of, and service of the order for, maintenance, even though the proceedings in connection with maintenance may continue after the decree in the suit has been made absolute. This practice, which I understand resulted from discussions with the Law Society at the outset, covers all proceedings for alimony pending suit. On the other hand, subsequent applications to vary or discharge an order for maintenance are held to require a fresh civil aid certificate. Thus, the fact that the claim for maintenance is mentioned expressly in the wife's application for a certificate merely emphasises the point that it will be a subject of the dispute. In part 4 of the prescribed form the wife gave certain particulars of her husband's means. But by reg. 4 (1) and (2) (i) and (ii) of the Legal Aid (Assessment of Resources) Regulations, 1950, her husband's resources are not to be treated in computing a wife's rate of income as her resources when

> "the proceedings in respect of which the application for a certificate is made are a matrimonial cause."

The wife further stated that she had no present annual income, either from employment or from any other source, except an allowance of £4 a week which she was receiving from her husband, and 8s. weekly family allowance. Finally, in answer to the question about savings, capital or house property, she said that she had only a Post Office savings account, with a credit of approximately 19s. Thus, in part 1, para. 8 of her application, the wife gave the requisite information to enable the local committee to determine the nature of the proceedings in relation to which legal aid was sought: namely, a matrimonial cause, in which her application for alimony pending suit had already become a subject-matter of the dispute. Then in part 4 of the form the wife gave the information about her resources, requisite to enable the board to determine her disposable income. The fact that, in answer to the question in para. 9: "Do you expect your income to remain about the same during the next twelve months; if not, what difference do you expect?" she answered that she hoped her solicitors would obtain reasonable alimony, is, in my opinion, irrelevant. If on a true construction of the Act and regulations, alimony pending suit is not liable to be included in her disposable income, the expression of her hope that an order for alimony would be obtained manifestly cannot make it so. On June 24, 1955, the emergency certificate was extended for a further period of six weeks. On June 27, 1955, Mr. Registrar Forbes made an interim order for alimony pending suit, for the amount already mentioned in the originating summons. As appears from the correspondence the previous allowance of £4 a week, mentioned in her application, ceased on July 1, 1955, and it has been common ground throughout the argument that the amount of the order represents the sole income of the wife at the material time.

On July 18, 1955, the wife received an offer of a civil aid certificate, on the basis that her disposable income had been assessed at £410 per annum, and her maximum contribution at £127, payable by an initial contribution of £10 11s. 8d., and eleven monthly instalments of the same amount. On Aug. 4 her solicitors wrote, asking to be informed of the basis on which the assessment of disposable income had been made. They said that the only explanation which occurred to them was that the assessment had been based on the order for alimony pending suit, and that if this was so, they would be grateful if the fact could be confirmed, because they would then propose to make certain representations to the National Assistance Board. They pointed out that the wife could not possibly afford to pay the monthly instalments at the prescribed rate, and requested that the matter should be treated as one of importance and urgency. In another letter of the same date, her solicitors, in support of the contention that the wife could not pay the sum of £10 11s. 8d. on the date of acceptance of the civil aid certificate, or the monthly instalments at that rate thereafter, referred to the cessation of the weekly allowance on July 1, and stated that it would be some months before the wife could hope to receive her tax rebate, and that the first payment under the order for alimony pending suit was not due until Aug. 12.

The point concerning the due date for the first payment under the order is that by the Legal Aid (Assessment of Resources) Regulations, 1950, reg. 1 (2) " the period of computation " is defined as being

> " the period of twelve months next ensuing from the date of the application for a certificate or such other period of twelve months as in the particular circumstances of any case the board may consider to be appropriate."

No other period has been selected: on the contrary, the solicitors' letter evoked a reply from the board that a revised determination in the wife's legal aid application had been made, because the original assessment was based on the assumption that she would receive a full year's allowance from her husband during the period of computation, with which the calculation of her assessment was concerned; but that

> " as her income under the court order does not start until Aug. 12, this was incorrect, and the assessment has been amended accordingly."

From the board's letter it is manifest that the computation of the wife's disposable income has been made solely on the basis of the amount to be received by her as alimony pending suit under the order of the court, within the twelve months next ensuing from the date of her application for a civil aid certificate. Indeed, it has been admitted throughout that this is the fact, and, as has already been stated, that the money so payable is her sole source of income. On Aug. 19 a fresh offer of a civil aid certificate on the basis of a maximum contribution of £107 was made.

The sequence of dates already mentioned might have raised an awkward question in connection with the revocation of the emergency certificate, and the decision not to issue a civil aid certificate in respect of the proceedings to which the emergency certificate related, notice of which was given on Aug. 16, 1955. There was the risk that, under the Legal Aid (General) Regulations, 1950, reg. 12 (1), the wife might be deemed never to have been an assisted person in the proceedings to which the emergency certificate related, which, of course, included the order of June 27, 1955, for alimony; and because of the hiatus between the revocation of the emergency certificate on Aug. 16, 1955, and the fresh offer of a civil aid certificate on Aug. 19, based on the computation of £107, it might have been impossible to relate back any certificate granted thereafter to the date of the issue of the emergency certificate, and so to pick up the wife's application of June 14, 1955. It is true that counsel for the National Assistance Board made it clear that he did not wish to take advantage of any technical slip, and was using the dates in this context as an illustration of his proposition that, in a given case, a particular subject-matter might cease to be the subject-matter of dispute, notwithstanding that the main dispute, to which the dispute in question was subsidiary or ancillary, still continued. It would indeed have been unfortunate if the court had been obliged to decide this question on the basis that the current offer of a civil aid certificate on the revised computation of disposable income could not in any case relate back to cover the order for the alimony pending suit, although the amount ordered was in fact taken into account as the basis of the computation. Happily, however, it is unnecessary to allude to the matter further. At the conclusion of the argument counsel for the Law Society, on the instructions, I understand, both of the board and of the Law Society, stated that the application for a civil aid certificate, dated June 14, 1955, is, for the purposes of the present case, to be deemed to have been continuously effective up to date. Counsel for the wife expressed himself fully satisfied by this clarification of the issue. In my opinion this was a very proper concession, and is in accordance with the reality of the matter, leaving aside all purely technical considerations.

At the outset counsel for the board took the preliminary point that the Legal Aid (Assessment of Resources) Regulations, 1950, provide [by reg. 9 (2)] that the board's computation of disposable income of an applicant is to be final, and although he did not dispute that the finality of the computation can be challenged if it is shown to be contrary to the statute and the regulations made thereunder, he submitted that the challenge should be made by the prerogative order of certiorari, and not by an originating summons under R.S.C., Ord. 54A. He relied on the decision of FARWELL, J., in *Re Carnarvon Harbour Acts, 1793 to 1903, Thomas* v. *A.-G.* (1) ([1936] 2 All E.R. 1325). In that case, however, no particular exercise of any power under the Acts was in question. FARWELL, J., regarded it as a case of the trustees of a public undertaking faced with a question of construction of their own Act, or their own Act in combination with other Acts, coming to the court, making the Attorney-General a party, and demanding a decision on a question of doubt which had not actually arisen. FARWELL, J. (ibid., at p. 1332), pointed out that it is in each case a question of discretion whether the court ought to make a declaratory order, and thought that in the case described the court ought not to exercise its discretion to make such an order.

It is to be observed that by the express terms of R.S.C., Ord. 54A, r. 4, the court or judge is not bound to determine any such question of construction if in its or his opinion the question ought not to be determined on an originating summons. The present case, however, is plainly not a case in which " no particular exercise of any power " is being called in question, or in which the question of doubt has not actually arisen. If the applicant be right in her contention, she has been adversely affected by the wrongful imposition on the offer of a civil aid certificate of the obligation to make a monetary contribution, computed in a manner contrary to the true construction of the relevant statute and regulations. Moreover, in *Barnard* v. *National Dock Labour Board* (2) ([1953] 1 All E.R. 1113), DENNING, L.J., said (at p. 1119):

> " . . . I am sure in the vast majority of cases the courts will not seek to interfere with the decisions of statutory tribunals—but I do not doubt that there is power to do so, not only by certiorari, but also by way of

> declaration. I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose on itself, and the court should not, I think, tie its hands in this matter of statutory tribunals. It is axiomatic that when a statutory tribunal sits to administer justice, it must act in accordance with the law. Parliament clearly so intended. If the tribunal does not observe the law, what is to be done? The remedy by certiorari is hedged round by limitations and may not be available. Why, then, should not the court intervene by declaration and injunction? If it cannot so intervene, it would mean that the tribunal could disregard the law."

Though it would be wrong to suggest that the point was abandoned, I did not receive the impression that it was pressed with much fervour or confidence. Indeed, counsel for the board joined the other counsel in the case in expressing the hope that I would determine the question. This is a consideration to which, on the authority of LORD EVERSHED, M.R., in *Bagettes, Ltd.* v. *G.P. Estates Co., Ltd.* (3) ([1956] 1 All E.R. 729 at p. 730), I am entitled to pay attention. For these reasons I overrule the objection.

Before proceeding further, I must mention one other matter. It appears that the only authority dealing with the construction of the words "subject-matter of the dispute" is *Thorogood* v. *Thorogood* (4), a case in a Divisional Court of this Division (consisting of COLLINGWOOD, J., and myself), heard on Oct. 19, 1955. That was an appeal by a husband from the decision of the justices of the North Aylesford Petty Sessional Division of Kent, sitting at Chatham, on his complaint to reduce the amount of an order in favour of his wife from the maximum amount of £5 a week, with the addition of the maximum sum of 30s. in respect of a child, of whom she had been given the custody. The order had in 1954 been increased to those figures from the original amounts of £2 and 10s. respectively (which were the maximum amounts prevailing at the time when the order was first made in 1943). The ground of the complaint was that since the 1954 order the husband's means had decreased. The justices had decided that there was no sufficient change to justify a revision of the order. The wife had been granted a civil aid certificate to resist the appeal, and her disposable income had been computed at £83. It was quite plain, from the figures under discussion, that the amount computed as the disposable income of the wife could not have been arrived at without taking into account the amount of the order, and I am reported as having said:

> "I am sure, and I have verified my references, that legal aid committees are doing that which the Act of Parliament expressly forbids them to do, namely taking into account in assessing the income the actual subject of the litigation, namely the amount of the order; and that is utterly wrong."

If those observations were ill-founded and govern the present case, I ought not to deal with the present application, and I made it clear that I should decline to do so in those circumstances. However, I was assured categorically, by counsel both for the board and the Law Society, that my observations were perfectly correct, in connection with that particular case. Seeing that the sole question was whether the amount of the order should be reduced, it is difficult to see how that amount could well be anything else than the subject-matter of the dispute. It was conceded by both counsel that this was manifestly so, and that one of the issues in the present application was to establish a distinction between the two cases.

In one branch of his argument counsel for the wife laid great stress on the nature of alimony, and the principle that it is incapable of assignment, which is illustrated, for example, by the observations of SCRUTTON, L.J., in *J. Walls, Ltd.* v. *Legge* (5) ([1923] 2 K.B. 240), where he said (at p. 244):

> "Strictly speaking the whole of this £836 is alimony . . . As a result all attempts to attach alimony have invariably failed."

See also YOUNGER, L.J. (ibid., at p. 246), and the very strong observations of VAUGHAN WILLIAMS, L.J., in *Paquine* v. *Snary* (6) ([1909] 1 K.B. 688), in which it was held that the court has no jurisdiction, on the application of a judgment creditor of a married woman who has obtained a separation order from her husband under the Summary Jurisdiction (Married Women) Act, 1895, to appoint a receiver by way of equitable execution of a weekly sum ordered by the court of summary jurisdiction to be paid by the husband to his wife for her maintenance. At the beginning of his judgment VAUGHAN WILLIAMS, L.J., said (ibid., at p. 690):

> " One feature about the case seems to me to be conclusive, which is that this weekly sum, which was ordered by the magistrate under s. 5 of the Act of 1895 to be paid to the defendant by her husband, is not assignable by the defendant and is in law inalienable. It is plain that equitable execution cannot properly be granted in order to enable a judgment creditor to seize money so paid, when the payments are admitted to be inalienable."

He added later (ibid., at p. 691) that

> " . . . it obviously could not have been the intention of the legislature that a wife, though continuing to be supported by her husband, should be placed in such a position that the money intended by the statute for her support should be taken by her judgment creditors and applied to payment of her debts, which clearly may not be in any sense for her support."

See also *Re Robinson* (7) ((1884), 27 Ch.D. 160), per COTTON, L.J., at p. 164.

On the other hand, counsel for the board relied on the decision of the Court of Appeal in *Re Landau, Ex p. Trustee* (8) ([1934] Ch. 549), that maintenance ordered by the Divorce Court to be paid to a bankrupt wife during the joint lives of herself and her husband was " income " within the meaning of s. 51 (2) of the Bankruptcy Act, 1914. See particularly the judgment of LORD HANWORTH, M.R. ([1934] Ch. at pp. 555, 556), where he relied on the observations of LORD SUMNER in *Hollinshead* v. *Hazleton* (9) ([1916] 1 A.C. 428 at p. 463), in relation to payments made for the purpose of enabling a certain office of state to be maintained, or for retaining the future services of officers, which have the same characteristic of inalienability at common law. Counsel for the board relied also on the observations of LORD HERSCHELL in *Hood Barrs* v. *Heriot* (10) ([1896] A.C. 174 at pp. 178, 179), on the kindred subject of property to which a married woman was entitled for her separate use without power of anticipation. LORD HERSCHELL drew a clear distinction between being prevented by the restraint from having the dominion over the money until it becomes due, and her disposing of it as she pleases after it has become due and payable. Correspondingly, it is suggested that in the present case there is nothing to prevent the wife spending the amount of the sums due monthly under the order as she chooses, and she is not under any obligation to use them exclusively for her support. If she chooses, so it is argued, to spend the money when it becomes due on a visit to the theatre or towards the cost of her litigation, that is her affair, and the mere accident that because in this particular case these payments represent her sole source of income she is in fact compelled to pay her contributions out of the alimony, does not affect the principle, and does not constitute a charge on or alienation of the amount of alimony due and payable under the order. See also *Re Tennant's Application* (11) ([1956] 1 All E.R. 425). I will revert to this point later.

Before referring to the rival contentions, it will be useful to consider the general scheme of the Act and regulations. As the relevant words of the long title to the Legal Aid and Advice Act, 1949, show, it is

> " An Act to make legal aid . . . in England and Wales . . . more readily available for persons of small or moderate means, to enable the cost of

> legal aid . . . for such persons to be defrayed wholly or partly out of moneys provided by Parliament, and for purposes connected therewith."

Effect is given to the word "partly" by provisions designed to ensure that assisted persons pay such contribution towards the legal aid as their means allow. Provision for contribution by the assisted person is made at two separate and distinct stages: namely, in the first instance by contributions made out of his disposable income, or disposable capital, as the case may be—(no question of disposable capital arises in the present case and that aspect of the matter can therefore be ignored); and, secondly, by imposing a charge by virtue of s. 3 (4) of the Act on property recovered or preserved in the proceedings in question, in respect of any sums remaining unpaid on account of a person's contribution to the legal aid fund, and of the amount by which the total contribution is less than the net liability of the fund on his account—which, in the argument, was conveniently described as the "short-fall" of contributions.

First, as regards contributions out of disposable income. It is the duty of the board to compute the disposable income for the relevant twelve months with certain prescribed deductions and allowances, more particularly described in Part 1 of Sch. 1 to the Legal Aid (Assessment of Resources) Regulations, 1950, and to fix the maximum contribution. It then becomes the duty of the local committee, acting on behalf of the Law Society, to whom is entrusted the general administration of the scheme, to fix the actual amount of the applicant's contribution, and the instalments, if any, by which it is to be paid. In certain circumstances, of which, assuming the wife's disposable income to have been computed on the right principle, this case would be an example, the local committee have no option but to fix the contribution at the maximum determined by the board. Moreover, the applicant is obliged to reveal any increase in his resources above a specified amount occurring during the period of computation, and provision is made for a fresh computation accordingly (see Legal Aid (General) Regulations, 1950, reg. 8 (1) (d)* and (2) to (5)*).

Section 4 (3) of the Act provides that the regulations shall include provision for securing that the resources of a person seeking or receiving legal aid shall be treated as not including the subject-matter of the dispute. It will be necessary to consider more particularly the regulation designed to secure that end, and the interpretation of the words "the subject-matter of the dispute" in relation to the circumstances of this case.

The contributions to be made out of disposable income are not the end of the applicant's liability to the legal aid fund, for, as has already been mentioned, property recovered or preserved is charged under s. 3 (4) of the Act with any short-fall of contributions. This charge is made effective by providing that the solicitor alone can given an effective discharge for any payment in respect of that property, and imposing on the solicitor the obligation to pay the money to the Law Society who, putting it shortly, will reimburse the legal aid fund in respect of the short-fall, and will pay any balance to the assisted person. In the nature of things, speaking generally, any property preserved or recovered will have been a subject-matter of the dispute, although, of course, it does not necessarily follow that the subject-matter of every dispute can be valued in terms of property, whether in the shape of money or otherwise. For example, in a divorce suit the overriding subject-matter of dispute is whether the matrimonial offence alleged is proved, and whether a decree of divorce shall follow. Manifestly, disputes of this kind are not capable of evaluation in terms of money, either at the initial stage, when disposable income falls to be computed, or at the conclusion of the suit for the purpose of chargeability. On the other hand, within the ambit of the main issue, subsidiary disputes in connection with ancillary relief may arise which can be valued in terms of money. For example, maintenance for the wife at any stage, from alimony pending suit to what are described in the Matrimonial Causes Rules, 1950*, as "a secured provision" or "variation of marriage settlements" may be the subject-matter of a dispute, albeit a dispute which is subsidiary to the main dispute, and which, unlike other ancillary disputes, such as those relating to the custody of, and access to, children, can have a money value. Here I would observe that the board have very wide powers of computing the disposable income of an applicant. See, for example, the Legal Aid (Assessment of Resources) Regulations, 1950, reg. 9 (1) and Sch. 1, Part 1, paras. 5, 6, 7 and 9. These powers, in my opinion, would be wide enough to enable the board to make their own computation of the amount of alimony pending suit likely to be received within the year, assuming, of course, that in any given case alimony is liable to inclusion in disposable income.

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* As amended by S.I. 1954 No. 166: see Supplement to 5 HALSBURY'S STATUTORY INSTRUMENTS 209.

The regulation designed to ensure compliance with s. 4 (3) of the Act is the Legal Aid (Assessment of Resources) Regulations, 1950, reg. 2, which reads as follows:

> "In computing the rate of income or the amount of capital of the person concerned there shall be excluded the value of the subject-matter of the dispute in respect of which application has been made for a certificate."

All counsel are agreed that it is implicit in this regulation that the subject-matter of the dispute must be one that can be valued in terms of money. But the question whether a particular resource of an applicant for a certificate is to be included in, or excluded from, the computation of his disposable income for the relevant period because it is, or is not, a "subject-matter of the dispute" depends on determining the point of time to which those words relate. Counsel for the wife contends that, on the true construction of the regulations, the decisive moment is that at which the application for a civil aid certificate is made; namely, in the present case, June 14, 1955; whereas counsel for the board contends that it is the moment at which the board makes the computation of the disposable income; that is to say, either July 18, 1955, or Aug. 19, 1955. With the reservation that there might be something in the nature of an antecedent agreement or a former order, unconnected with the current dispute, which might show that no dispute could be in existence at the material time, counsel for the board agreed with counsel for the wife that an application for alimony pending suit does raise a subject-matter of dispute. Counsel for the Law Society, however, submitted that the particular resource must exist in actual monetary form at the relevant date. Accordingly, he submitted that at the time of an application for alimony pending suit there is nothing more than the right to claim alimony, which may or may not succeed; and as he, like counsel for the board, contends that at the moment of the making of an order the dispute ceases, the effect of counsel for the Law Society's contention is that an application for alimony pending suit can never be subject-matter of the dispute, because at the time of the application it is in posse, and does not exist in monetary form, while at the time of the order it is no longer in dispute. There is nothing in the regulation itself to the effect that the subject-matter of the dispute must exist in actual monetary form. The question, therefore, seems to be whether any such qualification must be implied. Counsel for the Law Society's argument would apply to all applications for maintenance and, indeed, taken literally, would seem to prevent any chose in action from ever being the subject-matter of a dispute.

I have no doubt that in this respect counsel both for the wife and the board are right, and that undetermined applications for maintenance, including alimony pending suit, can be the subject-matter of a dispute. Assuming this to be so, there remains the question, about which counsel for the board and the

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* See r. 44: 10 HALSBURY'S STATUTORY INSTRUMENTS 219.

Law Society are agreed, whether the determination of the value of the alimony by judicial decision makes it impossible to regard the amount ordered as being any longer the subject-matter of the dispute, or, more precisely, to describe it as being " the value of the subject-matter of the dispute." Accordingly, if the subject-matter of the dispute ceased to exist on the making of the order of June 27, 1955, it is immaterial whether the date of the computation is that of the original computation of July 18, 1955, or the revised computation of Aug. 19, 1955. Whereas, if counsel for the wife is right, and the date of the application is the decisive date, the wife's claim for alimony then became, and remains, the subject-matter of the dispute, in respect of which by her application for a certificate she sought legal aid, and of which the value was determined on the making of the order, and must, therefore, be excluded from the computation of disposable income.

Counsel for the board submitted that the Legal Aid (Assessment of Resources) Regulations, 1950, reg. 2, should read as follows:

> " The National Assistance Board are prohibited when computing (in this instance a fortnight after the date of the application) the wife's disposable income from including the value of any subject-matter of any existing or surviving dispute, in respect of which application has been made in the same proceedings for a certificate."

No doubt this is a possible construction, but it raises the question whether there is any justification for inserting the condition that the dispute in question must exist, or survive, at the moment of computation. Counsel for the wife argued that the words " in respect of which application has been made for a certificate " have more than the mere adjectival significance contended for by counsel for the board. He argued that the making of the application is the cardinal point in the scheme for legal aid, since, as has already been seen, it is at that point that the applicant defines " the nature of the proceedings " in relation to which legal aid is sought, for which, he submits, " the subject-matter of the dispute " is an apt synonym, and it is from that moment, save in exceptional circumstances, that the period of twelve months starts, within which the disposable income of the applicant is to be computed. Even if the necessity for a fresh computation arises, the period for which the computation is to be made remains fixed from the start, and so, counsel for the wife submits, should the determination of the subject-matter of the dispute. He argues that whereas it is clear that on that cardinal date there was a dispute of which the subject-matter was the wife's right to, and the quantification of, alimony pending suit, anything recovered in that dispute has the quality of property recovered, and cannot thereby acquire the quality of disposable income; and he argues that it is irrelevant that maintenance in any of the forms recoverable in a matrimonial cause is expressly exempted by the Legal Aid (General) Regulations, 1950, reg. 16 (8)*, from chargeability as property recovered.

The essential difference between disposable income or disposable capital on the one hand, and property recovered on the other, may be illustrated by the example of an application for a certificate to bring an ordinary civil action in which two claims for liquidated amounts are made. Both claims would be the subject-matter of the dispute, covered by the same civil aid certificate. If judgment under R.S.C., Ord. 14, were obtained for one head of claim, while the action continued as to the other, the former would be property recovered, and would be chargeable as such in respect of any " short-fall " of contributions, but, by contrast with some new resource acquired during the period of computation but unconnected with the dispute, could not, it was submitted, be included retroactively as a resource in the computation of disposable income, or capital, as the case might be. It is manifest that this distinction raises an important

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* As added by S.I. 1954 No. 166: see Supplement to 5 Halsbury's Statutory Instruments 217.

A question of principle, which does not depend on the peculiar exemption of
maintenance from chargeability as property recovered. For, if that which was
the subject-matter of the dispute at the date of the application for a certificate
is recovered and becomes chargeable as property recovered for the short-fall
between the contributions and the costs, and, because the dispute has been
determined, is also liable to be treated retroactively as disposable income, or
B disposable capital, and to be brought into the computation for contributions
as such, this in effect would mean making the same " resource " liable to inclusion
in each of the two distinct categories of an applicant's resources. I cannot
believe that a construction of the regulations which would produce that result
can be right. In my opinion it is contrary to the general principles of the legal
aid scheme that the fact that the dispute has ended in the recovery of the very
C thing which at the time of the application for a certificate was the subject-matter
of the dispute should subject the value recovered to such a double liability.
Yet this would be the result in the present case but for the special exemption
of any form of maintenance from chargeability as property recovered. When
an increase of resources is derived from the determination of the dispute, after
the date of the application for a certificate, the appropriate means of ensuring
D that it attracts an additional contribution to the legal aid fund is, in my opinion,
through the charge on property recovered, and the special exemption of this
particular property from chargeability is irrelevant.

It may be useful, perhaps, to set out what has happened in this case in terms
of the Legal Aid (General) Regulations, 1950, reg. 3 (3), the Legal Aid (Assessment
of Resources) Regulations, 1950, reg. 1 (2), and ibid., reg. 2 itself. On June 14,
E 1955, the wife, being the person whose disposable income is to be computed
for the twelve months next ensuing from that date, made an application for a
civil aid certificate. As prescribed by the Legal Aid (General) Regulations,
1950, reg. 3 (3), her application contained information requisite to enable the
local committee to determine the matters. The first of these was the nature of
the proceedings in relation to which legal aid was sought; namely, to enable
F her to defend the husband's petition, to cross-petition, and, inter alia, to claim
maintenance and alimony pending suit—in other words, " the various subject-matters
of the dispute ", and for my part I can think of no words more apt to
describe the matters in litigating which the wife sought to be assisted. The
second matter was the reasonableness of granting a certificate—which I take to
mean whether the information supplied disclosed at least a prima facie case.
G Under the Legal Aid (General) Regulations, 1950, reg. 3 (3) (b), her application
contained information requisite to enable the board to determine the
wife's disposable income for the period of twelve months from the date of the
application. On the information supplied, her disposable income could not very
well be computed at anything but " nil ", unless the board, under the wide
powers to which reference has already been made, chose to estimate the amount
H likely to be received within the year in respect of alimony pending suit, the
application for which was already pending. Assuming this course to be open
to them, and to have been taken, it seems to me that it would have been impossible
for the board to include, as disposable income, the figure so assessed,
since at that time it would clearly have been the subject-matter of the dispute.

In effect, therefore, the question is whether to speak of the value of the subject-
I matter of a dispute that has been determined is a contradiction in terms. In
my opinion there is no such contradiction. Whether one speaks of the cause
of action for assistance in litigating which the applicant seeks legal aid; or
" the subject-matter of the dispute in respect of which application has been
made for a certificate " (Legal Aid (Assessment of Resources) Regulations,
1950, reg. 2); or " the nature of the proceedings in relation to which legal
aid is sought " (Legal Aid (General) Regulations, 1950, reg. 3 (3) (a) (i)), the
ascertainment of the value of the subject of dispute makes no change in the

nature of the matter on which the value has been put. This remains constant throughout. In relation to the present case I think that the Legal Aid (Assessment of Resources) Regulations, 1950, reg. 2, should be read as follows:

> "Whenever the board compute the disposable income of the applicant for a civil aid certificate for the period of computation they are forbidden to include the value of that which is disclosed in the application for a certificate as the subject-matter of the dispute."

This version does secure that within the wording of s. 4 (3) of the Act the resources of a person seeking or receiving legal aid shall be treated as not including the subject-matter of the dispute. Moreover, the fact that, generally speaking, the beginning of the period of computation is fixed as being the date of the application, and that the question to be determined is the amount of the disposable income for the period of computation, and that from that computation is to be excluded the subject-matter of the dispute, supports the suggestion that the date of the application is also the date for determining what is the subject-matter of the dispute.

It is true that the original computation may be amended under the Legal Aid (General) Regulations, 1950, reg. 8*, but the computation still remains a computation for the same period of computation of twelve months, beginning with the date of the application. In my opinion the interval of time, over which the applicant has no control, between her application for a certificate and the computation by the board, whether the delay is avoidable, or even arbitrary, or is unavoidable, should not affect the question of the inclusion or exclusion of a particular resource; and it should be immaterial whether the computation is made by estimation within the wide powers of the board in that behalf, or is postponed until the value is judicially determined.

Reverting, in conclusion, to counsel for the wife's argument, based on the nature of alimony, it may very well be that the characteristic of inalienability which attaches to all forms of alimony may account for the peculiar exemption from chargeability contained in the Legal Aid (General) Regulations, 1950, reg. 16 (8). Although I appreciate that the individual circumstances of the wife may virtually compel her, under pain of the revocation of her certificate, to use the monthly payments of her alimony pending suit for the discharge of her obligation to make the contributions to which she has been assessed, because she has no other source of income out of which to make them, I am inclined to accept the contention that this circumstance cannot in law constitute a hypothecation or alienation of the amount of the alimony. But as the present case, in my opinion, falls to be decided on the point that the subject-matter of the dispute has been included in the computation of her disposable income, contrary to s. 4 (3) of the Act and Legal Aid (Assessment of Resources) Regulations, 1950, reg. 2, I prefer not to express a concluded opinion on the point, which in any case would merely be obiter dictum. For these reasons I pronounce in favour of the wife, and make a declaration in her favour in the form set out in the application, to the effect that she is entitled to have the amount of the alimony pending suit excluded in the computation of her disposable income for the purposes of her contribution to a civil aid certificate.

Declaration accordingly.

Solicitors: *Kenneth Brown, Baker, Baker* (for the wife); *J. P. Davies* (for the National Assistance Board); *T. G. Lund* (for the Law Society).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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* As amended by S.I. 1954 No. 166 and S.I. 1955 No. 1829: see Supplement to 5 HALSBURY'S STATUTORY INSTRUMENTS 208, 209.

QUINN *v.* HORSFALL & BICKHAM, LTD.

[COURT OF APPEAL (Singleton, Morris and Romer, L.JJ.), May 8, 9, 10, 1956.]

Factory—Dangerous machinery—Horizontal milling machine—Milling cutter used for automatic profiling—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 14 (1)—*Horizontal Milling Machines Regulations,* 1928 (*S.R. & O.* 1928 *No.* 548), *exemptions, para.* (vii), *proviso, reg.* 3 (1).

Safe System of Working—Extent of master's duty—Exemption from particular fencing provision of regulations—Whether common law duty to require workman to work cutters of horizontal milling machine with guard provided or provide alternative guard.

The plaintiff, who was a workman with thirty years' experience as a miller working on milling machines, was employed by the defendants in their factory. He was working at automatic profiling on a horizontal milling machine when, having as he thought pressed the switch to stop the machine and intending to adjust it, he reached down towards a clamp while looking round for another workman and brought his hand into contact with the cutter which was still revolving, and sustained injuries. The machine was provided with a guard in the form of a hood which would go over the cutter and the top of the machine and which would have made an accident of this character less likely to happen, but it was not a complete guard and the hood was not down when the machine was in use for this process. The defendants did not, until after the accident, provide an improved guard and had not given instructions to their employees to use the machines with the hoods down. In an action by the plaintiff for damages based, among other grounds, on alleged breach of statutory duty under the Factories Act, 1937, s. 14 (1)* to fence securely a dangerous part of machinery the defendants contended that they were under no legal obligation to fence the machine since any obligation under s. 14 was superseded by the particular duty imposed by reg. 3† of the Horizontal Milling Machines Regulations, 1928, and, the process of automatic profiling being within exemption (vii) from reg. 3†, no duty remained on the defendants to fence the milling cutter when the machine was used for that process. At the trial of the action the plaintiff's claim was dismissed but the judge also assessed damages and intimated that, if the plaintiff had succeeded in establishing a right to damages, the plaintiff would have been held guilty of contributory negligence and the damages recoverable would have been reduced by fifty per centum. On appeal,

Held: (i) the defendants were liable for breach of statutory duty under s. 14 (1) of the Factories Act, 1937, since on the true construction of the Horizontal Milling Machines Regulations, 1928, and particularly of the proviso to the exemptions therein contained, s. 14 (1) applied to a process such as automatic profiling, which was within the exemptions and thus was a process to which the particular duty to fence imposed by reg. 3 did not apply.

Dicta of SOMERVELL, L.J., in *Franklin* v. *Gramophone Co., Ltd.* ([1948] 1 All E.R. at p. 359) and *Benn* v. *Kamm & Co., Ltd.* ([1952] 1 All E.R. at p. 836) approved.

(ii) further, the defendants were in breach of their duty to the plaintiff at common law in that they had failed to give instructions that the machine was to be used with the hood down or, if that were impracticable, to take other steps to prevent their employees being exposed to unnecessary risk.

(iii) although the court would not have assessed the responsibility of the plaintiff on account of his contributory negligence at fifty per centum, yet there were not sufficient grounds for holding the assessment to be wrong and the court could not interfere with the apportionment made by the trial judge.

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* The terms of s. 14 (1) are printed at p. 471, letter G, post.

† The terms of reg. 3 and of exemption (vii) and of the proviso to the exemptions are printed at p. 470, letter G, to p. 471, letter A, post.

Decision of Glyn-Jones, J. ([1956] 1 All E.R. 777) reversed.

[As to a master's duty to provide a safe system of work, see 22 Halsbury's Laws (2nd Edn.) 187-190, paras. 313-317; and for cases on the subject, see 34 Digest 194-198, *1583-1623*.

For the Horizontal Milling Machines Regulations, 1928 and 1934, exemptions, reg. 3 (1), reg. 6, see 8 Halsbury's Statutory Instruments 140, 141.]

Cases referred to:

(1) *Benn* v. *Kamm & Co., Ltd.*, [1952] 1 All E.R. 833; [1952] 2 Q.B. 127; 3rd Digest Supp.

(2) *Franklin* v. *Gramophone Co., Ltd.*, [1948] 1 All E.R. 353; [1948] 1 K.B. 542; [1948] L.J.R. 870; 2nd Digest Supp.

(3) *Miller* v. *Boothman (William) & Sons, Ltd.*, [1944] 1 All E.R. 333; [1944] K.B. 337; 113 L.J.K.B. 206; 170 L.T. 187; 2nd Digest Supp.

Appeal.

The plaintiff appealed from an order of Glyn-Jones, J., at Manchester Assizes, dated Dec. 20, 1955, and reported [1956] 1 All E.R. 777, whereby the plaintiff's claim for damages for personal injuries based on the defendants' breach of the Horizontal Milling Machines Regulations, 1928 and 1934 and s. 14 (1) of the Factories Act, 1937, and negligence at common law was dismissed.

The facts appear in the judgment of Singleton, L.J.

John Thompson, Q.C., and *R. Lambert* for the plaintiff.

J. D. Cantley, Q.C., and *W. D. T. Hodgson* for the defendants.

SINGLETON, L.J.: This appeal arises out of an accident on a somewhat complicated machine. The defendants are engineers who have a large modern factory near Manchester where they employ a considerable number of men. In one part of their factory they have horizontal milling machines of a type covered by the Horizontal Milling Machines Regulations, 1928. The plaintiff is a very experienced man who has had some thirty years' experience in work of the kind which he was doing. He described himself as " a skilled miller ". I take it that that means he was a man skilled in the working of a milling machine. On May 23, 1952, he was working at a horizontal milling machine and was adjusting a clamping screw on the machine when in some way his left hand was caught by a revolving cutter of the machine and his little finger and a portion of his ring finger were crushed and injured so that there had to be an amputation of a part of each. Everyone knew about the injury, which was of a type which had to be reported to the factory inspector for record purposes. The plaintiff did not, however, commence the action until Sept. 1, 1954. The action which was based on allegations of negligence and breach of statutory duty, was heard at Manchester by Glyn-Jones, J., who gave judgment in favour of the defendants on Dec. 20, 1955. Glyn-Jones, J., said that if he had found the defendants were liable he would have assessed the damages payable to the plaintiff at £800, but he would have held that in that event the plaintiff was fifty per cent. responsible for the accident, so that he would not have obtained judgment for more than £400. The plaintiff now appeals.

At the time of the accident, the plaintiff was engaged on a process known as automatic profiling. He was working on flats which are pieces of cast iron, forty or fifty inches long. Milling has to be done at each end in turn. Opposite the machine, on which there is the fast revolving cutter, there is a turntable, and the flat is fixed on something above the table so that one end of it can be brought into position under or against the cutter to enable the necessary work to be done to that end. Thereafter, when one end has been repaired or adjusted, the turntable is unclamped and turned round so that the other end of the flat is brought into position against the revolving cutter just as the first had been. In a few minutes both ends of the flats are milled in the way which is necessary. The plaintiff was doing that kind of work immediately before his accident, when he found that something was not quite right. He explained in his evidence that he had to unscrew a screw underneath the table to turn it round. He was asked by counsel:

> " Q.—And what happened then? A.—I found I could not put the cutter back again. It should go through the channel, if the alignment was perfect, and it fouled the side. I released the clamps at the back, adjusted the blade, put the cutter through, tightened the clamps up again and set on and, as it came back again, I found it had fouled and I had not got it in perfect alignment, as I like it, for the next job coming on. Q.—In what way was it fouling? A.—It was catching on the side of the channel. I had had the trouble with three or four, and a chap had brought me a flat that he had made a mess of, to be vulgar. He asked me, Would I do it up for him—there is a way of doing it up, you see—and he brought it to me to do it. He brought it before the accident—a little while before that—and I thought, if I can get some going here, I can finish that off for him, because he might have been just finishing his set. I thought, I will have to go back on the old job afterwards, he will have to wait for that, so I shoved the cutter back. I lifted it up, as it was binding. I lifted it off, shoved it back, pressed the stopcock my way, went to the middle of the machine, and I was watching for him, looking up. I watched there maybe a quarter or half-a-minute—an appreciable period—and while I was watching him it was in my mind that I could be on with my job, and, of course, I was thinking the machine was not running, and it was, you see."

I should point out that when he said " pressed the stopcock ", that was the action necessary to stop the machine. If he pressed it fully it would, if it was in order, stop the machine. He cannot have pressed it fully. The witness was asked by the judge:

> " Q.—You found that the thing was not quite in the correct position? A.—Yes. Q.—Did not you adjust it? A.—Yes, I was going to adjust it. I had to take the load off the work first, and that is pushing it back to its starting position, by knocking the clutch out and then putting it back. Then, my Lord, I pressed the stop button for it to stop. I moved to the centre so that I could do both at the same time, to save time, and looking for the chap, to tell him he would have to wait for his repairs. Q.—You were going to loosen these two clamps, so as to adjust the position of the flat that fraction that was necessary to give the cutter a clean run through? A.—That is correct. (Counsel): Q.—Did you look to see if the cutter was moving? A.—No, I did not. Q.—Why not? A.—My mind was on to tell this chappie he would have to wait. Q.—Did you think the cutter was moving? A.—No, not after pressing, because it was automatic. Q.—You thought you had pressed the switch. A.—Yes, I thought I had pressed— Q.— — the off-switch? A.—Yes."

Then he described how his fingers were caught as he was reaching down towards the clamp in a way he did not quite know.

His case was that as he was doing something on this machine, thinking that he had stopped the machine, he moved his hand towards the clamp and his hand was caught on the moving cutter. His explanation of what he did was not supported nor was it contradicted by any other evidence, and he was accepted by the judge as a truthful witness. The learned judge found, as I have said, that in any event he was fifty per cent. to blame for the accident, and that is based on the plaintiff's account of what he did at the time of his accident.

There is one other matter in connection with the machine to which I must draw attention. There is shown on the left-hand top diagram, No. 2, a portion of a hood, coloured in green, which goes over the cutter and over the top of the machine. That was a guard provided by those who made and supplied the machine. It was not used at the time that work was being done on the day of the accident for some reason or other. It was said in the course of the evidence (and it was found by the judge) that if the guard had been used it was much less likely that an accident of this kind would have taken place. At the same time it was not a complete guard. It was not a compliance with the requirements of s. 14 of the Factories Act, 1937, if that section applies to the facts of this case. Still, there was a guard; a guard which, had it been thought necessary to use it, might have been used for this operation and a guard which, as far as I can see, might have been extended in order to have made it a better guard than it was. Counsel for the defendants told the court that one reason why it was not used was that if it was in position it was not very easy for the man operating the machine to see the cutter working; he would have had to stoop down and look underneath to see the cutter. Whether that was a good reason for not using any sort of guard for this work I leave it for someone else to say. It is a fact which ought not to be taken against the defendants, but since the accident happened they have provided some other form of guard with unbreakable glass in front of it so that the workmen can see the cutters and can have a guard to prevent injury such as occurred in this case.

The action was based on a breach of the Horizontal Milling Machines Regulations, 1928, or on a breach of s. 14 of the Factories Act, 1937, and on a breach of the duty which the defendants owed to their employees at common law. First I will deal with the regulations. The Horizontal Milling Machines Regulations, 1928, were made under the Factory and Workshop Act, 1901, s. 79 whereof provided that the Secretary of State, if satisfied that

> " any manufacture, machinery, plant, process or description of manual labour, used in factories or workshops, is dangerous or injurious to health or dangerous to life or limb, either generally or in the case of women, children or any other class of persons . . . may certify that manufacture, machinery, plant, process or description of manual labour to be dangerous; and thereupon the Secretary of State may, subject to the provisions of this Act, make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case."

Many regulations have been made under the provisions of s. 79, and they remain in force by virtue of the Factories Act, 1937, s. 159. The Factories Act, 1937, s. 60, gave a power to make regulations in somewhat wider terms. The regulations begin:

> " Duties. It shall be the duty of the occupier to observe Part 1 of these regulations. It shall be the duty of every person employed to observe Part 2 of these regulations."

The next part of the regulations is:

> " Exemptions. Nothing in reg. 3 shall apply to any milling cutter used on . . ."

eight different processes, which are numbered, of which (vii) is automatic profiling. The work on which the plaintiff was engaged at the time of his accident was automatic profiling. That part of the regulation ends in this way:

> " Provided that these exemptions shall not prejudice the application of s. 10 of the Factory and Workshop Act, 1901*, in regard to fencing of such machinery."

Part 1 of the regulations sets out the duties of occupiers. Our attention has only been directed to regs. 3 and 6. I read reg. 3:

> " (i) The cutter or cutters of every horizontal milling machine shall be fenced by a strong guard, properly adjusted to the work, which shall enclose the whole cutting surface except such part as is necessarily exposed for the milling operations. (ii) The guard shall either:—(a) be provided

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* Repealed; see now the Factories Act, 1937, s. 14 (1).

> with adequate side flanges; or (b) extend on each side of the cutter or cutters to the end of the arbor, or to the arbor support, or to a distance of not less than half the diameter of the cutter. Provided that para. (ii) of this regulation shall not apply to cutters used for face milling."

That is a provision made by the Secretary of State as to how the cutter or cutters of every horizontal milling machine should be fenced. Prima facie, if that covered the whole of the dangerous part of the machine, it would take that part of the machine out of s. 10 of the Factory and Workshop Act, 1901*.

That was held in *Benn* v. *Kamm & Co., Ltd.* (1) ([1952] 1 All E.R. 833), in which SOMERVELL, L.J., in dealing with this kind of question said (ibid., at p. 836):

> " PARKER, J., adopted the wider construction. The use must depend on the construction of the regulations and in that respect I have come to a different conclusion which I have stated."

DENNING, L.J., said (ibid., at p. 837):

> " It seems to me that when the regulations say that a particular dangerous part is to be guarded in a particular way, the occupier satisfies his statutory obligations in regard to that part by guarding it in that way, but he remains under his ordinary statutory obligations in regard to other dangerous parts."

ROMER, L.J., said (ibid.):

> " It is plain that a set of regulations may be so comprehensive as to prescribe safeguards for all known dangers, and, if so, they would amount to a complete code which, on the authorities to which my Lord has referred, would supersede s. 14 (1) [of the Factories Act, 1937] or any other relevant enactment . . ."

It was said that the regulation which I have read took the place of s. 10 of the Act of 1901 and now takes the place of s. 14 of the Factories Act, 1937, and that consequently the obligation under s. 14 of the Act does not apply to this machine although everyone agrees that at the place at which this accident happened there was a dangerous part of machinery. Section 14 (1) of the Factories Act, 1937, provides:

> " Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced."

The defendants claim that s. 10 had gone in regard to the cutters of the horizontal milling machine covered by the Regulations of 1928, and consequently, that s. 14 of the Act of 1937 has no application in this case.

I will assume for the moment that that is right. The defendants add that an exemption applies because the plaintiff was using a milling cutter of the kind mentioned in the regulations and was engaged on automatic profiling; therefore that which he was doing, being one of the kinds of work mentioned within the exemption on cutters there included, was exempted from reg. 3. The defendants' case before the judge was that for this work of automatic profiling, they need not have a guard of any kind whatever over the cutters either by reason of s. 14 of the Act of 1937 or under the regulations. They claimed that they were exempted for this purpose. The result of that, assuming it to be right, is that by the Horizontal Milling Machines Regulations, 1928, the Secretary of State took out of the operation of s. 10 of the Act of 1901 this part of machinery which everyone agrees is a dangerous part. It may be doubted whether he had power to do that under s. 79 of that Act, but I pass that by to consider how far the power of the Secretary of State* went under s. 60 of the Factories Act, 1937. There he was given a power to modify certain statutory provisions. That which the defendants submit that he did in this case was to say that something which was a dangerous part of machinery need not be fenced. If that be right, it was giving to the Secretary of State the power which had been exercised as a rule by Parliament in this kind of case; however, I am not saying it was beyond the powers of the Secretary of State under s. 60. It occurs to me that if the Secretary of State did that it would be a most odd thing for him to do without providing any other form of guard or fence. Where regulations are made to enable some process to be carried on which could not be carried on if the case had to be dealt with under s. 14 of the Act of 1937 in the normal case, the regulations usually have been made which have provided some other form of guard, as, indeed, was provided by reg. 3 of the Regulations of 1928 in this case. If some operations are exempted from reg. 3 can it possibly be that the contention of the defendants that there is no need for any guard whatever is right?

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* See footnote, p. 470, ante.

A similar question though not wholly in line, arose in *Franklin* v. *Gramophone Co., Ltd.* (2) ([1948] 1 All E.R. 353). SOMERVELL, L.J., said (ibid., at p. 359):

> " There remains the question whether these regulations do ' modify ' the obligations imposed by s. 47 in the manner suggested, or whether that section still applies to inhalation of dust within the words of s. 47, though the grinder from which the dust comes is one which, under the regulations, is expressly not required to have appliances fitted to it. This depends on the wording of the regulations. It would be possible so to word a regulation as to make it quite clear one way or the other. Counsel for the employers relied on the fact that in the Horizontal Milling Machines Regulations, 1928, the exemptions have a proviso which reads as follows: ' Provided that these exemptions shall not prejudice the application of s. 10 of the Factory and Workshop Act, 1901, in regard to fencing of such machinery '."

The reference by the lord justice to the argument of counsel for the employers is prefaced by the words

> " it would be possible so to word a regulation as to make it quite clear one way or the other."

Let me go back to the " Exemptions " in the regulations. Having said that nothing in reg. 3 shall apply to any milling cutter used in the processes there described it goes on:

> " Provided that these exemptions shall not prejudice the application of s. 10 of the Factory and Workshop Act, 1901, in regard to fencing of such machinery."

I regard that as precisely within what SOMERVELL, L.J., meant in the case which I have just cited.

It appears to me, apart from that, that if one looks at the scope of the regulations one finds that reg. 3 provides that the cutters should be guarded in a particular way. When that is read with the proviso a little earlier, one finds that, if certain processes are being carried through, reg. 3 shall not apply. There is, however, the proviso that these exemptions shall not prejudice the application of s. 10 of the Factory and Workshop Act, 1901, in regard to the fencing of such machinery, from which it follows that s. 14 of the Factories Act, 1937, applies to these processes on milling cutters if they are not covered by the regulation—in other words, if they are exempt from the provision of reg. 3. That is how I read it, and it appears to me that that is the only sensible way to read it when one remembers over the years the attempts made by the legislature to provide additional protection for workmen. The tendency has been, on the whole, to give additional safeguards against accidents to workmen in the last fifty years. To my mind, there is no question that the proviso in the regulation shows that the provision as to fencing contained in the Act survived, so that one has to look back at s. 14 of the Act of 1937, which applies to this case. It was said by counsel on behalf of the defendants that that would make it impossible to carry out some of the processes exempted in the regulation. I do not think that that arises. When the evidence is examined it appears that the expert witness called on behalf of the plaintiff said that guards could be provided for each of them. No evidence was called by the defendants; no witness to explain why they did not use the guard, and no expert witness to show (if it be material) that some of the processes could not be carried on. It would seem difficult to carry through some of the processes mentioned with a guard such as is required by reg. 14, but those things are not beyond the wit of man these days. On the other hand, when one comes to the process of internal milling, it may be that a guard would not be needed for that as it might not be a dangerous part of machinery. That may be the very reason for drawing attention by the proviso to the applicability of s. 10 of the Factory and Workshop Act, 1901, indicating that if fencing is necessary by reason of its being a dangerous part of the machinery fencing must be provided.

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* The functions of the Secretary of State under the Factories Act, 1937, are now vested in the Minister of Labour and National Service; see the Defence (Functions of Ministers) Regulations, 1941 (S.R. & O. 1941 No. 2057), reg. 2, and the Transfer of Functions (Factories, etc., Acts) Order, 1946 (S.R. & O. 1946 No. 376), art. 2.

Thus I take a different view from that formed by GLYN-JONES, J. I am satisfied, as he was, that this was a dangerous part of the machinery, but I take a different view as to the applicability of s. 14 of the Factories Act, 1937. I think that it would be wrong to say that because of the impact of the regulations on the Act of Parliament the defendants are now exempt from providing any fence or guard for what is, admittedly, a dangerous piece of machinery—a fast revolving cutter in this horizontal milling machine. Should my view be wrong, I am of opinion that the defendants would be responsible for damages for breach of the duty which they owed to their workmen under the common law. That is no more, and no less, than a duty to take reasonable care not to subject their employees to unnecessary risk. The defendants apparently took the view that they need not guard this dangerous part of the machinery at all. I have said that, in my opinion, this was wrong. In any event, the machine was provided with a guard of a kind which might have avoided this accident. The judge thought that it probably would have done so. However, it was not in place; the men were not instructed to use it, and the reason for that was, we are told, that the men would have to stoop down to look at the cutters. No thought had been given to providing any other form of guard. They did not even use, or tell the men to use, the one which they had and which was supplied with the machine. On that ground, the defendants are responsible for damages for negligence.

The remaining point is a question of contributory negligence. GLYN-JONES, J., said twice in the course of his judgment that the plaintiff's action was inadvertent. If it was pure inadvertence I am not sure that he ought to have been held fifty per cent. to blame. I do not think, however, if one reads the whole of that part of the judgment, that the judge was using the word " inadvertence " quite in the way I would use it. It is necessary to remember that the plaintiff was a very experienced man; he knew the cutters were near the clamp; he ought not to have put his hand near the cutters without being sure that he had switched off the machine. Either he did not press the button fully or it may have been forgetfulness. The fact is that he put his hand close to the cutter when he had not turned off the machine and while he was doing that he was looking around for his mate. The judge thought that for an experienced man it was negligent. I also think it was, but I do not think I should have said that his negligence was of such a serious kind as to amount to fifty per cent. of the fault. However, I do not regard it as the duty of this court to interfere on the facts of this case and I do not think that there are grounds which would justify us in saying that the learned judge's division of responsibility was wrong. Accordingly I would allow the appeal and hold that the defendants are responsible in damages to the extent of fifty per cent. of the total amount provisionally assessed by the learned judge. A

MORRIS, L.J.: I am of the same opinion. The result of the Horizontal Milling Machines Regulations, 1928, is that when the cutters on milling machines are being used other than for the purposes referred to in the exemptions those cutters must be fenced in the way laid down by reg. 3. At such times and in such circumstances it is to the provisions of reg. 3 that attention must be directed and not to the provisions of the statutes. That is the effect of the decisions in *Miller* v. *William Boothman & Sons, Ltd.* (3) ([1944] 1 All E.R. 333) and in *Benn* v. *Kamm & Co., Ltd.* (1) ([1952] 1 All E.R. 833). If there is a dangerous part of a horizontal milling machine other than a cutter then the provisions of the Factories Act, 1937, apply to such dangerous part. The position was summarised in *Benn* v. *Kamm & Co., Ltd.* (1) in this sentence, which I take from the judgment of DENNING, L.J. ([1952] 1 All E.R. at p. 837): B C

> "It seems to me that when the regulations say that a particular dangerous part is to be guarded in a particular way, the occupier satisfies his statutory obligations in regard to that part by guarding it in that way, but he remains under his ordinary statutory obligations in regard to other dangerous parts." D

In *Benn* v. *Kamm & Co., Ltd.* (1), injury arose in reference to another dangerous part than the cutter. In the present case the injury arose by contact with the cutter.

The determination of the present case depends entirely on the construction of the regulations and in particular on the construction of the proviso to the part of the regulations under the heading "Exemptions". In *Benn* v. *Kamm & Co., Ltd.* (1), SOMERVELL, L.J., referred to the proviso. He said (ibid., at p. 836): E

> "Then there is a proviso: 'Provided that these exemptions shall not prejudice the application of s. 10 of the Factory and Workshop Act, 1901, in regard to fencing of such machinery.' That shows that, so far as the exemptions are concerned, the general provisions of s. 10 of the Act of 1901 . . . apply." F

That was to the same effect as what SOMERVELL, L.J., had earlier said in *Franklin* v. *Gramophone Co., Ltd.* (2) ([1948] 1 All E.R. 353 at p. 359) in the passage to which my Lord referred. I find myself taking entirely the same view. Before anyone reading the Horizontal Milling Machines Regulations, 1928, would come to reg. 3 he would read the words beginning G

> "Nothing in reg. 3 shall apply to any milling cutter used on",

then comes No. (i) of the exemptions, "or when used for", and then follow the remainder of the exemptions, No. (vii) of which is "automatic profiling". Therefore, in reference to this case, anyone reading the regulation would read it H

> "Nothing in reg. 3 shall apply to any milling cutter when used for automatic profiling."

That is the position in the present case. He would then read the proviso:

> "Provided that these exemptions shall not prejudice the application of s. 10 of the Factory and Workshop Act, 1901, in regard to fencing of such machinery." I

It is common ground that for the reference to s. 10 reference to s. 14 of the Factories Act, 1937, must be made. The proviso ends with the words "in regard to fencing of such machinery". The question arises, what is the meaning in the context of "such machinery". Counsel for the plaintiff has submitted in the first place that "such machinery" means the cutters. If that be so, then the position is abundantly clear, for the proviso would mean that

> "the exemptions shall not prejudice the application of s. 14 in regard to the

fencing of such cutters, namely cutters that are being used in one of the exempted processes."

It would follow that if that is the correct construction, s. 14 would apply when the cutter is being used for automatic profiling. Counsel alternatively submits that "such machinery" means the horizontal milling machines themselves. I think he submits that it is immaterial from his point of view whether his first or his second submission be accepted as correct. If "such machinery" means the horizontal milling machines, then the proviso, he submits, has the meaning that if a cutter is being used for automatic profiling (which is the case here), then nothing is to prejudice the application of s. 14 in regard to the fencing of the horizontal milling machines. That would include the whole of the machines.

On the other hand counsel for the defendants makes a different submission. He submits that one should read the phrase "such machinery" as machinery excluding the cutters, or read it as denoting all parts of the machine other than the cutters. I find myself unable to accept that submission. It seems to me that it would have been very easy to frame the proviso in that way had that been the intention. I can only read this proviso in this way, that the regulation is saying "When a milling cutter is being used for automatic profiling then reg. 3 does not apply". In other words, there is not then obligation to have the fencing of the kind prescribed by reg. 3. In that event, however, s. 14 of the Factories Act, 1937, is to apply in regard to the fencing of such machinery. I do not think that it matters whether such machinery in the context refers to the cutters or to the whole machinery. I incline to the latter view but I think that it is immaterial. I consider, therefore, that this case becomes one of construction and I can read the proviso in no other way than that which I have mentioned. It follows that there was a breach of statutory duty in this case and that the plaintiff is entitled to recover.

I do not wish to add anything as to the other parts of the case which have been covered by my Lord, except to say that I do not think for myself that I would, if I had been sitting, have arrived at the percentage of fifty per cent. as being the degree of fault of the plaintiff. In all the circumstances of the case, however, I do not think that we can interfere with the apportionment fixed by the learned judge.

ROMER, L.J.: I agree. It is quite clear that the whole difficulty in this case has arisen out of two words, "such machinery" in the proviso to the regulations, the difficulty being what the draftsman had in mind in using them. They might possibly be referring to the milling cutters themselves, which in the specified processes are the subject of the exemption, although I think in that event that the draftsman would have said "such cutters". Alternatively, they might be referring to the milling machine as a whole, or, thirdly, they might be referring to the machinery mentioned in s. 10 of the Factory and Workshop Act, 1901. I agree, however, with my brethren that in whatever sense one does read the words one is driven irresistibly to the conclusion that s. 10 of the Factory and Workshop Act, 1901 (now s. 14 of the Factories Act, 1937) was not intended to be displaced except in relation to the unexempted cutters. The proper approach is that the section does apply to all dangerous parts of machinery unless and to the extent that it is displaced either expressly or sufficiently clearly by implication by regulation made by the Minister. As the result of these regulations, the unexempted cutters (if I may so describe them) are taken out of the section and become subject to the regulations instead; but I can see nothing of sufficient force to warrant the suggestion that cutters when used for exempted processes are similarly taken out of the operation of s. 14. Indeed, in order to arrive at the opposite conclusion, it seems necessary to introduce into the proviso an exception, which is not there, by introducing the words "except the milling cutters specified in the exemption". There is no justification for introducing any such exception as that. One must take the language as one finds it and give it its general signification, with the result, as I have indicated, that s. 14 is not displaced with regard to these exempted cutters.

I accordingly would allow the appeal, and in regard to the other matters I have nothing to add to what my brethren have said.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *W. H. Thompson* (for the plaintiff); *Gardiner & Co.*, agents for *A. W. Mawer & Co.*, Manchester (for the defendants).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

SMYTH *v.* SMYTH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Davies, J.), April 18, 1956.]

Justices—Husband and wife—Maintenance order—Discharge—Conflicting decisions of High Court and magistrates' court—No concurrent jurisdiction—"Fresh evidence"—Refusal to discharge order—Appeal to Divisional Court—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 7, *s.* 10, *s.* 11.

On Apr. 14, 1954, the wife's complaint that the husband had been guilty of persistent cruelty to her was found by the magistrate to have been proved and an order was made in her favour under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. The wife then presented a petition for divorce on the ground of the husband's cruelty. The allegations in the petition were the same as those made before the magistrate with some additional incidents occurring after the date of the magistrate's order. The petition was dismissed on the ground that the contents had not been sufficiently proved, and the husband thereupon applied to the magistrate under s. 7 of the Act of 1895 for the discharge of the order of Apr. 14, 1954. The magistrate refused the application under s. 10 of the Act of 1895, he being of the opinion that the matter would be more conveniently dealt with by the High Court. On appeal by the husband,

Held: (i) the magistrate ought to have discharged the order of Apr. 14, 1954, since (a) the decision of the High Court was fresh evidence within the meaning of s. 7 of the Act of 1895, and (b) the magistrates' court, and not the High Court, alone had jurisdiction under that section to discharge the order and s. 10 of the Act of 1895 was inapplicable since it only applied where there were concurrent jurisdictions.

Kendall v. *Kendall* ([1952] 2 All E.R. 1038n.) and *Perks* v. *Perks* ([1945] 2 All E.R. 580) applied.

(ii) as s. 10 of that Act was inapplicable the court would discharge the order in exercise of their appellate jurisdiction under s. 11 of the Act of 1895 and r. 71 (6) of the Matrimonial Causes Rules, 1950.

Dictum of LORD GREENE, M.R., in *Perks* v. *Perks* ([1945] 2 All E.R. at p. 583) applied.

Appeal allowed.

[As to the refusal by a magistrates' court to make any order in a case fit for High Court, see 12 HALSBURY'S LAWS (3rd Edn.) 486, para. 1085, note (l); and for a case on the subject, see 27 DIGEST (Repl.) 731, *6976*.

As to discharging of order on fresh evidence, see 12 HALSBURY'S LAWS (3rd Edn.) 491, para. 1091, note (a); and for cases on the subject, see 27 DIGEST (Repl.) 727, *6940-6941*.

For the Summary Jurisdiction (Married Women) Act, 1895, s. 7, s. 10, s. 11, see 11 HALSBURY'S STATUTES (2nd Edn.) 852, 854.]

Cases referred to:

(1) *Kendall* v. *Kendall*, [1952] 2 All E.R. 1038n.; 117 J.P. 8; 3rd Digest Supp.

A (2) *Pratt* v. *Pratt*, (1927), 96 L.J.P. 123; 137 L.T. 491; 27 Digest (Repl.) 726, *6938*.

(3) *Knott* v. *Knott*, [1935] P. 158; 104 L.J.P. 50; 153 L.T. 256; 99 J.P. 329; 27 Digest (Repl.) 695, *6643*.

(4) *Perks* v. *Perks*, [1945] 2 All E.R. 580; [1946] P. 1; 115 L.J.P. 7; 173 L.T. 349; 110 J.P. 94; 27 Digest (Repl.) 731, *6976*.

B **Appeal.**

This was an appeal by the husband against an order of a metropolitan magistrate sitting at the Lambeth Magistrates' Court, dated Dec. 28, 1955.

The parties were married in 1930, and on Mar. 10, 1954, the wife left the husband. A summons was issued against the husband on the wife's complaint that he had been guilty of persistent cruelty to her. At the hearing at the Lambeth C Magistrates' Court on Apr. 14, 1954, the wife's complaint was found proved and an order containing a non-cohabitation clause was made in her favour under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. On Oct. 11, 1954, the wife presented a petition for divorce on the ground of the husband's cruelty. The particulars of cruelty were the same as the allegations which had been made by the wife in the magistrates' court, with additional D allegations of incidents between Apr. 14, 1954 and the date of presentation of the petition. The husband by his answer denied the alleged cruelty. The suit came before Mr. Commissioner GRAZEBROOK, Q.C., on Oct. 31, 1955, and on Nov. 2, 1955, the commissioner having heard all the evidence, found that the wife had not sufficiently proved the contents of her petition which he accordingly dismissed. On Nov. 23, 1955, a summons was issued against the wife on the E husband's application by way of complaint to the Lambeth Magistrates' Court for the discharge of the order of Apr. 14, 1954, on the ground that the wife's divorce petition had been dismissed. On Dec. 28, 1955, the husband's application was refused

> "under the provisions of s. 10 of the Summary Jurisdiction (Married F Women) Act, 1895, the court being of the opinion that the matter in question between the parties would be more conveniently dealt with by the High Court."

In the statement of his reasons, the magistrate stated:

> "This court found that the wife had established persistent cruelty and made a separation order accordingly. The High Court has since found that the G wife had not proved cruelty. I have no means of knowing to what extent, if at all, the finding of the High Court negatives the finding of this court. I am therefore of opinion that the question whether the separation order ought to be discharged can more conveniently be dealt with by the High Court."

H The husband now appealed.

B. Garland for the husband.
L. D. E. Cullen for the wife.

LORD MERRIMAN, P.: It is important to note that it was formally admitted for the purposes of this appeal that the wife's petition filed on Oct. 11, I 1954, included in their entirety all the allegations of misconduct which had been put forward before the learned magistrate in support of her complaint of persistent cruelty. In fact, without my going into details, certain additional allegations, occurring in the interval of some seven months between the hearing before the magistrate and the filing of the petition, had been added. That, of course, merely emphasises the fact that not only on the same material but on the same and additional material the High Court decided that the charge of cruelty was not established. That position as to fresh evidence is precisely covered by *Kendall* v. *Kendall* (1) ([1952] 2 All E.R. 1038n.) in which I gave the leading judgment.

That case, like the present, was an attempt by a wife to establish a charge of A
cruelty which had succeeded in the magistrates' court and had failed in the
High Court, and, to show how completely the two cases are alike, I will read a
few lines from my own judgment ([1952] 2 All E.R. at p. 1039):

> " We have looked at the notes of the evidence taken at the original
> hearing in 1944. It is quite clear from those notes, as we now know the
> wife herself [here I substitute ' counsel for the wife '] admitted, that the B
> cruelty then alleged coincided item by item, so far as was possible, with the
> cruelty alleged by her in her petition for divorce on the ground of cruelty,
> which was dated Aug. 2, 1951. I say ' so far as was possible ', because the
> last two paragraphs of her petition contained allegations of incidents which
> occurred after the original hearing and so could not have then been brought
> before the justices. In every other respect the charges are identical." C

Mutatis mutandis every word of that short passage applies, and admittedly
applies, to the present case. I then went on (ibid.):

> " On Mar. 24, 1952, the petition came before His Honour JUDGE STEWART,
> sitting as a commissioner in divorce at York, and was dismissed on the
> merits, the learned judge finding that the charges of cruelty in the petition D
> were not proved. Thereupon the husband took out this summons, putting
> forward, as he was fully entitled to do, the dismissal of these identical
> charges as fresh evidence."

That last sentence is the crux of the matter and invites one to look at s. 7 of the
Summary Jurisdiction (Married Women) Act, 1895, which is the foundation of
the jurisdiction of a court of summary jurisdiction to discharge an order that E
it has already made.

Leaving aside the question of variations of amount, which does not arise in
the present case, to which the words " upon fresh evidence " no longer apply*,
s. 7 provides:

> " A court of summary jurisdiction acting within the city, borough, petty
> sessional or other division or district, in which any order under this Act F
> or the Acts mentioned in the Schedule hereto, or either of them, has been
> made, may, on the application of the married woman or of her husband,
> and upon cause being shown upon fresh evidence to the satisfaction of the
> court at any time, alter, vary, or discharge any such order . . ."

It is not necessary for me to read the rest of the section. Two things are plain. G
The jurisdiction, so far as this Act is concerned, is plainly entrusted to what is
now called the magistrates' court† which made the order, and that court has
to be satisfied that good cause has been shown on fresh evidence. The point
in the citation from *Kendall* v. *Kendall* (1) which I have already read, is that on
the authority of *Pratt* v. *Pratt* (2) ((1927), 96 L.J.P. 123), a decision of the High
Court contrary to and inconsistent with that originally arrived at by the H
magistrates' court is fresh evidence, on which cause may be shown to the satisfaction of the justices that the order ought to be discharged. Moreover, it is
important to notice that, so far as I am aware (and no other jurisdiction has been
suggested in the argument before us), it is the court which made the order, or
any other magistrates' court which by later legislation may be empowered to
act‡, to which the jurisdiction to discharge is granted. If authority is necessary I
for that, we have been reminded that as long ago as *Knott* v. *Knott* (3) ([1935]
P. 158), in which, according to the headnote the rival jurisdictions of the High

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* See Money Payments (Justices Procedure) Act, 1935, s. 9: 14 HALSBURY'S STATUTES (2nd Edn.) 985.

† See Magistrates' Courts Act, 1952, s. 124: 32 HALSBURY'S STATUTES (2nd Edn.) 518.

‡ See the Magistrates' Courts Rules, 1952 (S.I. 1952 No. 2190); 13 HALSBURY'S STATUTORY INSTRUMENTS 54; replacing the Emergency Laws (Miscellaneous Provisions) Act, 1947, s. 2, Sch. 2, para. 6 (1), (2).

Court and the magistrates' court, and the method of harmonising them, were discussed, I am reported as saying ([1935] P. at p. 163):

> "The Divorce Court, [counsel] argues (rightly, as I think), has no jurisdiction to set aside the order for maintenance: the justices alone have that power under the Act of 1895."

No authority to the contrary has been cited, and, in effect if not in terms, counsel for the husband has agreed that that is a correct statement of the law. There are other cases in which precisely the same inference may be drawn, and I propose to act on that basis. Indeed, there is the authority of the Court of Appeal in a case which is all-important here, namely, *Perks* v. *Perks* (4) ([1945] 2 All E.R. 580) to which we were referred by counsel for the husband. That shows that, at any rate in matters of what LORD GREENE, M.R., described as questions of pure maintenance*, jurisdiction to discharge an order is held not by the High Court but by the justices. That was at a time before the precursor to s. 23 (1) of the Matrimonial Causes Act, 1950, was passed, namely, the Law Reform (Miscellaneous Provisions) Act, 1949, s. 5 (1), giving the High Court the same jurisdiction as the magistrates' court to make an order on the ground of wilful neglect to maintain.

To that extent only, the point which was decided in *Perks* v. *Perks* (4) is distinguishable from that which is being dealt with in the present case. In my opinion, though it was necessary, no doubt, for LORD GREENE to qualify his judgment throughout by dealing with the clear case as it was at that time, in which the justices alone had jurisdiction directly to award maintenance, and to distinguish that case from the ancillary right of the High Court to award maintenance in connection with matrimonial causes, the distinction properly drawn in that case has no real bearing on the matter which is before us, for the essence of the decision was this, that the magistrates' court had and the High Court had not jurisdiction to deal with the discharge of orders.

The present case was presented to and dealt with by the learned magistrate very summarily. Counsel who appeared in the case for the wife, and who, incidentally, had appeared in the divorce suit, has told us, and, of course, we accept it unreservedly, that he was prepared to show item by item, so far as was necessary, what is now the admitted identity of the facts leading to the conflicting decisions by the magistrates' court and the learned commissioner on the subject of these allegations of cruelty. That makes it difficult to understand how it comes about that in his reasons for declining to deal with the matter and saying that it is more convenient that it should be dealt with by the High Court under s. 10 of the Act of 1895, the learned magistrate had

> "no means of knowing to what extent, if at all, the finding of the High Court negatives the finding of this court."

He began by saying that his court had

> "found that the wife had established persistent cruelty and made a separation order accordingly. The High Court has since found that the wife had not proved cruelty",

and then comes the sentence which I have just read. The means were there if he would but have allowed counsel a few minutes in which to expound the subject, but instead, he said that he was of opinion that the question whether or not the separation order ought to be discharged could more conveniently be dealt with by the High Court. That, of course, involves reference to s. 10 of the Act of 1895, which reads as follows:

> "If in the opinion of a court of summary jurisdiction the matters in question between the parties or any of them would be more conveniently

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* LORD GREENE, M.R., said ([1945] 2 All E.R. 583, letter B): "A pure question of maintenance by itself never could be brought before the High Court by original application."

> dealt with by the High Court, the court of summary jurisdiction may refuse to make an order under this Act, and in such case no appeal shall lie from the decision of the court of summary jurisdiction: Provided always, that the High Court or a judge thereof shall have power by order in any proceeding in the High Court relating to or comprising the same subject-matter as the application so refused as aforesaid, or any part thereof, to direct the court of summary jurisdiction to re-hear and determine the same."

Clearly the proviso does not touch the matter of the present appeal. It is argued that that section makes this appeal wholly inappropriate, that we are doing something which the section says we ought not to do. The question is, what is the scope of s. 10, and that is where we come back to *Perks* v. *Perks* (4). The point of that decision was that s. 10 only applies to cases in which there is concurrent jurisdiction to deal with the particular complaint both in the magistrates' court and in the High Court. Lord Greene, M.R., said ([1945] 2 All E.R. at p. 583):

> " Those words ' more conveniently dealt with ' alone clearly suggest, to my mind, that the legislature was considering a case of concurrent jurisdiction and the question which was the more convenient forum ",

and then he pointed out that there were certain matters in which there was concurrent jurisdiction, but pure questions of maintenance were not among them. In fact, as I have already said, and I believe rightly, for no authority has been cited to the contrary, we are not dealing here with a case of concurrent jurisdiction at all. The magistrates' court alone has, and the High Court has not, power to discharge a magistrates' order. Similarly, du Parcq, L.J., said (ibid.):

> " If there is no existing jurisdiction in the High Court to deal with the matters in question, then it is wrong to say that those matters may more conveniently be dealt with by the High Court."

That is the answer to the whole thing. The magistrate was wrong in saying that this matter could be more conveniently dealt with by the High Court, because he was imposing on the High Court, or assuming that the High Court had, a jurisdiction which it had not at all. There was no balance of convenience between the two fora. His court was the forum which alone could " conveniently " try the issue, because he alone had the jurisdiction.

Is this appeal, then, maintainable? It is a formidable argument that on any view of the matter the present is a case of a magistrate who has declined jurisdiction which he ought to have assumed and, therefore, that application ought to be made to the Queen's Bench Divisional Court for an order of mandamus. It is no part of my business to lay down principles on which that tribunal acts, but the answer to that argument is, if my recollection is right, that the Queen's Bench Divisional Court is unlikely to grant an order of mandamus when there is an alternative form of relief. So that we come back to the question whether this appeal lies, and, if it does, whether we ought not to deal with it. In my opinion, it is implicit in the judgment of Lord Greene, M.R., in *Perks* v. *Perks* (4) that this appeal does lie, for he concludes his judgment in these words ([1945] 2 All E.R. at p. 583):

> " In my opinion, the judge had no jurisdiction to discharge the order, and the matter ought to have been dealt with by the stipendiary magistrate. The stipendiary magistrate had no power to issue his so-called certificate refusing to entertain the application. He ought to have entertained it and decided it. If either party had been aggrieved by his decision, there was a right of appeal under s. 11. That is the proper procedure."

Section 11, the opening words of which are important and are relied on by counsel for the wife, reads:

> "Save as is hereinbefore provided, an appeal shall lie from any order or the refusal of any order by a court of summary jurisdiction under this Act to the

> A Probate, Divorce and Admiralty Division of the High Court of Justice . . ."

If section 10, which is manifestly included in the words "Save as is hereinbefore provided", does apply, it does otherwise provide and then there is no right of appeal; but if s. 10 does not apply then there is a right of appeal because it is B not "otherwise hereinbefore provided." In my opinion it is plain that s. 10 does not apply, for the reason that I have given. Section 10 applies to a conflict of concurrent jurisdictions and not to a case like the present where the only jurisdiction lies with the magistrate. It is said with some force that, assuming that the magistrate had decided the matter, the words of LORD GREENE:

> "If either party had been aggrieved by his decision, there was a right of C appeal under s. 11. That is the proper procedure",

only apply to the decision Aye or No to discharge the order on the merits. Clearly they apply to that, but I cannot see any reason why they should apply only to that. Supposing the magistrate had assumed jurisdiction which he was entitled to assume, he could have decided whether or not the order should have been D discharged. That would have been a decision on the merits which plainly would have given a right of appeal. In the present case he has refused to make the order for a wrong reason, and dismissed the application, and in my opinion that is plainly a matter of appeal which is covered by the exact words of s. 11, "the refusal of any order"; that is to say he has refused to make an order discharging the original order, and as it is not "otherwise provided" that is plainly a matter of appeal under s. 11.

E In my opinion, therefore, we have jurisdiction to hear the present appeal, and, incidentally, now that I have stated my opinion, and assuming that DAVIES, J., agrees with it, I also say that we have power to extend the time for the appeal, which is out of time, and propose that we do so. Then, how ought we to deal with it? It is said that we ought to send it back to the magistrate, and that we, instead of the Queen's Bench Division, ought to order him to hear and determine. F I do not think that that is necessary. Rule 71 (6) of the Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940) says:

> "The Divisional Court may draw all inferences of fact which might have been drawn in the court below and may give any judgment and make any order which ought to have been made . . ."

G In my opinion it is plain that the learned magistrate ought to have made the order that the husband's complaint was proved to his satisfaction and that the original order should be discharged. As he has failed to make that order, in my opinion we have the power to make it, and I propose that we should do so.

DAVIES, J.: I agree, and would add only a few words on one point, namely, H whether or not an appeal lies to this court from the refusal of the learned magistrate to adjudicate on the husband's application to discharge the original order. As I read s. 10 of the Summary Jurisdiction (Married Women) Act, 1895, the effect of it is that in any matter where there is concurrent jurisdiction in a court of summary jurisdiction and in the High Court, that is to say, where the matter may be investigated and determined by either court, then, if in the opinion of the I court of summary jurisdiction the matter would be more conveniently dealt with by the High Court, the court of summary jurisdiction may refuse to adjudicate. In a case falling within the ambit of the section there is to be no appeal from the judicial exercise of its discretion by the court of summary jurisdiction, subject to the proviso that the High Court, in its turn, if it thinks that the matter is more suitable for a court of summary jurisdiction, may send it back. All this presupposes that the matter is one within the jurisdiction of the High Court. If, as in the present case, the matter is not within the jurisdiction and competence of the High Court at all, then, in my judgment, s. 10 never comes into play.

That being so, the special prohibition of appeals against what I have described as the discretionary order which may be made under the section can have no application either, and, as LORD MERRIMAN, P., has said, the matter remains at large under the general provisions of s. 11, which provides that an appeal shall lie from, amongst other things, any refusal of an order by a court of summary jurisdiction.

I have thought it right to add this because, if I may say so with respect, although the concluding sentences of the judgment of LORD GREENE, M.R., in *Perks* v. *Perks* (4) ([1945] 2 All E.R. at p. 583) are plainly wide enough to cover the present situation, I, for myself, doubt whether the learned Master of the Rolls in that case was actually contemplating an appeal on a point like the present one; he may well have been thinking of an appeal from an actual decision on the merits one way or the other as between a husband and a wife on an application to discharge. The result is the same, of course, though arrived at on a perhaps narrower ground. I agree that the present appeal should be allowed and the original order be discharged.

Appeal allowed.

Solicitors: *Lewis & Shaw* (for the husband); *Kearton & Co.* (for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

Re WEINER'S WILL TRUSTS.
WYNER *v.* BRAITHWAITE AND OTHERS.

[CHANCERY DIVISION (Harman, J.), April 20, 1956.]

Trust and Trustee—Duty of trustee—Beneficiary absolutely entitled—Shares in private company—Persons interested in settled portion desiring retention of whole by trustees—Right of beneficiary absolutely entitled to receive transfer of his portion.

The plaintiff had become absolutely entitled beneficially in the events which had happened to forty-five per cent. of the estate of a testator. The estate included at all material times not less than seventy-five per cent. of the issued ordinary shares of J.W., Ltd. The remaining fifty-five per cent. of the testator's estate (to which the plaintiff was not entitled) was settled in various portions on other beneficiaries who were defendants. The plaintiff desired the trustees to transfer to him his portion of the estate. Those interested in the settled portions of the estate objected to the transfer on the ground that the splitting of the holding of shares in J.W., Ltd., would be detrimental to their interests.

Held: the plaintiff was entitled to have transferred to him his portion of the estate (including forty-five per cent. of the holding of shares in J.W., Ltd.), because the retention of property to which the plaintiff was absolutely entitled could only be justified in special circumstances absent from the present case.

Re Sandeman's Will Trusts ([1937] 1 All E.R. 368) applied. *Re Marshall* ([1914] 1 Ch. 192) considered.

[As to the right of a beneficiary to a transfer of trust property, see 33 HALSBURY'S LAWS (2nd Edn.) 213, para. 393; and for cases on the subject, see 43 DIGEST 758, *2011-2015.*]

Cases referred to:

(1) *Re Kipping, Kipping* v. *Kipping*, [1914] 1 Ch. 62; 83 L.J.Ch. 218; 109 L.T. 919; 43 Digest 867, *3126.*

(2) *Re Horsnaill, Womersley* v. *Horsnaill*, [1909] 1 Ch. 631; 78 L.J.Ch. 331; 100 L.T. 603; 43 Digest 900, *3433.*

(3) *Re Marshall, Marshall* v. *Marshall*, [1914] 1 Ch. 192; 83 L.J.Ch. 307; 109 L.T. 835; 43 Digest 868, *3128.*

A (4) *Re Sandeman's Will Trusts, Sandeman* v. *Hayne*, [1937] 1 All E.R. 368; Digest Supp.

Adjourned Summons.

This summons was issued by Patrick Denis Wyner for an order directing the two first-named defendants as trustees of the will of Joseph Weiner, deceased, to pay and transfer to the plaintiff forty-five per cent. of the residuary personal B estate of the testator.

By his will dated Feb. 28, 1940, the testator gave his residuary estate to his trustees on trust with the consent of his wife during her life and after her death at their discretion to sell the same with power to postpone such sale. The testator directed the investment of the proceeds of sale and in particular authorised their investment

C

> "in or upon the purchase of or at interest upon the security of any shares or securities of and in my company"

J. Weiner, Ltd. The testator declared that the trustees should hold the investments so made and any part of the residuary estate remaining unconverted (defined as his "trust fund") on trust to pay to his wife during her life in every D year either (a) thirty-five per cent. of the gross income of the trust fund or (b) the gross annual sum of £3,000 while not less than twenty-five per cent. of the shares held by the testator at his death in the said company should be retained by his trustees, or the gross annual sum of £2,000 while less than twenty-five per cent. of the shares held by the testator at his death were so retained, whichever of the said sums payable under (a) or (b) should be for the time being the greater. E The sum payable under (b) was payable out of income, but with a right if necessary to resort to capital. Any surplus income remaining in any year was to be divided and applied as follows:—two-thirteenths thereof as income of the first fund thereinafter mentioned, four-thirteenths as income of the second fund, two-thirteenths as income of the third fund and the remaining five-thirteenths as income of the fourth fund. On the death of his wife the trust fund was to be F divided into four parts: one such part (called "the first fund") to consist of forty-five per cent. in value, another part (called "the second fund") to consist of twenty per cent. in value thereof, another part (called "the third fund") to consist of ten per cent. and the remaining part (called "the fourth fund") to consist of the remaining twenty-five per cent. in value thereof. The first fund and the income thereof was directed to be held on trust for the testator's adopted G son, Patrick Denis Wyner (the plaintiff), on his attaining the age of thirty years, with a substitutional gift in favour of the said adopted son's children should the said adopted son not attain that age. The second fund was directed to be held on trust to pay the income thereof to the testator's son John Weiner (the third defendant) during his life and after his death on trust for the children of the said John Weiner living at his death who attained the age of twenty-one years in H equal shares absolutely, with a gift over to take effect if any child of John should predecease John leaving issue living at John's death. The third fund was directed to be held on trust for such of three named grandchildren (the fourth, fifth and sixth defendants), children of the said John Weiner, as attained the age of twenty-one years if more than one in equal shares. The fourth fund was directed to be held on trust to pay the income thereof to or equally between such I of three persons (the seventh, eighth and ninth defendants) who should for the time being be living and directors or a director or in the employ of the said company; and after the death of all of them or on all of them ceasing to be such director or so employed, then the fourth fund was to be added to the third fund so as to be subject to the trusts declared in relation to the third fund.

At the date of the testator's death, which occurred on July 28, 1941, the residuary estate included all the issued ordinary shares in J. Weiner, Ltd., which was a private company. At the date of the issue of the originating summons in this matter, the trustees held seventy-five per cent. of the issued capital.

By a deed dated July 25, 1952, the testator's widow assigned all her interest under the will to the plaintiff, who had attained the age of thirty years on Nov. 22, 1951.

Harold Lightman, Q.C., and *A. C. Sparrow* for the plaintiff.

G. D. Johnston for the first and second defendants, the trustees of the will.

Lionel Edwards, Q.C., and *Maurice Berkeley* for the third, fourth, fifth and sixth defendants.

Ian Campbell for the seventh, eighth and ninth defendants.

HARMAN, J.: The opposition to the plaintiff's claim is that it is said on behalf of the third, fourth, fifth and sixth defendants, who between them have a settled share in the estate and will eventually become entitled to the other fifty-five per cent. of the shares, that shares in a private company are more valuable when held as part of a controlling interest in one hand than when held in parcels, and, therefore, it is right that, in the interests of the beneficiaries as a whole, the trustees should be forbidden to distribute these shares. What is meant is that the fourth, fifth and sixth defendants, who will be entitled to the holding of fifty-five per cent. on the death of their father, the third defendant, who is life tenant of some portion of that holding, regard it as desirable that the shares should be retained in one hand and not divided, and the question merely is whether the plaintiff is entitled to receive his portion of the shares. First of all one must come to a conclusion whether the plaintiff has an indefeasible right to his portion of the estate. [HIS LORDSHIP referred to the trusts of the testator's will and to the deed dated July 25, 1952, and continued:] In those circumstances, it seemed to me prima facie that it was clear that the plaintiff, having joined together the two funds of income in which he is interested [viz. not less than thirty-five per cent. assigned by the testator's widow plus the two-thirteenths of the remainder given to the plaintiff by the testator's will, together making not less than forty-five per cent.], and an interest in remainder in forty-five per cent. of the capital, was entitled to say that his share was home and to ask that it should be handed to him. The trustees, quite rightly, replied that that would not do, because the widow, and therefore the plaintiff as her assign, had a right to resort to capital which, although it may be a bigger interest, yet might land the trustees in trouble if the plaintiff resorted to it. The plaintiff has answered that point by saying that he will surrender that right and become, so far as the widow's interests are concerned, purely an income beneficiary. There is an outstanding debt of a small amount to the first wife of the testator and to that extent also there is an unadministered portion of the estate. There is beyond that an asset of the estate not yet ascertained in America, which, if it comes in, may involve some payment of estate duty and may possibly cause an increase in the estate duty rate; it is not, however, conceivable that the extra which is so payable would ever exceed the amount obtained from America, so there is no difficulty in practice about that.

The real objection is that, these being shares in a private company, they ought not to be distributed, because that will injure the settled fifty-five per cent. It will equally injure, I suppose, the unsettled forty-five per cent.; but counsel, on behalf of the third, fourth, fifth, and sixth defendants, says that whatever the plaintiff may think about his side of it, these defendants would like the whole to be retained, and that they have a right to insist that it should be retained. Counsel relies first on *Re Kipping, Kipping* v. *Kipping* (1) ([1914] 1 Ch. 62), which decided that where before 1925 an estate consisted of realty a person absolutely entitled to an undivided share was not entitled to have it handed over to him, because it is notorious that that was less valuable than retaining the whole of the real property. Neither in that case nor in the earlier case, *Re Horsnaill, Womersley* v. *Horsnaill* (2) ([1909] 1 Ch. 631) was it considered whether there should be an appropriation. However that may be, in *Re Marshall, Marshall* v. *Marshall* (3) ([1914] 1 Ch. 192), it was said quite clearly in the Court of

Appeal that the principle of *Re Kipping* (1) had no application to personal estate. *Re Marshall* (3) concerned the division of shares in a public company. Cozens-Hardy, M.R., said (ibid., at p. 199):

> " Speaking generally, the right of a person, who is entitled indefeasibly in possession to an aliquot share of property, to have that share transferred to him is one which is plainly established by law."

Then he said that it was not true in the case of real estate if he was to take an undivided share. He continued (ibid.):

> " But that doctrine, it seems to me, has no application, apart from special circumstances, to personal property."

He then made certain observations about limited companies, which show that the Court of Appeal did inquire into the circumstances of the company there in question. It was not a private company, and it was suggested to me that the Master of the Rolls at least hinted that it would have been a different matter altogether had the company been a private company: he does say (ibid., at p. 200):

> " There may be cases with reference to the particular position of a company like this, at a particular time, which may justify the trustees in exercising their discretion, if they can satisfy the court that these special circumstances exist; but the case of the present trustees is not put upon that ground at all."

Re Marshall (3) was essentially different from this case, in that the trustees were there insisting that, as they had a power to postpone sale, they were entitled to exercise that power willy-nilly the beneficiaries, and it was held that they were not. In this case the trustees have taken no such action. They say that they are quite willing to divide and do not seek to exercise their power of postponement in any way. The pressure comes not from the trustees, but from other beneficiaries. Swinfen Eady, L.J., said ([1914] 1 Ch. at p. 201):

> " This summons was taken out by the trustees, and they make no case upon the facts that it is expedient that they should be allowed to retain the shares for some longer time, but they rely in their defence upon a matter of law, their contention being that, having regard to the true construction of the will, they are entitled to retain the shares as long as they think fit",

and he goes on to say that there has been no attempt to prove special circumstances. Phillimore, L.J., said (ibid., at p. 202):

> " If there is such a right [that is, to refuse to allow division]—it rests upon the duty of the trustees to do their best for all the beneficiaries, it being their consequential duty to keep as large a block of shares as possible together so as to have large voting power . . . "

Counsel for the third, fourth, fifth and sixth defendants put his case as high as this, as I think he must: In the case of any private company where the trustees hold a control, no special circumstances need be adduced at all; the mere fact that a controlling interest is held and will not be held if the shares be divided is enough to make the court refuse to make the trustees divide. I cannot take that view at all. It would mean, in effect, that there never could be a division, because it must involve the loss of control. I cannot see that there is anything short of some special circumstances which would justify me in holding up the transfer of these shares; such a case, for instance, as where the trustees come forward and say that there are good reasons why they should not divide at the present time; they may be able to effect some scheme within the next year or so, and they happen to know that the plaintiff is opposed to that. No such special circumstances are made out. There are certain derogatory observations by the third defendant, Mr. John Weiner, in America, who says he does not think much of the plaintiff's application to business. That seems to me to be entirely an impertinence on the part of Mr. John Weiner and has nothing to do with it. Even if I took a different view, I think *Re Sandeman's Will Trusts, Sandeman* v. *Hayne* (4) ([1937] 1 All E.R. 368) would carry the case the plaintiff's way. That was a case of a private company, and a power to retain the shares. The trustees desired to retain them for the purpose of maintaining control of the company, and Clauson, J., said that they had no right to exercise their power to postpone so as to keep the plaintiffs out of their rights. He said (ibid., at p. 373):

> " I can conceive that there might be circumstances—they would have to be very special—which would justify the court in refusing to give effect to the plaintiffs' rights; but I cannot find, on the evidence before me, anything to suggest that such circumstances exist in this case . . . I cannot see that any harm will be done to anybody by giving effect to the prima facie right of the plaintiffs to have their shares, and the voting power on their shares, in their own control."

It is said there is a difference between the present case and *Re Sandeman's Will Trusts* (4) because here there is a trust for sale and in *Re Sandeman's Will Trusts* (4) there was not. In my view, however, a person who is beneficially entitled to forty-five per cent. of some shares subject to a trust for sale is entitled to require the trustee not to sell but to hand to the beneficiary his shares, they being of themselves easily divisible and not at all the same as real estate, in relation to which there may be no such right.

Consequently, I am of opinion that the plaintiff is justified in calling on the trustees to hand over to him his forty-five per cent. of this estate. Before the trustees do that, however, they are entitled to be satisfied about the matters I have mentioned, certainly the matter of the release of his potential right to invade the capital in the event of a deficiency of income. Apart from that, an annuity outstanding to the estate of the first wife of the testator must be properly secured, and part of the plaintiff's share is liable for that. Subject to that, I propose to direct the trustees to hand over to him forty-five per cent. of the testator's residuary estate.

Order accordingly.

Solicitors: *Philip Conway, Thomas & Co.* (for the plaintiff); *G. A. Herbert* (for the first and second defendants); *Canter & Martin* (for the third, fourth, fifth and sixth defendants); *Wood & Sons* (for the seventh, eighth and ninth defendants).

[*Reported by* Philippa Price, *Barrister-at-Law.*]

REGAZZONI *v.* K. C. SETHIA (1944), LTD.

[COURT OF APPEAL (Denning, Birkett and Parker, L.JJ.), April 20, 23, 24, 25, 26, 1956].

Contract—Illegality—Enforcement of illegal contract—Contract involving shipment from India contrary to the law of India—Recognition of relevant Indian law.

Conflict of Laws—Foreign law—Recognition—Political law.

As a result of a dispute about South Africa's treatment of Indians in South Africa, the Indian government by regulation prohibited the taking of goods out of British India which were destined for a port or place in the Union of South Africa or were intended for the Union although destined for some port or place outside it. Under an agreement between the parties the defendants undertook to sell and deliver to the plaintiff c.i.f. Genoa a quantity of jute bags, which to the knowledge of both parties were to be shipped from India and were to be re-sold to South Africa contrary to the regulation. The defendants failed to deliver the jute bags and the plaintiff brought an action for damages for non-delivery. It was agreed that the contract was governed by English law.

Held: the agreement was unenforceable since, although the English courts would not enforce the revenue or penal laws of another country, yet they would take notice of the laws of a friendly country (whether revenue, penal, or political laws or howsoever else described) to the extent that the English courts would not enforce an agreement by two persons knowingly to break those laws or to procure someone else to break them (see p. 490, letter H, p. 493, letter I, p. 495, letters B to F, and p. 496, letter D, post).

Foster v. *Driscoll* ([1929] 1 K.B. 470) applied; dictum of LORD MANSFIELD in *Holman* v. *Johnson* ((1775), 1 Cowp. at p. 343) criticised.

Decision of SELLERS, J. ([1956] 1 All E.R. 229) affirmed.

[As to impossibility of performance of a contract by reason of illegality under foreign law, see 8 HALSBURY'S LAWS (3rd Edn.) 185, para. 319; and for cases on the subject, see 11 DIGEST (Repl.) 441-443, *828-840*.]

Cases referred to:

(1) *Ralli Brothers* v. *Compañia Naviera Sota y Aznar*, [1920] 2 K.B. 287; 89 L.J.K.B. 999; 123 L.T. 375; 11 Digest (Repl.) 435, *791*.

(2) *Biggs* v. *Lawrence*, (1789), 3 Term Rep. 454; 100 E.R. 673; 11 Digest (Repl.) 441, *828*.

(3) *Foster* v. *Driscoll*, *Lindsay* v. *Attfield*, *Lindsay* v. *Driscoll*, [1929] 1 K.B. 470; 98 L.J.K.B. 282; 140 L.T. 479; 11 Digest (Repl.) 441, *832*.

(4) *Holman* v. *Johnson*, (1775), 1 Cowp. 341; 98 E.R. 1120; 11 Digest (Repl.) 325, *16*.

(5) *Government of India* v. *Taylor*, [1955] 1 All E.R. 292; [1955] A.C. 491.

(6) *Waugh* v. *Morris*, (1873), L.R. 8 Q.B. 202; 42 L.J.Q.B. 57; 28 L.T. 265; 12 Digest (Repl.) 264, *2041*.

(7) *Re Visser, Queen of Holland* v. *Drukker*, [1928] Ch. 877; 97 L.J.Ch. 488; 139 L.T. 658; 11 Digest (Repl.) 323, *7*.

(8) *Peter Buchanan, Ltd. & Macharg* v. *McVey*, [1955] A.C. 516n.; [1954] I.R. 89.

Appeal.

Appeal against an order of SELLERS, J., made on Dec. 19, 1955, and reported [1956] 1 All E.R. 229, dismissing an action for damages for breach of contract brought by the plaintiff against the defendants for failure to deliver five hundred thousand new B. twills September/October, 1948, c.i.f. Genoa under an agreement made in September, 1948. SELLERS, J., held that the contract was invalid and unenforceable by the proper law of the contract, which was agreed to be English law, since its performance involved a breach of Indian law in that, to the knowledge of the parties, it contemplated the export from India of goods intended for the Union of South Africa contrary to a regulation made by the government of India in 1946. He therefore dismissed the action. The plaintiff appealed.

Neil Lawson, Q.C., and *E. J. Cohn* for the plaintiff.
A. A. Mocatta, Q.C., R. W. Vick and *B. P. F. Kenworthy-Browne* for the defendants.

DENNING, L.J.: The Union of South Africa is a country with a tremendous problem—some say an insoluble problem—in regard to the races in her midst. Her attempts at a solution met with the disapproval of the government of India. To mark its disapproval, the government of India in 1946 put an embargo on the shipment of goods from India to South Africa. This embargo hit hard the trade in jute, particularly in jute sacks known in the trade as B. twills. India was practically the only supplier of those sacks at that time, and South Africa was a large consumer of them and needed them for bagging her maize crop. In order to overcome the embargo, South Africa was prepared to pay very high prices for these sacks, and middlemen were ready to help her by one means or another, so long as the money reward was tempting enough. This case is a dispute between two of those middlemen.

The plaintiff is a Swiss citizen. From 1947 to 1951, he told the court, he had sold ten to twelve million of these bags a year to the South African government, all for dollars. They were not shipped direct from India to South Africa, for that would be too plain a breach of the Indian law. He got them sent to a European port, such as Genoa, as if they were to be used in Europe, and then transhipped them to South Africa. He made transactions, he said, for millions of sacks via Genoa.

The transaction with which we are concerned is one of those transactions via Genoa. It came about in this way. In 1948 the plaintiff's agent, a Mr. Weil, met an Indian gentleman, Mr. Sethia, in Zürich. Mr. Sethia was a director of an English company, K. C. Sethia (1944), Ltd., the defendants, who had close connections with an Indian company of a similar name. Mr. Weil and Mr. Sethia discussed the possibility of transactions in jute bags from India. Mr. Sethia told Mr. Weil that if he, Mr. Sethia, had any part in sending goods to South Africa from India, whether directly or indirectly, and the Indian government knew of it, he would be in difficulty. So he said he did not want to know " officially " what happened to the goods after they reached the nearest European port. His scruples were respected. A contract was made in 1948 between Mr. Weil, the plaintiff's agent, and a Mr. Raydt, who was the agent for the defendants, the English company, for the supply of half a million of these sacks, B. twills. It was made by telegram passing between Mr. Weil in Basle and Mr. Raydt in Hamburg, in the German language. Mr. Weil's telegram of Sept. 4, 1948, read:

> " Accept 500,000 new B. twills September October price 248s. c.i.f. Genoa consignee Gattoni Milan. Bank guarantee payment against delivery of freight documents Dreyfus Bank. Wire agreement."

" Accept " meant " we will accept ". Gattoni was a servant or nominee of the plaintiff. By telegram of Sept. 6 Mr. Raydt replied: " B. twills in order ". The judge has held that thereupon there was a concluded contract for delivery of half a million sacks at 248s. for every one hundred, c.i.f. Genoa.

The defendants, the suppliers, did not fulfil that contract. We do not know the actual reason. It may be that Genoa had become suspect in the eyes of the Indian authorities, or it may be that the defendants could sell better elsewhere. Whatever the reason, the defendants did not fulfil the contract, and the plaintiff now sues them for damages for breach of it. He made an excursion into the German courts, without success. There was trouble about parties, and he failed.

In 1954, when nearly six years had elapsed since the alleged breach, he brought this action in the English courts, claiming damages for failure to deliver the sacks in accordance with the contract. He claimed special damages because he said he had lost the profit which he would have made on the re-sale to South Africa, which was a re-sale in dollars. The judge has found that the price payable by the plaintiff to the defendants was a high price, and the pleadings show that the profit on the re-sale to South Africa would be a high profit. The question is whether the contract will be enforced in these courts.

Both parties agree that the proper law of the contract is English law. It is said that the contract is unenforceable because there was an intention to break the Indian law in the matter. The Indian law was enacted on July 17, 1946, before India became independent. A regulation was made under the Sea Customs Act, 1878, by which the government of India prohibited

> " the taking by sea or by land out of British India of goods from whatever place arriving which are destined for any port or place in the Union of South Africa or in respect of which the chief customs officer is satisfied that the goods, although destined for a port or place outside the Union of South Africa, are intended to be taken to the Union of South Africa."

On the true construction of the regulation, I think it prohibits shipments out of India, either directly or indirectly to South Africa, whenever South Africa is the ultimate destination of the goods. The second part enables the chief customs officer to stop exports in cases where, although the ultimate destination may appear to be outside South Africa, nevertheless he is satisfied that they are intended to be taken to South Africa. Counsel for the plaintiff asks us to hold that the chief customs officer had an executive discretion, almost like a person who has a discretion whether to grant an export licence or not. I do not so read the regulation. I think there is an absolute prohibition against shipment direct or indirect from India to South Africa. Indeed, looking at the evidence and the correspondence in the case, there can be little doubt that the parties to this contract knew perfectly well that such shipment was illegal. When they spoke of " difficulties ", the difficulties which they envisaged were getting over the prohibition of export from India. I need only read one illuminating paragraph in the letter of July 18, 1948, just before this contract was made, from Mr. Weil to Mr. Raydt:

> " As regards the B. twills business, I know all the difficulties connected with this business. I believe, however, that Sethia, as an Indian firm, are the very firm to achieve something where other firms fail. When I was together with Sethia in Zürich, we discussed these transactions, and at that time he indicated that in this connection he could do some things which it would be impossible for other firms to do. This was to be assumed from his price quotations . . . Let Mr. Sethia make use of his good connections, and make an offer in these sacks on the terms as before."

It seems to me quite plain that these were middlemen attempting to overcome " difficulties ", as they called them; but what they were in fact attempting to overcome was the prohibition by Indian law of shipment direct or indirect from India to South Africa.

Now, what is the law on this matter ? I quite agree that, on looking at the terms of this contract by itself, there is nothing that necessitates or requires either party to do an act which is illegal by the law of any country. It is possible that the contract might lawfully have been fulfilled, for example, by the defendants getting the goods from somewhere other than India, or by buying them on board ship, or by the plaintiff not sending them to South Africa. All that is possible. I do not see, therefore, that this case can be brought within the case of *Ralli Brothers* v. *Compañia Naviera Sota y Aznar* (1) ([1920] 2 K.B. 287); because there is nothing in the stated terms of this contract which compels the performance of an act illegal in the country where it is to be performed. But that is not the sole ground on which these courts will refuse to enforce a contract. The cases, starting from *Biggs* v. *Lawrence* (2) ((1789), 3 Term Rep. 454), and finishing with *Foster* v. *Driscoll* (3) ([1929] 1 K.B. 470), show that, if two persons agree together on a transaction which to their knowledge is intended to be carried out by means of one or other of them breaking the laws of a friendly country, or procuring or assisting another person in the breach of such laws, then the courts of this country will not lend their aid to the enforcement of the transaction. The reason is that it would be a breach of the comity which should exist between countries, and especially between countries of the British Commonwealth. The courts of one country should not help break the laws of another. The transaction may not on the face of it disclose any illegal intention. The parties will usually take steps not to let any illegality appear. They will execute a contract for the sale of goods, or for the purchase of a steamer, or such like, which does not actually necessitate the performance of an illegal act, hoping thereby to validate the transaction and make it enforceable. But the court is not to be hoodwinked by subterfuges of that kind. Once it appears that, in order to implement the transaction, one of the parties to the knowledge of the other intends to break or to assist in breaking the laws of a friendly country or to get some one else to do it, then it will not be enforced.

Holman v. *Johnson* (4) ((1775), 1 Cowp. 341) is quite distinguishable, because there the sale of the tea at Dunkirk was complete before anything illegal was done or intended to be done by anyone. Where, however, the transaction is not complete and both parties contemplate that, in order to complete it, one or other of them, or some one on their behalf, will do something to break or to assist in breaking the laws of a friendly country, then in my judgment these courts will not enforce it.

Counsel for the plaintiff urged us to hold that this legislation by the government of India was an act of retaliation directed against South Africa, an economic sanction imposed because of the racial policy of South Africa, a political law of which, he says, the courts should take no notice. He referred us to the observations of LORD MANSFIELD in *Holman* v. *Johnson* (4), where he says (1 Cowp. at p. 343):—" no country ever takes notice of the revenue laws of another." Counsel says that has been applied to penal laws, and should extend also to political laws. It seems to me that LORD MANSFIELD goes too far when he says that these courts will *take no notice* of such laws. It is perfectly true that the courts of this country will not enforce the revenue laws or the criminal laws of another country at the suit of that other country, either directly or indirectly. These courts do not sit to collect taxes for another country or to inflict punishments for it; and this is so even between countries of the Commonwealth, as the House of Lords held in *Government of India* v. *Taylor* (5) ([1955] 1 All E.R. 292). These courts will not enforce such laws at the instance of the other country. It is quite another matter to say that we will take no notice of them. It seems to me that we should take notice of the laws of a friendly country, even if they are revenue laws or penal laws or political laws, however they may be described, at least to this extent that, if two people knowingly agree together to break the laws of a friendly country or to procure some one else to break them or to assist in the doing of it, then they cannot ask this court to give its aid to the enforcement of their agreement.

In *Foster* v. *Driscoll* (3) people tried to smuggle whisky into the United States in breach of the prohibition laws. They were not allowed to come to these courts for assistance to settle their differences. So, too, these middlemen, who were engaged in trying to break the export laws of India, must settle their differences between themselves as best they may. They cannot come to our courts for assistance.

I would, therefore, dismiss the appeal.

BIRKETT, L.J.: I am of the same opinion. The question for determination is: Will an English court enforce a contract of the nature of this contract as disclosed in the evidence ? Counsel for the plaintiff has contended for a certain view, but I have no doubt that the true view of the facts is that taken by SELLERS, J. The evidence and correspondence show clearly that the genesis of the contract was: how could the parties best overcome the prohibition on the export of bags from India to South Africa ?

The learned judge quite rightly paid great attention to the preliminary meeting in Zürich, where Mr. B. L. Sethia, who was unfortunately not able to give evidence at the trial, discussed with Mr. Weil, the plaintiff's agent, in the presence of Mr. Wild, the interpreter, how they were to get over these difficulties. Mr. Wild said this of the Zürich meeting:

> "Q.—Was there any discussion concerning a particular kind of transaction in jute sacks ? A.—Yes. Q.—What particular kind of transaction ? A.—The re-export of jute bags from European ports to South Africa."

Observe the form of the answer: "The re-export of jute bags from European ports to South Africa"—not from India to South Africa, but from European ports.

> "Q.—Any particular kind of jute bags—jute bags of European origin, or some other origin ? A.—With Mr. Sethia we talked about jute bags from India. Q.—What did Mr. Sethia say about this kind of business ? A.—Mr. Sethia said that he could not make direct export of jute bags from India to South Africa. Q.—Did he say why ? A.—He explained that the export of jute bags from India to South Africa was not allowed by the Indian government. Q.—In what way was it suggested that bags of Indian origin could get to South Africa, in those discussions ? A.—Mr. Sethia said that he could offer and supply jute bags to Mr. Weil c.i.f. any European port and he would leave it to us where we would re-export these bags. Q.—Did he suggest or not whether there would be anything wrong in Mr. Weil re-exporting these bags from a European port to South Africa ? A.—Mr. Sethia did not want to know that the bags were re-exported to South Africa, but he did not say that it was against the law if we did it. Q.—Was there any discussion about the particular position of Sethia or Sethia's firm in this business ? A.—As far as I understood, Mr. Sethia would be the shipper of the bags."

In the opening sentences of the evidence in the court below Mr. Wild, the interpreter, told the judge of this discussion in Zürich between Mr. Sethia and Mr. Weil. The discussion was about the re-export from European ports of jute bags from India. Mr. Sethia said: "You know I cannot do it directly; that is forbidden; but I do not want to know that they are going to South Africa; I just do not want to know."

My Lord has read one or two passages and I am not going to read any more, because I think that from the beginning it was clear to both parties that the contract was to take Indian jute bags and to get them from India to South Africa. It was plainly known that the ban operated against any direct shipment. Mr. Sethia himself said "I cannot do it directly; there is a ban about that; with regard to my sending them to Genoa or a European port, I can do that; but, of course, if they are going to South Africa, you had better not tell me." The whole discussion was as to how to get them to South Africa; and when the learned judge in this case dealt with these matters, after discussing one of the points raised in the court below, whether there was a binding contract, he said this ([1956] 1 All E.R. at p. 230):

> "Having regard to the further issues which have to be determined, a meeting prior to this contract between Mr. B. L. Sethia, a director of the defendant company at the time, Mr. Weil and Mr. Raydt (with a Mr. Wild

> as an interpreter) is of importance. The precise date is uncertain, but the meeting was probably in 1947, before August of that year when India became independent."

And then he says what the discussion was, and adds this (p. 231):

> " I feel no doubt that the meeting at Zürich was for the purpose of finding a way to take advantage of this situation "

—namely, the ban on exporting Indian jute bags from India for South Africa, the demand by South Africa for jute bags, and the consequent higher prices that could be obtained in that situation.

> " Mr. Sethia is an Indian and the defendant company were in touch with Indian shippers of the same name, Sethia, who were relations of the defendants' directors but were trading as a separate company."

And later (ibid., at p. 232):

> " . . . I am clearly of opinion that both of the parties were well aware of the restrictions and that it would have been unlawful for the shipper to export directly or indirectly to South Africa . . . Both parties to this contract contemplated and intended that the contract goods should be shipped from India and be made available in Genoa so that the plaintiff might make a re-sale or fulfil a bargain of re-sale to the South African buying agency. That had been decided generally by the agents and Mr. B. L. Sethia at Zürich. Not only was India the source of supply discussed at their meeting, but that India was to be the source of supply is indicated although that is not conclusive by the high price . . . "

That is supported by other evidence that at the time of the contract India would have been the only source of supply for a contract of half a million bags for fairly prompt delivery and not spread over a very long time. Therefore, it has not been difficult to come to a conclusion about the nature of the contract and I entirely agree with the learned judge that this contract was intended to get round the prohibition against direct and indirect shipment. The relevant regulation was made by the Department of Commerce in exercise of the powers given by s. 19 of the Sea Customs Act, 1878, and therefore by the central government. It imposes a prohibition against bringing into India, either by sea or land, goods which have been consigned from, or grown, produced or manufactured in the Union of South Africa, subject to certain exceptions: if the goods have been processed in other countries, if the value of the processing reaches a certain mark, and so on. It states:

> " (b) to prohibit the taking by sea or by land out of British India of goods from whatever place arriving which are destined for any port or place in the Union of South Africa "—.

Let me stop there, as though there were a semi-colon. The word " destined " there does not mean just consigned. I think it means goods which are to have South Africa as their final destination, and it is, first of all, a prohibition: " You shall not ship goods to South Africa." Nothing is said there about transhipment. Then:

> " or in respect of which the chief customs officer is satisfied that the goods, although destined for a port or place outside the Union of South Africa, are intended to be taken to the Union of South Africa."

Of course, there " destined " cannot have quite the same meaning as in the first place, if it refers to ultimate place of destination. But I think the sense is plain: " What we seek to prohibit is an export of goods to South Africa, and we want to do it both directly and indirectly. Directly raises no problem; we merely say it cannot be done. But we recognise that there are all sorts of ways by which indirectly our purpose may be defeated: you may send goods to

European ports." Therefore there is a provision that, if the chief customs officer is satisfied that goods are being sent e.g., to Genoa, but the real destination is a port in South Africa, then the ban applies.

As regards transhipment, the regulation is:

> " (a) to prohibit the transhipment at any port in British India of goods when destined for any port in the Union of South Africa and (b) to prohibit the transhipment at any port in British India of goods when destined for any port other than a port in the Union of South Africa, save with the permission of the chief customs officer who shall not grant such permission unless he is satisfied that it is not intended that such goods shall be taken to the Union of South Africa."

Clause (a) is dealing with direct shipment. I take the whole purpose of that legislation to be: " We want to prohibit and do prohibit the direct and the indirect export of Indian goods to South Africa." This is a matter of inference, but I think reasonable inference. In June, 1947, a year after the original legislation (July, 1946) by a fresh notice, the shippers of jute and jute goods

> " are informed that in future direct shipments only will be allowed to all territories which have a seaboard of their own and enjoy direct shipping facilities. (2) In cases in which direct shipments are impracticable necessitating shipment via an intermediary port, such as Aden and Port Said, shipments will be permitted only on condition that shippers enter into a bond undertaking to produce within three months or such extended period as the export control authority may grant, a certificate of landing from the government of the country of final destination to the effect that the consignments in question had reached the ultimate destination. (3) Failure to produce such a certificate within the stipulated time will render the shipper concerned liable to penal action."

I draw the inference from that that the efforts to control the indirect shipment into South Africa had not been so successful as the Government of India hoped, and they therefore introduced this new legislation in order to tighten up the restrictions. But I am quite satisfied for my own part that the Indian legislation was to the effect that there was a ban on the sending of Indian goods directly or indirectly to South Africa, as the learned judge in fact found in this case.

I think this case is governed by the principle laid down by the majority of this court in *Foster* v. *Driscoll* (3) ([1929] 1 K.B. 470). It was submitted that this was a political law and that the English courts ought therefore to take no notice of it. A passage from DICEY'S CONFLICT OF LAWS (6th Edn.), p. 152, has been cited to us and the argument has turned on the words in the preface dealing with the way in which the rule should be considered. I find it difficult to understand what is intended by the use of this word " political " in respect of legislation. The authorities cited in DICEY do not seem to carry the matter much further; certainly they have no application to this case. All legislation may properly be called " political legislation ". Every Act passed by Parliament is in that sense " political legislation ". One can understand " revenue legislation ", " revenue law ", " confiscatory law ", " penal law ". Those are all clearly defined; but the expression " political law " seems to me to be so vague that it is really very difficult to attach to it any special or particular meaning. I am satisfied that, however it is to be described, none of the principles which apply to revenue, penal or confiscatory law apply to this legislation as to South Africa. I agree with my Lord that it is wrong to say no notice shall be taken of laws of this kind, as distinct from saying that they shall not be enforced. But my view of the whole case, particularly when I recall the facts on which the contract was based, turns on the principle enunciated by my Lord, that, where the basis of a contract is that one party or both will break the law of a friendly country, the contract may

be said to be an illegal contract and this court will not enforce it. Particularly A
is that so in the case of a friendly country within the British Commonwealth.

For these reasons I am of the opinion that the learned judge came to a right conclusion. I agree with his judgment and with the judgment of my Lord, and I think this appeal ought to be dismissed.

PARKER, L.J.: I also agree. I think that this case depends entirely, B
as indeed did *Foster* v. *Driscoll* (3) ([1929] 1 K.B. 470) on the true view of the facts. There are four relevant findings by the learned judge. The first is where he says this ([1956] 1 All E.R. at p. 234):

> " In my judgment, this court ought to recognise that in September/October, 1948, it was illegal for an Indian shipper to export jute fabrics from India where the ultimate destination was the Union of South Africa." C

The second is to be found at p. 232:

> ". . . I am clearly of opinion that both of the parties were well aware of the restrictions and that it would have been unlawful for the shipper to export directly or indirectly to South Africa."

The third is the passage to which BIRKETT, L.J., has referred (ibid.): D

> " Both parties to this contract contemplated and intended that the contract goods should be shipped from India and be made available in Genoa so that the plaintiff might make a re-sale or fulfil a bargain of re-sale to the South African buying agency."

And, lastly (ibid., at p. 233), that E

> ". . . India would have been the only source of supply for a contract of five hundred thousand bags for fairly prompt delivery and not spread over a very long time."

To those findings I might add an admission made by counsel for the plaintiff in the course of the appeal to the effect that both parties knew that the F
goods were destined for South Africa.

Some of those findings were challenged by counsel for the plaintiff in this court. In particular, it was said that it had not been established that Indian law prohibited indirect shipments to South Africa. It was also said that, on a true view of the evidence, the contract could have been performed in a way which was perfectly legal and would not offend against the Indian law. Without going G
through the evidence in detail, it seems to me that those findings of fact of the learned judge are amply justified, and I entirely agree with the conclusion at which he arrived where he said (ibid., at p. 236):

> " In my judgment, this contract to the knowledge of both parties at the time of contracting could not in fact have been performed without the performance in a foreign and friendly country of an act which was illegal by H
> the law of that country, and I must hold the contract to be invalid and unenforceable."

The only findings as to which I have had any doubt are, first, as to the true effect of Indian law, and, secondly, as to the knowledge of the parties as to the Indian law. That an evasion of Indian law was contemplated and intended is I
perfectly clear. The parties intended a shipment on the face of it to Genoa in order to prevent disclosure that South Africa was the ultimate destination. But it is said that would involve, not a breach of Indian law, but merely an evasion of it. Whether it is a breach or not, of course, depends on the true construction to be given to the Indian law. I think that, on a proper construction of the Indian law, shipment to Genoa with a view to transhipment to South Africa was a breach of that regulation. I think it was illegal under Indian law, whether or not the customs officer was suspicious or expressed satisfaction that,

A notwithstanding that it was apparently being sent to Genoa, the ultimate destination was South Africa. Further, I think that was the knowledge of the parties at the meeting in Zürich in 1947, or, as it was corrected later, in the summer of 1948. It is perfectly true that, in regard to indirect shipments as opposed to direct shipments to South Africa, reference was made to " difficulties " as opposed to illegality. But reading the evidence as a whole, and also the views B of the parties as expressed in the correspondence, I am perfectly satisfied that they full well knew that a breach of Indian law would be involved.

That being so, on those findings it seems to me perfectly clear that, although the contract might have been performed in a perfectly legal way, looking at it alone, yet these facts have proved the " wicked intention " to which BLACKBURN, J., referred in *Waugh* v. *Morris* (6) ((1873), L.R. 8 Q.B. 202). BLACKBURN, J., C there said (at p. 208):

> " We quite agree, that, where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that in order to void a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked D intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance."

Once that " wicked intention " referred to by BLACKBURN, J., is proved, as I think it clearly was in this case, it seems to me that the case falls fairly and squarely within the principle enunciated in *Foster* v. *Driscoll* (3). SANKEY, L.J., E says this ([1929] 1 K.B. at p. 521):

> " To sum up, in my view an English contract should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country notwithstanding the fact that there may be, in a certain event, alternative F modes or places of performing which permit the contract to be performed legally."

LAWRENCE, L.J., said this (at p. 510):

> " The ground upon which I rest my judgment that such a partnership is illegal is that its recognition by our courts would furnish a just cause G for complaint by the United States government against our government (of which the partners are subjects) and would be contrary to our obligation of international comity as now understood and recognized, and therefore would offend against our notions of public morality."

It is true that SCRUTTON, L.J., dissented, but I think it is perfectly clear that he dissented merely on his reading of the particular facts in the case. He H quoted the passage from BLACKBURN, J., to which I have already referred, and, if he had taken the same view of the facts as the other members of the court, I think he would have found that the " wicked intention " had been proved and would have held as did LAWRENCE, L.J., and SANKEY, L.J. Thus, at the very opening of his judgment, SCRUTTON, L.J., said (ibid., at p. 484):

> I " While I should like to arrive at the same result, I think that on legal principles, as the adventure could be carried out lawfully or unlawfully, and the parties have not agreed how to carry it out, the courts can deal with the legal results as if it were carried out lawfully."

And again he said (at p. 497):

> " The adventure, it appears to me, could be carried out in a legal way and could be carried out in an illegal way, and the adventurers had not bound themselves to either way."

In other words, his reading of the facts was such that the " wicked intention " referred to by Blackburn, J., had not been proved.

Taking that view of the matter, it is unnecessary for me to express any opinion on the alternative way in which counsel for the defendants put the case, based on *Ralli Brothers* v. *Compañia Naviera Sota y Aznar* (1) ([1920] 2 K.B. 287). It is sufficient to say that, in my view, if the appeal were to be upheld on that ground, it would involve an extension of the principle in *Ralli Brothers* v. *Compañia Naviera Sota y Aznar* (1) in that this contract could be performed legally so far as the contract documents are concerned.

Finally, counsel for the plaintiff took the point that the Indian law was a revenue, penal or political law, to which the courts of this country will pay no attention. It is clearly in my view not a penal or a revenue law, and I share the difficulty to which my Lords have referred as to what in this connection is meant by a political law. I have not discovered how the word " political " first crept into the rule referred to in Dicey, and it may be that it is merely dealing with the case of a foreign Sovereign seeking to enforce some prerogative or sovereign right. However that may be, it seems to me that, whether it can be classed as a penal, revenue or political law or not, this is not a case in which such a law is sought to be enforced either directly or indirectly. As it seems to me, it is sought here to ascertain whether performance of the contract involves a breach of the law of a foreign and friendly state; and, provided the law does not offend on some ground as contrary to public policy, such as laws concerning slavery or the like, I can see no reason in principle why the result should depend on the nature of the law itself. English public policy being to do nothing which will cause complaint from a foreign sovereign state, it seems to me that it matters not whether the law is or is not a penal, revenue or political law.

It is true, as Denning, L.J., has said, that Lord Mansfield in *Holman* v. *Johnson* (4) ((1775), 1 Cowp. at p. 343) used very wide words indeed, and that his statement has been referred to with approval by the House of Lords in *Government of India* v. *Taylor* (5) ([1955] 1 All E.R. 292), but it is equally clear that the wording of Lord Mansfield in certain respects, at any rate, is, taken literally, too wide. That was recognised in the House of Lords case and indeed was recognised by Tomlin, J., in *Re Visser, Queen of Holland* v. *Drukker* (7) ([1928] Ch. 877), and more recently in the Irish case of *Peter Buchanan, Ltd. & Macharg* v. *McVey* (8) ([1955] A.C. 516n.). There, Kingsmill Moore, J., having made an exhaustive analysis of the cases and referred to *Foster* v. *Driscoll* (4), said (ibid., at p. 523):

> " I doubt whether Lord Mansfield intended his remarks to preclude a court from informing itself as to the provisions of a foreign revenue law in order to determine the question whether a foreign transaction was or was not fraudulent and void according to the law of that country."

I do not see why in principle this court should not also inform itself of the provisions of a penal or revenue law in order to see whether or not the parties to an English contract had in effect agreed to break that law. For these reasons I would dismiss the appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Buckeridge & Braune* (for the plaintiff); *Stuart Hunt & Co.* (for the defendants).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

BETTY'S CAFÉS, LTD. *v.* PHILLIPS FURNISHING STORES, LTD.

[CHANCERY DIVISION (Danckwerts, J.), April 16, 17, 18, 19, 23, 24, May 7, 1956.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to reconstruct premises on termination of current tenancy—Landlord a limited company—Intention at material time to reconstruct on termination of tenancy not established—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 30 (1) (*f*).

The applicants were tenants of two adjoining shops, occupied by them for the business of a café proprietor and retail confectioner, under a lease for a term expiring on Dec. 31, 1953. In August, 1953, the respondent company purchased the reversion (a term of 999 years from Jan. 1, 1806) of these premises and the purchase was completed on Mar. 1, 1954. On Sept. 23, 1953, the applicants were granted a new tenancy by the county court under the Leasehold Property (Temporary Provisions) Act, 1951, for twelve months from Jan. 1, 1954, and this tenancy continued by virtue of s. 24 (1)* of the Landlord and Tenant Act, 1954. At the end of 1954 J., the secretary and a director of the respondent company, caused rough plans and estimates to be prepared by the company's architect for structural alterations to the premises necessary to adapt them for use for the respondent company's business. The rough estimate of cost was £20,000, but no bills of quantities or detailed plans were prepared and no steps were taken to obtain the approval of the local authority. J. had not authority to bind the respondent company to carry out such alterations. On Jan. 26, 1955, the board of directors of the respondent company decided that unless the applicants were prepared to vacate for a nominal consideration the present position should not be disturbed until the respondent company had been landlords for five years. In March, 1955, negotiations with the applicants for the sale of the reversion ensued. On June 17, 1955, the board of the respondent company decided to retain the reversion. On June 28, 1955, the applicants served notice requesting a new tenancy for fourteen years. On Aug. 15, 1955, the respondent company gave notice of opposition, relying on s. 30 (1) (f)† of the Landlord and Tenant Act, 1954 (i.e., on an intention to carry out substantial work of construction which it could not reasonably do without obtaining possession). On Oct. 27, 1955, the applicants commenced proceedings for the grant of a new tenancy by the court. On Nov. 25, 1955, the board of the respondent company approved expenditure of £15,000 on the premises based on a report that the architect had surveyed the premises and estimated the expense of reconstruction to be in the region of £15,000. This resolution did not identify any particular works as being intended to be carried out. After the application to the court had been heard for four days the board of the respondent company resolved on Apr. 23, 1956, that in the event of the company obtaining possession of the premises the work specified in the architect's original estimates should be carried out forthwith and expenditure of £20,000 should be approved.

Held: the respondent company's opposition under s. 30 (1) (f) of the Landlord and Tenant Act, 1954, failed because, although the work which the architect had originally specified and for which he had estimated the approximate cost as £20,000 was substantial and could not reasonably be carried out without obtaining possession of the premises, yet the company had not shown that at the material time, which was the date of the service of the notice of objection, it intended on the termination of the tenancy to carry out the work; accordingly a new tenancy would be granted.

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* The terms of the sub-section are printed at p. 499, letter A, post.

† The terms of the paragraph are printed at p. 499, letter I, post.

Atkinson v. *Bettison* ([1955] 3 All E.R. 340) and *Fisher* v. *Taylors Furnishing Stores, Ltd.* ([1956] 2 All E.R. 78) considered.

Dictum of ASQUITH, L.J., in *Cunliffe* v. *Goodman* ([1950] 1 All E.R. at p. 725) applied.

[For the Landlord and Tenant Act, 1954, s. 24, s. 30, see 34 HALSBURY'S STATUTES (2nd Edn.) 409, 414.]

Cases referred to:

(1) *Atkinson* v. *Bettison*, [1955] 3 All E.R. 340.
(2) *Smart (J. W.) (Modern Shoe Repairs), Ltd.* v. *Hinckley & Leicestershire Building Society*, [1952] 2 All E.R. 846; 3rd Digest Supp.
(3) *Fisher* v. *Taylors Furnishing Stores, Ltd.*, [1956] 2 All E.R. 78.
(4) *Cunliffe* v. *Goodman*, [1950] 1 All E.R. 720; [1950] 2 K.B. 237; 31 Digest (Repl.) 378, *5070*.
(5) *Town Tailors, Ltd.* v. *Peacocks Stores, Ltd.*, (Mar. 20, 1956), unreported.
(6) *X.L. Fisheries, Ltd.* v. *Leeds Corpn.*, [1955] 2 All E.R. 875; [1955] 2 Q.B. 636.

Adjourned Summons.

The applicants, Betty's Cafés, Ltd., who were the tenants of business premises known as 42 and 44, Darley Street, Bradford, applied to the court by originating summons, dated Oct. 27, 1955, for the grant of a new tenancy, under the Landlord and Tenant Act, 1954, for a period of fourteen years commencing on June 24, 1956. The application was opposed by the landlord, Phillips Furnishing Stores, Ltd. (referred to hereinafter as " the respondent company ") on the ground specified in s. 30 (1) (f) of the Act, namely, that on the termination of the current tenancy the respondent company intended to reconstruct the premises comprised in the holding, or a substantial part of those premises, or to carry out substantial work of construction on the holding or part thereof, and that it could not reasonably do so without obtaining possession of the holding.

The facts appear in the judgment and are summarised in the headnote.

L. A. Blundell and *C. B. Priday* for the applicants, the tenants.

Ryder Richardson, Q.C., and *J. P. Widgery* for the respondent company, the landlord.

Cur. adv. vult.

May 7. **DANCKWERTS, J.**, read the following judgment: This is an application by a company now known as Betty's Cafés, Ltd. (and referred to hereinafter as " the applicants "), under the Landlord and Tenant Act, 1954, for a new tenancy of property, known as Nos. 42 and 44, Darley Street, at Bradford in the county of York.

Before examining the facts it will be convenient to state the relevant provisions of the statute. Those are, for the most part, contained in Part 2 of the Act, which bears the heading " Security of tenure for business, professional and other tenants ". Section 23 (1) provides:

> " Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes."

By s. 23 (2):

> " In this Part of this Act the expression ' business ' includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate."

Section 23 (3) defines the expression " the holding " as the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by him. By s. 24 (1):

> "A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act; and, subject to the provisions of s. 29 of this Act, the tenant under such a tenancy may apply to the court for a new tenancy . . . (b) if the tenant has made a request for a new tenancy in accordance with s. 26 of this Act."

Section 26 (1) provides that a tenant's request for a new tenancy may be made where the tenancy under which he holds for the time being (in the Act referred to as "the current tenancy") is a tenancy granted for a term of years certain exceeding one year, whether or not continued by s. 24 of the Act, or granted for a term of years certain and thereafter from year to year. The words of this provision would not normally have covered the situation of the applicants, but it is admitted that it is covered by the extended meaning created by a transitional provision contained in para. 4 of Sch. 9 to the Act. By s. 26 (2) a tenant's request for a new tenancy is to be for a tenancy beginning at such date, not more than twelve nor less than six months after the making of the request, as may be specified therein, but the date is not to be earlier than the date on which the current tenancy would have expired. By s. 29 (1):

> "Subject to the provisions of this Act, on an application under s. 24 (1) of this Act for a new tenancy the court shall make an order for the grant of a tenancy comprising such property, at such rent and on such other terms, as are hereinafter provided."

By s. 26 (6):

> "Within two months of the making of a tenant's request for a new tenancy the landlord may give notice to the tenant that he will oppose an application to the court for the grant of a new tenancy, and any such notice shall state on which of the grounds mentioned in s. 30 of this Act the landlord will oppose the application."

Section 30 (1) provides:

> "The grounds on which a landlord may oppose an application under s. 24 (1) of this Act are such of the following grounds as may be stated in the landlord's notice under s. 25 of this Act, or, as the case may be, under s. 26 (6) thereof . . ."

Then follow a number of paragraphs, (a) to (g). Paragraph (g) is:

> "subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence."

The landlord, Phillips Furnishing Stores, Ltd. (referred to hereinafter as "the respondent company"), is, however, unable to rely on this ground in the present case because of s. 30 (2) which requires that, in order to take advantage of s. 30 (1) (g), the landlord must have purchased the reversion at least five years before the termination of the current tenancy. The only ground, therefore, relied on by the respondent company in the present case is that specified in s. 30 (1) (f), which is as follows:

> "that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding."

It is on the proper construction and application of this provision that this case really depends.

Section 31 (1) provides that, if the landlord opposes an application under s. 24 (1) of the Act on grounds on which he is entitled to oppose it in accordance with s. 30 and establishes any of those grounds to the satisfaction of the court, the court shall not make an order for the grant of a new tenancy. By s. 32 (1) the order for the grant of a new tenancy is to be for a new tenancy of the holding, and in the absence of agreement the order is to designate that property by reference to the circumstances existing at the date of the order. By s. 33 the new tenancy, in default of agreement, is to be such a tenancy as may be determined by the court to be reasonable in all the circumstances, being, if it is a tenancy for a term of years certain, a tenancy for a term not exceeding fourteen years, and is to begin on the coming to an end of the current tenancy. By s. 34 the rent payable under a tenancy granted by order of the court under this Part of the Act is to be such as may be agreed between the landlord and the tenant, or as, in default of such agreement, may be determined by the court to be that at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor, there being disregarded (a) the effect of the tenant or his predecessors having been in occupation; (b) any goodwill created by the tenant's business; (c) any effect on rent of any improvements carried out by the tenant or a predecessor in title of his otherwise than in pursuance of an obligation to his immediate landlord; and (d) special value in the case of licensed premises.

Section 35 provides for the determination by the court of the other terms of the tenancy. Where a tenant is unable to obtain a new tenancy by reason of any of the grounds specified in paras. (e), (f) or (g) of s. 30 (1), there is in s. 37 a provision for the payment to the tenant, in appropriate cases, of compensation equal to twice the rateable value of the holding. By s. 63 (2) (b), in cases where the rateable value of the holding exceeds £500, the court is the High Court. The rateable value of the property in the present case was £1,160, until under the recent re-assessment it was raised to £1,627.

The applicants (or their predecessors who were, in substance, the same company before reconstruction or changes of name) have carried on the business of café proprietors and retail confectioners in the greater part of Nos. 42 and 44, Darley Street since 1925 as tenants under a series of leases. The last of these, which was dated Apr. 29, 1946, was for a term of eight years expiring on Dec. 31, 1953, at an annual rent of £1,400. The previous leases were for terms of eight years, eight years, and five years, respectively. Part of the property was sub-let in rather an odd way to a company called William Timpson, Ltd., who carried on a retail business for the sale of boots and shoes in the ground floor of No. 42 and the basement of No. 44. On June 24, 1955, however, William Timpson, Ltd., left the property in favour of another site in Bradford, and since then the applicants have carried on their business in the whole of the property. For this purpose they made a doorway giving access between Nos. 42 and 44 on the ground floor so that the ground floor of No. 42 could be used as an extension of the ground floor of No. 44, and they use the front shop of No. 42 simply for display purposes at present. The basement of the property is now used for a boiler-house and storage and service in connection with café meals. The ground floor is used as a shop for the sale of bread and chocolates and sweets, and partly as a café for light meals, for which the first floor is also used. There is a ballroom on the second floor, and there is some evidence that a parquet floor was put in on this floor by the applicants' predecessors while tenants. The top floor is used for the kitchen required by the applicants' business. The applicants have similar businesses at Harrogate, York and Leeds, and a factory at Starbeck, Harrogate. Darley Street is one of the principal shopping streets in Bradford, and Nos. 42 and 44, although not in the most sought-after parts of the Bradford shopping district, which appear to be Kirkgate and the part of Darley Street nearest thereto, are in a very good position. The company do a very substantial business with their shop and café, and the ballroom floor is used extensively for dances, dinners and wedding receptions. There is no doubt that the site is a very valuable one for the purposes of the applicants' business. The building was probably built about 1903.

The respondent company acquired the reversion by a contract dated Aug. 25, 1953, at a price of £38,750, and it appears that the intention was to finance the purchase by a re-sale and a lease back to the company by an investor at a rent equivalent to six per cent. on the investment. I think it is fairly clear that the respondent company hoped to occupy the property for the purposes of its furniture business. The company, directly or through subsidiaries, owns some sixty shops, but had not got a shop in Bradford when the purchase was made. The purchase transaction seems to have been approved at a board meeting of the company's directors on Sept. 4, 1953, but the purchase was not completed until Mar. 1, 1954. The interest acquired was the remainder of a term of 999 years from Jan. 1, 1806, at a ground rent of £15 6s. per annum under a lease dated May 1, 1806. However, an application had been made to the Bradford County Court under the Leasehold Property (Temporary Provisions) Act, 1951, by the applicants for a new tenancy of the property, and on Sept. 23, 1953, the court made an order for a new tenancy of Nos. 42 and 44, Darley Street (then occupied partly by the applicants and partly by William Timpson, Ltd.) for a period of twelve months from Jan. 1, 1954, at a rental of £2,000, and on the same terms as in the existing lease.

On Oct. 27, 1953, Mr. H. J. Buckle, an estate agent, appearing to act on behalf of the respondent company, and as a result of instructions from a director of the company, approached Mr. Trevor Hall, who was a member of the firm of Messrs. Stanley Walker & Son, estate agents, acting for the applicants, with a tentative proposition that the respondent company should sell the property to the applicants for £45,000. The matter was mentioned to Mr. Wild, a director of the applicants, but proceeded no further at this stage, although Mr. Wild was interested. On Dec. 16, 1954, Mr. Jones, who was the secretary and a director of the respondent company, wrote to Mr. Ovenden, the company's architect, a letter instructing him to prepare plans of the work which the company could carry out in Nos. 42 and 44, Darley Street, to adapt the property for the company's use. He instructed the architect to make a good survey of the property with sufficient detail to draw out a plan and from it build up a list of the works which the company would normally carry out, for example, a new front, any walls to be moved, a new staircase, lift, and so on. " List them out, roughly price them and let me have it ", Mr. Jones said. He added:

> " This is most important, as structural alterations and so on form one of the means upon which a landlord can serve notice and possibly secure possession."

Accordingly the architect visited the site, and on Jan. 7, 1955, he sent to Mr. Jones a copy of the drawing of the premises as existing and a proposal, together with a brief outline of a specification describing his suggestions, and he mentioned that the approximate cost of the work would be £20,000. These are the works on which the respondent company now rely for the purpose of s. 30 (1) (f) of the Act. No bills of quantities or detailed plans were ever prepared, nor even were any steps taken to secure the approval of the local authority. It does not appear that Mr. Jones had any authority from the respondent company's board of directors to give the instructions which he gave to the architect. On Jan. 26, 1955, a meeting of the board decided that

> " unless [the applicants] were prepared to vacate for a more or less nominal consideration, the present position should not be disturbed until the required five years had elapsed (approximately three and a half years to

> run) at the end of which the company could with security serve the appropriate notice upon [the applicants] and their sub-tenants and obtain possession."

Mr. Jones was present at this meeting, but there is no evidence that the plans and details of work were ever mentioned at the meeting. If they were, the resolution is inconsistent with any intention to put them into operation in the immediate future.

In March, 1955, however, apparently as the result of a discussion between Mr. Buckle, Mr. Jones and Mr. M. Winstone, one of the managing directors of the respondent company, the suggestion of a purchase of the property by the applicants was re-opened. At any rate, at an interview on Apr. 5, 1955, between Mr. Buckle, Mr. Hall, Mr. Wild and Mr. Dixon, a solicitor for the applicants, a purchase of the property by the applicants at £57,000, or possibly £55,000, to be financed by a re-sale to an investor and a long lease back at £3,500 a year, was discussed. Thereafter negotiations proceeded between Mr. Buckle (who consulted Mr. Jones or Mr. Winstone at times) and representatives of the applicants, and persons or bodies likely to finance the arrangements. Mr. Winstone seems to have been the person principally responsible for the whole scheme. Early in June, 1955, agreement had been reached, subject to contract, that the applicants should purchase the property for £55,000, and should re-sell it to the National Coal Board Superannuation Fund for £56,250, and take a lease from the latter for forty-two years with full repairing and insuring covenants at an annual rent of £3,515 6s., and on June 17, 1955, Messrs. Clifford Turner & Co., the respondent company's solicitors, in pursuance of instructions given by Mr. Jones, sent to Messrs. Booth, Wade, Lomas Walker & Co., the applicants' solicitors, a formal contract for approval. On that day, June 17, 1955, however, a meeting of the respondent company's board of directors was held. The minute of this meeting is as follows:

> "Mr. M. Winstone recorded that [the applicants], the sitting tenants, were prepared to purchase the property for £55,000. After a full discussion it was resolved that it would be in the [respondent] company's interest to retain the property although the company would not obtain possession for some three years."

On the same day Mr. Jones wrote to Mr. Buckle, informing him of the board's decision and asking him "to call off all negotiations". As the contracts agreed were conditional on the exchange of formal contracts, the respondent company's board of directors were, of course, within their legal rights in determining the negotiations, and their decision is entirely in accordance with their resolution at the board meeting of Jan. 26, 1955; but the important point is that the contentions put forward at the hearing before me, and supported by the evidence of Mr. Jones, involve the total repudiation of any authority from the board for Mr. Jones or Mr. Winstone to have opened or pursued the negotiations or to bind the respondent company in any way without the authority of a resolution of the board of directors.

Having been deprived of their reasonable expectation of acquiring the property by purchase, the applicants turned to the Landlord and Tenant Act, 1954. On June 28, 1955, they served a notice requesting a new tenancy of the whole of the property for a period of fourteen years and at a rent of £2,500, the other terms of the tenancy to be those contained in the lease of Apr. 29, 1946. The figure for the rent has since been raised to £2,750 per annum. On Aug. 15, 1955, a notice of opposition was sent, purporting to be signed by Mr. Jones on behalf of the respondent company. No resolution of the board of directors of that company authorising this step has been proved before me, and in view of the company's attitude in regard to the ostensible authority of Mr. Jones, I am not sure that I should treat this notice of opposition as having any validity. The grounds relied on in the notice are that on the termination of the current tenancy the

A respondent company intends to reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof, and that the company could not reasonably do so without obtaining possession of the holding. The notice relies, therefore, on the provisions of s. 30 (1) (f) of the Landlord and Tenant Act, 1954. On Nov. 25, 1955, according to the respondent company's minutes, there was a B meeting of the board of directors of the company at which Mr. Winstone reported that the company's architect had surveyed the property and estimated that reconstruction would cost in the region of £15,000. It was decided to approve expenditure thereon up to that sum.

There is no question of demolition of the building in the present case. The respondent company, therefore, has to prove that, on the termination of the C current tenancy, the company intends to reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof, and that the company could not reasonably do so without obtaining possession of the holding. The provisions of s. 30 (1) (f) have already been considered by the Court of Appeal and have given rise to doubt and confusion.

D In *Atkinson* v. *Bettison* (1) ([1955] 3 All E.R. 340), the tenant of a provision shop was applying for a new lease. The landlord, who was a jeweller, could not oppose on the ground set out in s. 30 (1) (g), in order to acquire possession for his own business, as he had only recently acquired the premises; but he claimed under s. 30 (1) (f) that he intended to reconstruct a substantial part of the premises. The proposed work was the provision of a new shop front of a different E type, the demolition of a wall at the back of the shop so as to throw the whole ground floor into the shop, a complete re-laying of the floor in a different material, and the provision of extensive new shop fittings. No work was to be done on the upper floors. The county court judge found that the real purpose of the landlord was to get possession so as to carry on a business of his own and that the proposed reconstruction was merely ancillary to that purpose. He also found that the part F of the premises affected was not a substantial part, and he directed the grant of a new lease. The Court of Appeal dismissed an appeal by the landlord. They held that the question whether the work was a reconstruction of a substantial part of the premises was a question of degree and a question of fact, on which the decision of the county court judge should prevail. The court, however, also discussed the question whether the real purpose of the landlord was to get G possession of the property and the work was merely ancillary. DENNING, L.J., said (ibid., at p. 342):

> " On the evidence and on the findings of the learned county court judge, however, there is no doubt that the real purpose of the landlord is to get possession in order to carry on a business of his own. The proposed work is a H secondary or ancillary matter. By the decision of this court in *J. W. Smart (Modern Shoe Repairs), Ltd.* v. *Hinckley & Leicestershire Building Society* (2) ([1952] 2 All E.R. 846)—a decision on the Leasehold Property (Temporary Provisions) Act, 1951, but on very similar provisions—it was held that, in order to come within a similar sub-section, the landlord's *primary purpose* must be to reconstruct the premises or a substantial part thereof. In the I present case that is not his primary purpose. His primary purpose is to get possession for his own business. He cannot get the premises on that ground because he has not owned the premises for five years. He should not be allowed to circumvent that provision by putting forward a secondary purpose as though it were the main purpose."

HODSON, L.J. ([1955] 3 All E.R. at p. 343) and MORRIS, L.J. (ibid., at p. 344), also referred to the importance of the primary purpose as compared with an ancillary purpose.

Those observations, however, have been qualified in some ways in two later decisions of the Court of Appeal*. In the case of *Fisher* v. *Taylors Furnishing Stores, Ltd.* (3) ([1956] 2 All E.R. 78) which was decided on Mar. 20, 1956, two adjoining shops, one a retail shop for electrical goods and the other a wool shop, were purchased in September, 1954, by Taylors Furnishing Stores, Ltd., who wished to obtain possession of both shops in order to put up a new shop for their furnishing business at a cost of some £20,000. One of the tenants applied for an order for a new tenancy under the Landlord and Tenant Act, 1954. The buildings were about two hundred and fifty years old and were very near the end of their useful life, and in any case they ought to be demolished in about five years' time. The county court judge found it impossible to distinguish the case from *Atkinson* v. *Bettison* (1) and refused an order for a new lease, although it appears to me to have been an utterly different case from *Atkinson* v. *Bettison* (1). In the Court of Appeal DENNING, L.J., proceeded to explain *Atkinson* v. *Bettison* (1) in the following manner ([1956] 2 All E.R. at p. 79):

> " The correct ground of the decision [in *Atkinson* v. *Bettison* (1)] was that the proposed work was not ' substantial ' within s. 30 (1) (f); but the court considered also s. 30 (1) (g) and (2), which says that, if the landlord wants to get possession for his own purposes, he must have been owner for the last five years. In this connection, the court gave an emphatic warning against allowing a landlord too easily to escape from the five-year rule. That is the full extent of *Atkinson* v. *Bettison* (1), and it should not be taken to decide anything more. I there said that ([1955] 3 All E.R. at p. 342): ' . . . [the landlord] should not be allowed to circumvent that provision [the five-year rule] by putting forward a secondary purpose as though it were the main purpose '. The sort of case I had in mind was where a landlord wants to get possession of a shop for his own business and for that reason buys it over the tenant's head a year or so before the lease comes to an end. He knows that he cannot oppose a new lease under s. 30 (1) (g) because he bought the property less than five years before the end of the tenancy. So he puts forward a case for reconstruction under s. 30 (1) (f), hoping to get possession on that ground. In such circumstances the court must be careful to see that s. 30 (1) (f) is fully satisfied before it allows him to get possession. For this purpose the court must be satisfied that the intention to reconstruct is genuine and not colourable; that it is a firm and settled intention, not likely to be changed; that the reconstruction is of a substantial part of the premises, indeed so substantial that it cannot be thought to be a device to get possession; that the work is so extensive that it is necessary to get possession of the holding in order to do it; and that it is intended to do the work at once and not after a time. Unless the court were to insist strictly on these requirements, tenants might be deprived of the protection which Parliament intended them to have. It must be remembered that, if the landlord, having got possession, honestly changes his mind and does not do any work of reconstruction, the tenant has no remedy. Hence the necessity for a firm and settled intention. It must also be remembered that the Act is intended for the protection of shopkeepers, and that this protection would be nullified if a big concern could buy the property and get possession by putting in, say, a new shop-front. Hence the necessity for the work being substantial.
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> " Whilst I adhere to the view that the landlord should not be allowed to circumvent the five-year rule by putting forward a colourable case of reconstruction, nevertheless I think that it is going too far to say that the work of reconstruction must be the primary purpose. The word ' primary ' is taken from the judgment of this court in *J. W. Smart* (*Modern Shoe*

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* The second decision is *Town Tailors, Ltd.* v. *Peacocks Stores, Ltd.* (5) (unreported) cited at p. 506, letters C to E, post.

> *Repairs*), *Ltd.* v. *Hinckley & Leicestershire Building Society* (2) ([1952] 2 All E.R. 846). It was perfectly accurate in that connection. The Leasehold Property (Temporary Provisions) Act, 1951, contained temporary provisions which only extended the lease for a year or two, and so a landlord ought not to be allowed to get possession unless there was an overpowering necessity for the work to be done at once. The Act of 1954 contains permanent provisions to which different considerations apply. In many cases the landlord will have two purposes, both of which are genuine and important: the one is to get possession for his own business, and the other is to reconstruct the premises. He does not lose the benefit of s. 30 (1) (f) simply because he bought the premises less than five years before. Suppose a man buys up derelict premises and the only sensible thing is to pull them down at once and re-build. If he intends to let them to a new tenant, he clearly can rely on s. 30 (1) (f). He should not be debarred from so doing simply because, instead of letting them, he intends to occupy them himself. The legal position is made clear by s. 31 (1), which says that, if the landlord establishes *any* of the grounds set out in s. 30 (1), a new lease must be refused. The fact that he cannot establish one ground does not prevent him from relying on another."

I have thought it right to read these passages in full, because, in one part, they tend to lend support to the claims of the applicants in the present case, and, in another part, they seem to lend aid to the contentions on behalf of the respondent company. I have to discover whether they provide me with a guide to the proper application of the Act. MORRIS, L.J., in the same case said ([1956] 2 All E.R. at p. 83):

> " If a case occurs in which it appears that a landlord had a desire to obtain possession for his own occupation and had no thought at all of making any alteration to the premises, but if, after realising that, because he had not owned for five years, he could not oppose an application of his tenant for a new lease, he then proclaimed an intention to reconstruct, the court would have to decide whether the newly proclaimed intention was genuine. It certainly could be entirely genuine even though it owed its birth to a realisation of the effect of s. 30 (2) on a desire and intention coming within s. 30 (1) (g); but the circumstances would call for careful examination. Intentions can easily be asserted: their genuineness must be established. In such examination the only inquiry would be and must be whether the landlord has proved an intention which brings him within the language of s. 30 (1) (f). Any consideration of primary and secondary purposes, where any such consideration can occur and is helpful, must always be subordinate to an inquiry directed to the actual words of the section."

PARKER, L.J., after examining in detail the provisions of the Act, said (ibid., at p. 84):

> " Each ground is entirely separate and independent, and each, if proved, entitles the landlord to succeed. Thus, if the ground specified in para. (f) is proved to the satisfaction of the court, it matters not to what use the landlord ultimately intends to put the holding. He may intend to let it when the work is done to a third party; he may intend ultimately to occupy it himself for his own business; or he may not have made up his mind at all. To suggest that, if his intention is ultimately to occupy it himself and he cannot by reason of s. 30 (2) rely on para. (g), he is thereby debarred from relying on para. (f), is to apply a proviso to the operation of para. (f) which is not there and for which there is no warrant. Of course, if he finds himself debarred from relying on para. (g) and is forced to rely on para. (f), his task will not be an easy one; it will at once be suspected that his alleged intention is not genuine and that it is merely put forward to circumvent

> his inability to rely on para. (g). But, assuming that he satisfies the court that the intention is genuine, I can see no reason why he should be debarred from relying on para. (f). To succeed, however, he must establish his case under the paragraph. Thus he must satisfy the court, not only that the intention is genuine, but also that it was firm and settled, and that (to use the words in *Cunliffe* v. *Goodman* (4) ([1950] 1 All E.R. at p. 725), it had ' moved out of the zone of contemplation—out of the sphere of the tentative, the provisional and the exploratory—into the valley of decision '."

In the result the court allowed the landlord's appeal. One thing, at any rate, is clear, that the facts in *Fisher* v. *Taylors Furnishing Stores, Ltd.* (3) were very different from those in the present case.

Another case which was also decided by the Court of Appeal on Mar. 20, 1956, was *Town Tailors, Ltd.* v. *Peacocks Stores, Ltd.* (5) (unreported). In that case Town Tailors, Ltd., a tailoring firm, had applied for a new tenancy on the expiration of their tenancy, which they had held for twenty-one years. Their landlords, Peacocks Stores, Ltd., opposed the application on the ground that they wanted to obtain possession in order to reconstruct a substantial part of the property, which comprised buildings, a hundred to a hundred and fifty years old, which cried aloud (it was said) for reconstruction. The landlords had the two upper floors, and the tenancy was only of the shop on the ground floor. The work proposed involved, in effect, the re-building of the shop, taking in an extra part of the yard, and making walls to support a new upper storey. The county court judge was satisfied that the landlords had a bona fide intent to reconstruct, that the work was substantial, and that the landlords intended to do it at the termination of the current tenancy. He thought, however, that he was bound to decide against the landlords by reason of *Atkinson* v. *Bettison* (1). The Court of Appeal reversed his decision. I think it is clear that that is a very different case from the present.

With such help as I can obtain from those cases, I now turn to the situation in the present case. The contentions on behalf of the respondent company are based on the plans and details of work supplied by the company's architect to Mr. Jones being work which it is intended to carry out on the determination of the current tenancy. The minutes of the respondent company did not show any adoption or authorisation of these proposals by the board of directors on behalf of the company (unless this can be extracted from the minute of Nov. 25, 1955), but on Monday, Apr. 23, 1956, at 10 a.m. (after the hearing had been proceeding for four days) a meeting of the board of directors was called and they passed the following resolutions:

> " (i) That in the event of the [respondent] company obtaining possession of these premises from [the applicants] on the termination of the [applicants'] current tenancy thereof the work detailed in [the architect's] specification dated January, 1955, and plan numbered 45/2 be forthwith carried out and that expenditure up to £20,000 upon such work be approved. (ii) That counsel appearing for the company in the application by [the applicants] now proceeding in the Chancery Division be authorised to give an undertaking either to the court or to [the applicants] that the above-mentioned works will be carried out as soon as is practicable in the event of possession being so obtained."

Assuming that the works above mentioned can be regarded as relevant for the purposes of the present application, it is necessary to consider the nature of these works. From the plans and details of works supplied by the architect and his evidence before me, it appears that the work proposed may be summarised as follows. All the existing staircases and the existing service lift are to be removed. Instead, a larger staircase of reinforced concrete is to be constructed in the corner of the premises, and a much larger lift is to be installed, enclosed in brick walls in the back part of the premises, involving the bricking up of the existing windows at that part of the back wall. Party walls between Nos. 42 and 44 will be removed on the ground floor so as to turn that floor into one space, and the floor of No. 42 will have to be built up so as to make it the same level as that of No. 44. The kitchens will disappear from the third floor and new lavatory accommodation will be installed on that floor. All the floors will be cut about to a considerable extent in the process, and it may be that the upper floors will require strengthening. The cost of all these works will be considerable, amounting to at least £20,000.

It is true that no reconstruction of the main walls is involved in the proposals, except in respect of the blocking of windows, and the object is to adapt the premises for the purposes of the respondent company's business which involves the storage, exhibition and moving of bulky articles. It seems to me, however, that it is a reconstruction of a substantial part of the premises—the greater part of the interior—for these purposes, and that it involves substantial work of construction. Accordingly, in my view, the provisions of s. 30 (1) (f) of the Landlord and Tenant Act, 1954, would be satisfied by the works in these respects. It was contended on behalf of the applicants that these works could be carried out without the respondent company obtaining possession of the holding: that is to say, that the applicants' business could be continued on the premises, notwithstanding the carrying out of the work, by work being done during week-ends and holidays, and screens being erected to minimise the dust and other disturbance to customers. I think it is plain that the cost of the works would be substantially increased if these methods could be and were adopted, but, in view of the amount of debris which would have to be removed in the course of the operations, and the inconvenience or danger to customers, I do not see how the business could be carried on in these conditions. I think that the respondent company's architect was probably correct when he said that the local authority would not permit the carrying out of the works in this manner. Thus, I reach the conclusion that possession of the holding would be necessary for the carrying out of the works, and this condition in s. 30 (1) (f) is also satisfied.

The next question, and, as it seems to me, the most important one, is whether I should be satisfied that at the material time or times "on the termination of the current tenancy the landlord intends" [within s. 30 (1) (f)] to carry out the work of reconstruction. On this question I have, at any rate to guide me, the warnings delivered by the Court of Appeal in the cases to which I have referred. The Act is intended for the protection of shopkeepers, and I must be satisfied that the requirements of s. 30 (1) (f) are complied with. There must be a firm and settled intention. Intentions can easily be asserted. The intention must have "moved out of the zone of contemplation—out of the sphere of the tentative, the provisional and the exploratory—into the valley of decision." It is to be observed that the whole object of the proposed works is to adapt the building for the purposes of the respondent company's business, and for no other purpose. The works will not be carried out unless the respondent company acquires possession against the request and application of the applicants for a new tenancy. The respondent company has stated this frankly, and the resolution of Apr. 23, 1956, is expressed in those terms. Therefore the intention, if it existed or exists, is conditional on the applicants' application being defeated and possession being obtained forthwith by the respondent company. It is questionable whether an intention which is dependent on a condition of this kind, which is not within the sole volition of the respondent company, is such a firm and settled intention as is required by the terms of s. 30 (1) (f). In this respect, the enlightening observations of ASQUITH, L.J., in *Cunliffe* v. *Goodman* (4) ([1950] 1 All E.R. at pp. 724, 725) are very relevant. The Court of Appeal would seem now to disapprove of the word "ancillary" in regard to this Act, but the intention to reconstruct in the present case is obviously wholly ancillary to the object of the respondent company to obtain possession of the property for its business.

There is, however, an even more important question, namely, whether any A
intention whatever to carry out the works on which reliance is placed has been formed by the respondent company at any relevant time. It may be useful to consider, first, what is the relevant time when the firm and settled intention required by s. 30 (1) (f) must exist. On this point there are some important observations, even if obiter, by SIR RAYMOND EVERSHED, M.R., in *X.L. Fisheries, Ltd.* v. *Leeds Corpn.* (6) ([1955] 2 All E.R. 875). In that case, after B
the service on the landlord of a request by a tenant for a new tenancy, but before the expiration of the two months in which notice of opposition could be served, the landlord sold the property to a local authority. No notice of opposition was served and the local authority relied on the privileges afforded to a public authority by s. 57 of the Act. In the course of expressing the view that the landlord need not be the same person throughout for the purposes of C
the Act, SIR RAYMOND EVERSHED, M.R., said (ibid., at p. 878):

> " It is, in other words, I think quite plain that when the landlord comes to put in his notice of opposition, it is sufficient if at the time he puts it in he is in fact the landlord. It is, therefore, sufficient if he, having acquired the premises or the reversion since the date of the request, is able to say D
> when he puts in his notice of opposition before the two months' period expires that he is the landlord and (to take the example that I chose from s. 30) that on the termination of the current tenancy he intends to reconstruct."

It seems to me that this must be the vital moment, that at the date of the service of the notice of objection it must be true in fact that the landlord intends E
to carry out the work of reconstruction.

On the evidence the respondent company is quite unable to prove any such intention. A company is an artificial person and its intentions must be formed by those who are entitled to govern and to represent the company in regard to such matters. The articles of the respondent company are in usual form and enable the directors to exercise the powers of the company for all practical F
purposes. Sometimes, of course, a company may exercise its functions by means of some agent, but it does not appear to me that there is any such contention which can help the respondent company in the circumstances of this case. The company repudiated the authority of Mr. Jones or Mr. Winstone and Mr. Buckle to act on behalf of the company in respect of the property in question, and Mr. Jones disclaimed any right to bind the company by his acts without G
a directors' meeting. [HIS LORDSHIP referred to the fact that no other director of the company had been called as a witness and continued:] In these circumstances the intention of the respondent company can be discovered only from the acts of the board of directors as recorded in the minutes of the company. There is no minute recording any resolution of the directors to carry out the works suggested by the architect either at the determination of the current H
tenancy or at any time until the conditional resolution is passed on Apr. 23, 1956, which is, it seems to me, too late. The earlier resolutions, before the date of the request for a new tenancy, are only consistent with the company awaiting the end of the five-year period (when an intention to reconstruct would be immaterial). The resolution of Nov. 25, 1955, which was, in any case, after the expiration of two months from the date of the applicants' request, does I
not authorise the carrying out of the work at the determination of the current tenancy. It merely vaguely approves expenditure of £15,000, which is not identified with any particular works or time, and is less than the architect's estimate of the cost of the works which he suggested. In the result the respondent company has not established the ground contained in s. 30 (1) (f) of the Act to my satisfaction, and the company's opposition to the grant of a new tenancy fails.

It remains for me to consider the terms on which a new tenancy should be granted, pursuant to s. 33 and s. 34 of the Act. In the circumstances of the case, in my view it is reasonable that the applicants should be granted a tenancy for the maximum period of fourteen years allowed by the Act. The Act is designed to provide security of tenure for the tenants, and it does not seem to me to be an objection that the longest term of their previous tenancies did not exceed eight years. As regards the rent, the highest figure put forward on behalf of the respondent company was £3,500 per annum. It is true that, in the course of the negotiations for the abortive purchase and financing by a re-sale, the applicants were prepared to accept a lease at an annual rent of £3,500, in addition to the ground rent; but that was on the footing of receiving a lease for an unbreakable term of forty-two years. On the evidence given by the various experts some lower rent would be appropriate to a term so much shorter, as fourteen years will be. Having regard to all the circumstances, I think that the rent should be £3,000 per annum. The other terms of the tenancy will be similar to those contained in the lease of Apr. 29, 1946. The tenancy will be of the whole of Nos. 42 and 44, Darley Street, and the term of fourteen years will run from June 24, 1956.

Order accordingly.

Solicitors: *Ward, Bowie & Co.*, agents for *Booth & Co.*, Leeds (for the applicants); *Clifford-Turner & Co.* (for the respondent company).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

NOTE.

Re 20, EXCHANGE STREET, MANCHESTER.
AUSTIN REED, LTD. *v.* ROYAL INSURANCE CO., LTD.

[CHANCERY DIVISION (Danckwerts, J.), May 7, 8, 1956.]

Court of Appeal—Time for appeal—Abridgment of time—R.S.C., Ord. 58, *r.* 4 (1) (*c*), *r.* 14 (*as substituted by the Rules of the Supreme Court* (*Appeals*), 1955 (*S.I.* 1955 *No.* 1885))—*R.S.C., Ord.* 64, *r.* 7.

[For the Landlord and Tenant Act, 1954, s. 64, see 34 HALSBURY'S STATUTES (2nd Edn.) 441.

For R.S.C., Ord. 64, r. 7, see the ANNUAL PRACTICE, 1956, p. 1378; and for the old Ord. 58, r. 15 (1), see ibid., p. 1274.]

Adjourned Summons.

By a lease dated Feb. 1, 1952, premises consisting of a shop at 20, Exchange Street, Manchester, were demised by the landlord, Royal Insurance Co., Ltd., to the tenant, Austin Reed, Ltd., for a term of three years from Jan. 1, 1952, at a rent of £3,400 a year. By a notice, dated Oct. 7, 1955, under s. 25 of the Landlord and Tenant Act, 1954, the landlord terminated the tenancy on Apr. 14, 1956, and stated that it would oppose an application for a new tenancy under s. 30 (1) (f) of the Act on the ground that on the termination of the tenancy the landlord intended to demolish or reconstruct the premises comprised in the tenancy and could not reasonably do so without obtaining possession thereof. On Nov. 15, 1955, the tenant gave notice to the landlord, under the Act, that it would not be willing to give up possession of the premises on the date specified in the landlord's notice. By an originating summons dated Feb. 3, 1956, the tenant applied for the grant of a new tenancy under Part 2 of the Act for a period until Nov. 30, 1956, at the same rent. The application was heard by DANCKWERTS, J., and was refused. Counsel for the landlord then applied for an order abridging the time allowed to the tenant for appealing from six weeks to one week. The report deals only with the application in regard to the time for appealing.

Roy Wilson, Q.C., and *Adrian Hamilton* for the tenant.
Charles Russell, Q.C., and *M. Browne* for the landlord.

Charles Russell, Q.C. (for the landlord), referred to s. 64 of the Landlord and Tenant Act, 1954, which reads:

> " (1) In any case where—(a) a notice to terminate a tenancy has been given under . . . Part 2 of this Act . . . and . . . (c) apart from this section the effect of the notice or request would be to terminate the tenancy before the expiration of the period of three months beginning with the date on which the application is finally disposed of, the effect of the notice or request shall be to terminate the tenancy at the expiration of the said period of three months and not at any other time.
>
> " (2) The reference in sub-s. (1) (c) of this section to the date on which an application is finally disposed of shall be construed as a reference to the earliest date by which the proceedings on the application (including any proceedings on or in consequence of an appeal) have been determined and any time for appealing or further appealing has expired . . ."

After pointing out that, if the tenant decided to appeal towards the end of the six-week period allowed by the new R.S.C., Ord. 58, r. 4 (1) (c)*, the result might be that the landlord would not obtain possession much before November, 1956, counsel continued: My application now is that your Lordship should make an order abridging the time in which the tenant can appeal from six weeks to one week.

DANCKWERTS, J.: Where is my power to do that ?

Charles Russell, Q.C.: The relevant provision as to the time for appeal is contained in R.S.C., Ord. 58, r. 4 (1) (c)*: " in any other case, six weeks ". That means six weeks from the time of signing, entry or perfection of the order. Order 64, r. 7, is perfectly general in its terms:

> " A court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed. Provided that when the time for delivering any pleading or document or filing any affidavit, answer or document, or doing any act is or has been fixed or limited by any of these rules or by any direction on or under the summons for directions or by any order of the court or a judge the costs of any application to extend such time and of any order made thereon shall be borne by the party making such application . . ."

So there is power to abridge the time, including the time for appeal. It is, however, a power which is very rarely exercised, and then normally only by consent, so that it is necessary to consider briefly what is the compelling reason for exercising the power in this case. [Counsel then submitted his reasons for applying for the abridgment of time.]

DANCKWERTS, J.: What do you say, Mr. Wilson ?

Roy Wilson, Q.C. (for the tenant): I shall submit to your Lordship that at the moment your Lordship has no power to grant any such abridgment. [After submitting reasons why such an order should not be made, even if the court had power to make it, counsel continued:] Order 64, r. 7, is a general provision as to the extension of time or the abridging of time fixed for doing any act or taking any proceedings. In regard, however, to the actual time for appealing, there is a notable difference between the provisions of the old Ord. 58, r. 15, and the new Ord. 58, r. 4 and r. 14. The old Ord. 58, r. 15 (1), provided:

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* The new Ord. 58 is contained in S.I. 1955 No. 1885, which came into operation on Apr. 10, 1956.

> " Except with the leave of the court or judge by whom the judgment or order appealed from was given or made, or of the Court of Appeal, no appeal from any interlocutory order shall be brought after the expiration of fourteen days, and no other appeal shall be brought after the expiration of six weeks, from the date on which the judgment or order was signed . . ."

If one turns to the new order, there is no inclusion of the words " Except with the leave of a court or judge by whom the judgment or order appealed from was given or made ". Rule 4 (1) of the new Ord. 58 reads:

> " Subject to the provisions of this rule, every notice of appeal shall be served under para. 5 of r. 3 of this order within the following period . . ."

The appropriate sub-paragraph is (c): " in any other case, six weeks ". Rule 14 of the new Ord. 58 reads:

> " Without prejudice to the power of the Court of Appeal under Ord. 64, r. 7, to enlarge the time prescribed by any provision of this order, the period for serving notice of appeal under r. 4 of this order or for making application ex parte under r. 13 (3) of this order may be extended by the court below upon application made before the expiration of that period."

Thus it is obvious that there is a quite specific difference in the wording of the new Ord. 58, which makes it clear that, whereas, formerly, the time for appealing was subject to the general power either to extend or abridge, under the new order the time for appealing is subject only to the power of the Court of Appeal, under Ord. 64, r. 7, to enlarge the time. Therefore, unless the Court of Appeal, under Ord. 64, r. 7, enlarges the time, the time for appealing shall be the time laid down in r. 4 of Ord. 58.

DANCKWERTS, J.: There is no reference to abridgment in r. 14, is there?

Roy Wilson, Q.C.: No, my Lord, none at all. That is a matter of significance because in the old Ord. 58, r. 15 (1), there was the general reference to the leave of the court or a judge, which would bring in Ord. 64, r. 7.

DANCKWERTS, J.: The old Ord. 58, r. 15 (1), said that no appeal should be brought after a particular time. Now it is put in quite a different way.

Roy Wilson, Q.C.: Yes, my Lord, it is. Therefore, in my respectful submission, for some reason or other the Rule Committee of the Supreme Court have thought fit to deprive the court of the jurisdiction to abridge the time.

DANCKWERTS, J.: It appears to me that under the new Rules of the Supreme Court in regard to appeals I have not any power to abridge the time for an appeal. I would like to add that, if I had any such power under Ord. 64, r. 7, I doubt whether I should exercise it in a case of this kind. The possible hardships to which counsel for the landlord referred seem to me to be hardships created by the Landlord and Tenant Act, 1954, and by matters with which I ought not to interfere, since the legislature has thought fit to provide for certain consequences in cases of this kind.

Application for abridgment of time for appealing refused.

Solicitors: *Underwood & Co.* (for the tenant); *Linklaters & Paines,* agents for *Laces & Co.*, Liverpool (for the landlord).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

COMMISSIONER OF STAMP DUTIES OF THE STATE OF NEW SOUTH WALES *v.* PERMANENT TRUSTEE CO. OF NEW SOUTH WALES, LTD.

[PRIVY COUNCIL (Viscount Simonds, Lord Morton of Henryton, Lord Cohen, Lord Keith of Avonholm and Lord Somervell of Harrow), April 23, 24, 25, May 16, 1956.]

Privy Council—Australia—New South Wales—Estate duty—Gift inter vivos—Exclusion of donor—Trust for benefit of deceased's daughter—Deceased empowered by daughter to deal with income of trust funds paid into bank—Whether bona fide possession and enjoyment retained by daughter to the entire exclusion of deceased—New South Wales Stamp Duties Act, 1920-1940, *s.* 102 (2) (*d*).

In 1924, D., by a deed of settlement, transferred property to the respondent company to be held by it on trust, inter alia, to apply the whole or part of the income thereof for the maintenance, education and general support of his daughter as the trustee should think proper until she should attain the age of thirty or marry with the written consent of her parents, and, on her attaining the age of thirty, to pay over the balance of the trust fund with all accumulations of income for her sole and separate use. The daughter was born in 1910 and during her minority various sums were paid to D. by the respondent company while he was maintaining and educating her. In 1938 she married and in 1940 attained the age of thirty when she became absolutely entitled to the corpus of the trust funds. Towards the end of 1938 the daughter, at D.'s request, authorised the respondent company to take instructions from D. in all matters regarding the trust and in relation to a new account which was being opened in her name with a bank by D. This authority was to continue until withdrawn by her in writing. She also wrote at the end of 1938 to the bank authorising D. to operate the new account in the fullest possible manner. Early in 1939 she instructed the respondent company to pay into that account any money coming in from the trust from then until further instructions from her. All the income of the trust fund was duly paid into the new bank account. Up to April, 1943, D. drew out practically the whole of the moneys paid into the account and used the greater part of them for his own purposes. It was common ground between the parties that these sums were to be regarded as loans made by the daughter to D. without interest. The daughter did not herself draw on the account nor did she revoke any authority she had given. In 1946, D. died, and, in assessing the death duty payable in respect of his estate, the appellant included therein, by virtue of the New South Wales Stamp Duties Act, 1920-1940, s. 102 (2) (d)*, a sum of £38,162 13s. 7d., being the value of the property subject to the deed of settlement at the date of the death of D.

Held: the sum in question was rightly included in the dutiable estate since D. from 1939 onwards was in full control of any income arising from the trust so that his daughter did not retain bona fide possession and enjoyment of the trust property to the entire exclusion of her father or of any benefit to him within s. 102 (2) (d).

Appeal allowed.

[**Editorial Note.** The United Kingdom legislation comparable to s. 102 (2) (d) of the New South Wales Stamp Duties Act, 1920-1940, is the Customs and Inland Revenue Act, 1881, s. 38 (2) (a), as amended by the Customs and Inland Revenue Act, 1889, s. 11 (1), for which respectively see 9 HALSBURY'S STATUTES (2nd Edn.) 332, 344.]

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* The terms of s. 102 (2) (d) are set out at p. 513, letter E, post.

A Case referred to:

(1) *O'Connor* v. *Comr. of Succession Duties* (*South Australia*), (1932), 47 C.L.R. 601.

Appeal.

Appeal by special leave by the Commissioner of Stamp Duties of the State of B New South Wales from an order of the Full Court of the High Court of Australia, dated Aug. 19, 1954, allowing an appeal by the respondent company, the executor of the will of the deceased testator, from a rule of the Full Court of the Supreme Court of New South Wales dated June 1, 1953, on a Case Stated by the appellant under the New South Wales Stamp Duties Act, 1920-1940, s. 124. The facts appear in the judgment of the Board.

C *Gordon Wallace, Q.C.* (of the Australian Bar), *Anthony Cripps* and *J. Hobhouse* for the appellant.

Sir Garfield Barwick, Q.C. (of the Australian Bar), and *J. G. Le Quesne* for the respondent company.

VISCOUNT SIMONDS: Arthur Henry Davies, who will be called " the D testator ", died on Jan. 28, 1946, domiciled in New South Wales. The question for their Lordships' determination is whether, by virtue of s. 102 (2) (d) of the Stamp Duties Act, 1920-1940, his estate is, for the purpose of assessment and payment of death duty, to be deemed to include certain trust funds which were then subject to the trusts of a deed of settlement made by him on Aug. 13, 1924.

The relevant section is in the following terms:

> E " 102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided the estate of a deceased person shall be deemed to include and consist of the following classes of property:— . . . (2) . . . (d) Any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act, of which bona fide possession and enjoyment has not been assumed by the donee immediately F upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died."

The deed of settlement of Aug. 13, 1924, purported to be made between the testator of the first part, Muriel Norah Davies, his daughter, of the second part, G and the respondent, Permanent Trustee Company of New South Wales, Ltd. of the third part, but was executed by the testator and the respondent company only. Its principal provisions were as follows (the daughter being referred to as " the beneficiary " and the respondent as " the trustee "):

> " (i) The trustee shall stand possessed of the trust fund whether there H shall or shall not be any other fund applicable to the maintenance and education of the beneficiary or any person bound by law to provide for such maintenance and education upon trust: (a) To apply the whole or such part as the trustee shall think fit of the income arising from the trust fund for or towards the maintenance education and general support of the beneficiary in such manner in all respects as the trustee may think proper until such I beneficiary attains the age of thirty years or marries with the written consent and approval of her parents the said Arthur Henry Davies and Muriel Davies or of the survivor of them provided that in case the beneficiary shall marry during the lifetime of her parents without such consent as aforesaid the trustee shall continue to apply the income in manner aforesaid until the beneficiary attains the age of thirty years. (b) To accumulate the residue (if any) of the same income which in the judgment of the trustee may not be required for the purposes aforesaid or any of them in the year in which such income may have arisen by way of compound interest by

> investing the same and the resulting income therefrom for the benefit of the beneficiary or other the person or persons who under the trusts hereinafter contained shall have become entitled to the trust fund Provided that the trustee may resort to the accumulations of any preceding year or years and apply the same for any of the purposes hereinafter mentioned for the benefit of the beneficiary.
>
> " (ii) In case of the marriage of the beneficiary without such consent as aforesaid before attaining the age of thirty years the trustee may with the written consent of her parents or the survivor of them at any time after such marriage pay over to the beneficiary one half of the trust fund together with any accumulation of income then in the hands of the trustee.
>
> " (iii) On the beneficiary attaining the age of thirty years the trustee shall pay over to her the balance of the trust fund or the whole of such trust fund if still in the hands of the trustee together with all the accumulations of income then in hand for her sole and separate use.
>
> " (iv) In case the beneficiary shall attain the age of twenty-one years or marry under that age with such consent as aforesaid the trust fund shall be held by the trustee upon trust for such person or persons and in such manner in all respects as the beneficiary shall by will or codicil appoint."

The daughter was born on Feb. 22, 1910, and came of age on Feb. 22, 1931. During her minority the respondent company made payments of £1,000 annually from 1926 to 1930 to the testator while he was maintaining and educating her, and also made two further such payments in 1931 and 1932 and, at her request, further similar payments in each of the years 1933 to 1937. On July 1, 1938, she married one Jackaman at Alexandria in Egypt. On Feb. 22, 1940, she attained the age of thirty, and it has been assumed and is common ground that she then became absolutely entitled to the corpus of the trust funds. Before, however, that event happened, the series of transactions began which are decisive for the determination of this case. In stating them, their Lordships rely on the facts and documents in the Special Case to be presently mentioned, such inferences as arise from those facts and documents and the findings on the trial of the issues, also to be mentioned.

The story begins with a letter which the testator wrote to his daughter on Nov. 2, 1938, addressing her as " Dear Cherry " by which name she was commonly known. After referring to a benefit that he took under his father's will and stating that he proposed to deal with it in such a way that the principal would pass to her account in New South Wales while he in the meantime benefited by any interest that was made, he said that he was seeing the respondent company that day and would advise her what she should write to them in the matter of instructions regarding transferring income abroad. There he broke off his letter and continued it later saying that he had seen the trustee company and arranged with them to await her letter. He then proceeded:

> " The next thing I want you to do is to write on a separate sheet, addressed to them, giving them the authority to take my instructions in all matters regarding your trust or the new account I am opening in the Bank of New South Wales in your name. This account will be entitled Cherry Jackaman."

Then, after explaining why he was opening this account, he said that he wanted her to sign a cheque and also the letter of authority to the bank and also a specimen signature and send them out by the first mail to him so that he could hand them to the bank there. He then further explained the reason for his action thus:

> " The reason why I want you to sign the cheque is that your account will then loan to me the amount and this in turn will reduce my overdraft with the bank by a like amount and by doing so will reduce the amount of interest I have to pay the bank . . . I am enclosing therefore as mentioned above

> one cheque . . . for your signature Cherry Jackaman, one letter to the manager of the Bank of New South Wales and two slips for your specimen signature but please do not date the letter or the cheque, as these will not take effect until I open the account . . ."

And finally he said that it was his intention from time to time to pay more money into this account and, by so doing, "relieve his account of such amounts" if anything should happen to him suddenly. The daughter appears to have followed her father's instructions faithfully. On Dec. 1, 1938, she wrote to the respondent company authorising them to take instructions from her father in all matters regarding her trust and in the new account he was opening in her name in the Bank of New South Wales, and saying that the authority was to be a continuing one until withdrawn by her in writing. On Dec. 29, 1938, she wrote to the Bank of New South Wales authorising her father to operate on her account in the fullest possible manner, and, on Jan. 9, 1939, she wrote to the respondent company instructing them from then until further instructions from her to pay into her account at the bank any money coming in from her trust.

It is convenient at this stage to refer to two questions and answers on the trial of issues subsequently directed, viz.:

> "Question 4. After the opening of the said account on Dec. 29, 1938, did the testator have authority to withdraw money from time to time from the said account by drawing cheques thereon, without first obtaining the approval of the said Muriel Norah Jackaman to any particular withdrawal? A.—Yes.
>
> "Question 4A. If the answer to Question 4 is Yes, did the testator receive such authority prior to or at the time when he opened the said account or subsequently? A.—He received the authority prior to the time when he opened the account."

The account of the transactions may be continued in the words of the testator to be found in a memorandum addressed by him to his daughter, which was not dated but can be attributed to June or July, 1939. He refers to a letter from the respondent company and to the amount of income from the settlement and proceeds:

> "On Dec. 29 I opened an account with the Bank of New South Wales for Cherry Jackaman and this is the account I required your signature for and your authority to work on, which you sent me some time ago. You will see from the accompanying statement, which shows the position of this account of yours with my books, that the account was opened up just at the end of last year by my paying into it an amount of £5,025 of my own money. Since when, up to date, the trustees have paid in £1,552 12s. 10d. This is because I told them that whenever any funds from your investments reach £100 they should be paid into this account, so the total amount at present which has been paid into your account is £6,577 12s. 10d., but withdrawn from it has been £6,400 5s. This amount is made up of £5,000 which I withdrew (on the day I deposited the £5,025) together with refunds of £750, £150, £200, £300 to myself and an amount of 5s. for a cheque book.
>
> "The reason why I opened the account when I did was that this £5,025, a gift from me, would be free of probate if I live beyond three years of the date. All these withdrawals in my books naturally stand as a credit to you, which in the event of my dying my estate would have to pay them back before my nett worth for probate purposes was assessed.
>
> "It is necessary for these moneys to be 'loaned' to me so that I can make the advances to you through my London account per the medium of letters of credit and such like.
>
> "By doing it this way it removes any necessity for you to advise anyone you have an income, because by law a father can legally provide his children

> with living expenses, etc. Of course when I see you I can go further into details, but I guess you can understand there is no need at present for you to know. In fact the less you know the better in case you are asked any questions. The whole thing in fact is a gift from me and not an income."

The practice thus begun was continued. All the income of the trust fund was duly paid into the daughter's account at the bank, and no other money was paid into it. Up to Apr. 4, 1943, the testator drew out practically the whole of the moneys paid into the account and used by far the greater part of them for his own purposes. In December, 1945, a further sum of £2,000 was withdrawn and applied for the benefit of the daughter. It does not appear that she at any time herself drew on her account, nor did she revoke any authority that she had given before the testator's death which, as already stated, took place on Jan. 28, 1946. Though it was at one time disputed, it is now common ground that the sums thus withdrawn by the testator from the daughter's account are to be regarded as loans made by her to him without interest. There has been no finding of fact whether they were repayable at death, or on demand, or at some other time. In their Lordships' opinion, the proper inference is that they were repayable out of the testator's estate on his death, but this appears to them to be an immaterial circumstance for the purpose of determining this case.

On the footing that the sums in question were loans, the appellant, in assessing the death duty payable in respect of the estate of the testator, included therein (a) the sum of £38,162 13s. 7d., being the value at the date of his death of the trust property, and (b) the sum of £5,025 which he had paid into her bank account when it was opened on Dec. 29, 1938. The respondent company, as executor of the testator's will, claimed that both items were wrongly included; the contention in regard to £5,025 was abandoned, that in regard to the larger sum remained and remains. The appellant accordingly on Nov. 20, 1951, stated a Case under s. 124 of the New South Wales Stamp Duties Act, 1920-1940, by which he submitted for determination by the Supreme Court of New South Wales (inter alia) the question whether the said sum of £38,162 13s. 7d. should be included in the dutiable estate of the testator. On Mar. 10, 1952, the Full Court ordered that issues of fact agreed on by the parties should be filed and tried before a judge sitting in the equity jurisdiction without a jury, and that all findings of such judge should be made subject to the right of either party to argue their relevance. Issues of fact were duly agreed and filed and, after hearing oral evidence, the chief judge in equity made his findings. The questions and answers have, for the most part, already appeared expressly or implicitly in the narrative which has been given. But this further question and answer may be stated:

> "Issue 11: What were the motives of the testator in opening the said account and depositing therein the sum of £5,025 and what were his intentions as to the manner in which the said account should be operated upon?
>
> "Finding: The motives of the testator in opening the said account and depositing the said sum of £5,025 were his natural love and affection for the said Muriel Norah Jackaman and his intentions as to the manner in which the said account should be used were:—(a) To deposit therein an amount of £5,025 as a gift from him to the said Muriel Norah Jackaman. (b) To withdraw from that amount with her concurrence the sum of £5,000 as a loan from her to him. (c) To arrange that the [respondent company] should pay into the said account with her concurrence the income from the assets held upon the trusts of the deed executed by him in 1924. (d) To withdraw with her concurrence so much of that income as he from time to time wished to be used by him as he wished but subject to an obligation on his part to repay to her the amounts not applied for her benefit or at her request."

On June 1, 1953, the Full Court of the Supreme Court (Street, C.J., Owen and Clancy, JJ.) unanimously held that the sum in question was rightly included in the dutiable estate. The respondent appealed from this decision to the High Court of Australia which, by a majority, reversed it. The learned chief justice (Dixon, C.J.) and Fullagar, J., dissented, and it appears to their Lordships that their view is to be preferred.

Section 102 (2) (d) of the Stamp Duties Act, 1920-1940, has been the subject of much judicial discussion, as have been the corresponding provisions of the United Kingdom Finance Acts, but, in the present case, the difference of opinion in the High Court is due not to any difficulty in ascertaining the law but to that of correctly appreciating the facts to which the law is to be applied, a difficulty which, as has on more than one occasion been pointed out in the High Court, is not diminished by the transparent defects of the procedure by way of Case Stated. But, whatever limitations this procedure may impose on an investigation of the facts, it appears to their Lordships that the inference is not only open but inevitable that from 1939 onward the testator was (to use the words of the chief justice) " master of the income as it was paid over by the trustee ". He was, too, in a position to ensure that it was so paid over. His dual authority from his daughter which enabled him on the one hand to direct the trustee how her money should be disposed of and on the other to deal with it when it reached the bank, placed him in a position of unchallengeable control, unless and until it was revoked. It was not revoked. In these circumstances, the conclusion is irresistible that the daughter, who at material times was the sole beneficiary under the settlement, did not retain bona fide possession and enjoyment of the trust property to the entire exclusion of her father or of any benefit to him. Here it does not seem that any nice question arises whether it was from the subject-matter of the gift that the donor (the testator) was excluded or, alternatively, from any benefit, nor whether it is necessary that the benefit taken by the donor should impair the possession and enjoyment by the donee of the subject-matter of the gift. For here the design and the result of the arrangement were that the daughter's possession and enjoyment were reduced and impaired precisely by the measure of the testator's use and enjoyment of her income.

It was argued for the respondent company that this was not the way in which the whole transaction should be regarded. It was said that when the testator, armed with the authority given by the daughter's letter of Dec. 1, 1938, directed the trustee to pay the trust income to her bank account, he acted in a fiduciary capacity and that, when he drew on that account for his own purposes, he was not using the trust income but was borrowing from her money which had lost its identity. She chose, it was said, to lend it to him; she might equally well have lent it to a stranger. In the joint judgment of Kitto and Taylor, JJ. (in which Webb, J., concurred), this is the decisive point. It would, they say, be difficult to resist this conclusion (i.e., a conclusion favourable to the appellant) if the testator, when he took moneys out of his daughter's bank account, had taken them free from any obligation of repayment. In that case, though the same relationship of creditor and debtor had been established between the bank and the daughter, the trust income presumably retained its identity so far at least that, for the purpose of the section, it could not be said that the donee had retained exclusive possession and enjoyment of the subject-matter of the gift. But this does not appear to their Lordships to be a valid distinction. The transaction must be viewed as a whole and, since an integral part of it was that the testator, before the account was opened, was authorised to draw on it for his own purposes, it is irrelevant whether, when he did draw on it, he was, or was not, under any obligation to repay. Gift or loan, he for his own advantage used her money, paying no interest for it, and by so much reduced her enjoyment of what was her trust income and nothing else. The obligation to repay affected the quantum of the benefit obtained by him; it did no more.

If this is the right view of the transaction, as their Lordships think it is, the case falls into line with *O'Connor* v. *Comr. of Succession Duties* (*South Australia*)

(1) ((1932), 47 C.L.R. 601), the correctness of which decision has not been questioned.

For these reasons, which are substantially those of the chief justice and FULLAGAR, J., their Lordships are of opinion that this appeal should be allowed. The judgment of the High Court must be set aside and the judgment of the Supreme Court of New South Wales restored. Their Lordships will humbly advise Her Majesty accordingly. There will be no order as to costs.

Appeal allowed.

Solicitors: *Light & Fulton* (for the appellant); *Bell, Brodrick & Gray* (for the respondent company).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

PAVLIDES *v.* JENSEN AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), December 6, 7, 1955, May 3, 4, 14, 1956.]

Company—Shareholder—Minority of shareholders—Representative action by one shareholder allegedly on behalf of all except defendants—Alleged negligent sale by directors—Directors controlling majority of voting power—Acts not fraudulent or ultra vires—Whether shareholder entitled to maintain proceedings.

T.A.C. Ltd. had a capital divided into six hundred thousand ordinary shares of 10s. each and six hundred thousand deferred shares of 1s. each. Five hundred and seventy-eight thousand of the ordinary shares of T.A.C. Ltd. and the greater part of the deferred shares were held by another company. The individual defendants were directors of T.A.C. Ltd. and had been at the material times and were directors of, and a majority of the board of, the holding company. Holders of deferred shares of T.A.C. Ltd. were not entitled to receive notice of or to attend or vote at general meetings. In 1947 T.A.C. Ltd. sold an asbestos mine for £182,000 to another (i.e., a third) company in which T.A.C. Ltd. held twenty-five per cent. of the issued capital. The sale was not submitted to the approval of T.A.C. Ltd. in general meeting. The plaintiff, who was the holder of 1,980 deferred shares in T.A.C. Ltd. alleged that the sale was grossly negligent because it was at an undervalue, the true value being about £1,000,000. The plaintiff claimed on behalf of himself and all other shareholders of T.A.C. Ltd. except the defendant directors against the defendant directors and T.A.C. Ltd. a declaration that the directors were guilty of a breach of duty, and inquiry as to the damages caused to T.A.C. Ltd. by such breach of duty, and payment by the directors to T.A.C. Ltd. of the amount of such damages. The plaintiff did not allege that the sale was ultra vires, or that the directors had acted fraudulently. On a preliminary point as to the competence of the plaintiff, as a minority shareholder, to bring the action,

Held: the action was not maintainable by the plaintiff because, the sale of the mine being within the powers of T.A.C. Ltd. and no acts of a fraudulent character being alleged by the plaintiff, the sale could be approved or confirmed by the majority of shareholders.

Dictum of LORD DAVEY in *Burland* v. *Earle* ([1902] A.C. at p. 93) applied.

Dicta of SIR GEORGE JESSEL, M.R., in *Russell* v. *Wakefield Waterworks Co.* ((1875), L.R. 20 Eq. at pp. 480, 482), considered.

[As to representative actions in respect of corporate wrongs, see 6 HALSBURY'S LAWS (3rd Edn.) 445, para. 863, 447, para. 866; and for cases on the subject, see 9 DIGEST (Repl.) 622, *4150-4157*, 662, 663, *4382-4394.*]

Cases referred to:

(1) *Foss* v. *Harbottle*, (1843), 2 Hare, 461; 67 E.R. 189; 9 Digest (Repl.) 662, *4382.*

(2) *Russell* v. *Wakefield Waterworks Co.*, (1875), L.R. 20 Eq. 474; 44 L.J.Ch. 496; 32 L.T. 685; 10 Digest (Repl.) 1268, *8963*.

(3) *Atwool* v. *Merryweather*, (1867), L.R. 5 Eq. 464n.; 37 L.J.Ch. 35; 9 Digest (Repl.) 659, *4362*.

(4) *Burland* v. *Earle*, [1902] A.C. 83; 71 L.J.P.C. 1; 85 L.T. 553; 9 Digest (Repl.) 645, *4290*.

(5) *Mozley* v. *Alston*, (1847), 1 Ph. 790; 16 L.J.Ch. 217; 9 L.T.O.S. 97; 41 E.R. 833; 9 Digest (Repl.) 715, *4740*.

(6) *Menier* v. *Hooper's Telegraph Works*, (1874), 9 Ch. App. 350; 43 L.J.Ch. 330; 30 L.T. 209; 9 Digest (Repl.) 659, *4367*.

Preliminary Point of Law.

This was an application by the defendants in an action for the preliminary determination under R.S.C., Ord. 25, r. 2, before the trial of the action of the question whether on the facts alleged in the re-amended statement of claim the plaintiff was entitled to institute or maintain the action. The plaintiff brought the action on behalf of himself and all other shareholders of Tunnel Asbestos Cement Co., Ltd., except the defendant directors, and claimed a declaration that the defendant directors were guilty of a breach of duty, an inquiry as to damages and payment of the amount found on the inquiry. The plaintiff did not allege fraud or ultra vires. The facts appear in the judgment.

Charles Russell, Q.C., and *K. W. Mackinnon* for the defendants.
Raymond Walton for the plaintiff.

Cur. adv. vult.

May 14. **DANCKWERTS, J.**, read the following judgment: This is an application under R.S.C., Ord. 25, r. 2, for the determination of the following point of law:

> "Whether on the facts alleged in the re-amended statement of claim the plaintiff was and is entitled to institute or maintain this action."

The writ in the action was issued as long ago as June 19, 1950, and the events to which the action relates took place in 1947, but there is a history of amendments and previous applications with the object of putting an end to the action, into the details of which I need not go. The present statement of claim was delivered on June 29, 1950, and was amended on Dec. 19, 1950, in red ink, and was amended again in green ink on Feb. 27, 1956.

The defendants are Tunnel Asbestos Cement Co., Ltd., and three directors of that company. The action purports to be a minority shareholder's action, on behalf of the plaintiff and all other shareholders in the company except the three defendant directors. The capital of the company consists of six hundred thousand ordinary shares of 10s. each and six hundred thousand deferred shares of 1s. each. There were at one time redeemable preference shares also, but these have all been redeemed. The plaintiff is the holder of 1,980 deferred shares in the capital of the company, which have, therefore, a nominal value of £99. He has held these shares since 1936. The deferred shareholders have, after the payment of a dividend of five per cent. to the ordinary shareholders, an equal interest with the ordinary shareholders in the profits of the company; but by art. 74 of the company's articles the holders of the deferred shares are not entitled to receive notices of or to attend or vote in person or by proxy at any general meeting of the company. Five hundred and seventy-eight thousand of the ordinary shares and the greater part of the deferred shares are held by another company, called Tunnel Portland Cement Co., Ltd., of which the defendant directors are also directors.

The complaint of the plaintiff relates to a sale of an asbestos mine in Cyprus, which was acquired by the defendant company (according to the statement of claim) in 1936 for about £142,000 and was re-sold in 1947 for about £182,000 to Cyprus Asbestos Mines, Ltd., in which the company holds twenty-five per cent. of the issued capital. This sale was carried through by the defendant directors, and was not submitted to the approval of the defendant company in general meeting. The plaintiff alleges that the conduct of the defendant directors in effecting the sale was grossly negligent, because it was at an undervalue, the true value of the mine (according to the plaintiff's allegations) having been "somewhere in the neighbourhood of £1,000,000." If the allegations be true, this was, of course, a wrong to the defendant company for which the defendant company but no one else would be entitled to bring an action. The plaintiff claims that he is entitled to the assistance of the court in the manner of this action because (1) he is unable to requisition or attend a general meeting of the company under the terms of its articles and (2) the alleged delinquent directors are in a position to control the defendant company and so prevent the company taking any action against them. The method of control alleged by the plaintiff in this respect is stated in the latest amendment in green ink of para. 11 of the statement of claim as follows:

> "in that (i) at all material times a majority of the ordinary shares of the defendant company (which shares alone have at such times carried the right to vote at general meetings of the company) have been and still are held by the Tunnel Portland Cement Co., Ltd., and (ii) at all material times the three personal defendants have been directors of that company (the defendant Jensen being the chairman of the directors thereof) and together able as such to command a majority of votes at all meetings of the board thereof except between Apr. 13, 1953, and Dec. 31, 1954. The three personal defendants were and are thus in a position to control the exercise of the majority voting power attached to the said shares so held by Tunnel Portland Cement Co., Ltd."

The allegations of negligence or misfeasance are denied by the defendants, but the defendants have asked for the decision of the point of law in this case with the object of determining the action and avoiding the expense of the trial. I have to deal with this application on the footing that the allegations in the statement of claim are true. It is agreed that I ought not to allow myself to be affected either by the smallness of the plaintiff's apparent stake in the fortunes of the company or by any scepticism that I may feel as to the alleged magnitude of the defendants' delinquency.

It is contended on behalf of the defendants that the matters in respect of which the plaintiff complains, and in particular the question whether proceedings should be taken against the directors, is a matter of internal management of the company, with which, on the principle stated in *Foss* v. *Harbottle* (1) ((1843), 2 Hare, 461) the court normally will not interfere. It is contended further on behalf of the defendants that the present case—based on negligence of directors—is not within the few recognised exceptions to the above-mentioned rule, namely, cases of ultra vires, illegality, or fraud (including fraudulent oppression of a minority by the majority of the shareholders). Further, it is said, the case is not a case where the control of the voting power is in the hands of the directors of the company whose actions are impugned; for they are not the shareholders; the shares are held by another company of which the defendant directors merely happen also to be among the directors.

For the plaintiff, it is contended that the above-mentioned exceptions are not exhaustive, and the court will grant relief wherever justice requires on any ground, and particularly where an otherwise helpless minority shareholder is in need of assistance by the court. As regards control, it is contended that, except for an immaterial period, the defendant directors, being a majority of the directors of Tunnel Portland Cement Co., Ltd. (the holders of the vast bulk of the shares of the company) were in a position to stifle any attempt to institute proceedings in the name of the company against them.

A number of text-books and a very large number of decisions were cited to me, partly, of course, with the negative object of eliminating any precedent for the present action. In Buckley on the Companies Acts (12th Edn.), at pp. 168, 169, the position is stated as follows:

> " 1. If an act, which might be done with the approval of a majority, be done irregularly and without such approval, then the majority are the only persons who can complain, and the court will not entertain the complaint except at the instance of the majority, and in a proceeding in which the corporation is plaintiff. 2. In any proceeding brought to redress a wrong done to the corporation or to recover property of the corporation, or to enforce rights of the corporation, the corporation is the only proper plaintiff. Except that if (see r. 3, infra) an individual corporator sues the corporation to prevent it from doing something ultra vires, e.g. to restrain it from carrying out an agreement with a third party, and joins that third party as a defendant, then as a necessary incident to the first part of the relief claimed, the court will go on to direct the repayment of money, or restoration of property paid or disposed of under the agreement. 3. A single shareholder suing on behalf of himself and others, or suing alone and not on behalf, may make the company a defendant and may restrain the company and directors from doing an act which is illegal, or criminal, or ultra vires the corporation, and which a majority are consequently unable to affirm. A stranger who is not specially damaged cannot sue, neither, semble, can a shareholder, who has with knowledge received and retains part of the proceeds of the ultra vires act, except to restrain future ultra vires dealings. If, however, a majority are opposed to the illegal act, quaere whether the company should not be made, or at any rate joined, as plaintiff. 4. If the act complained of be not ultra vires, but be of a fraudulent character or a wrong done to the corporation, of which therefore the corporation alone upon the principles already stated can complain, yet if the alleged wrongdoers be themselves the majority or turn the scale of the majority, then the minority may sue by one shareholder on behalf of himself and others. So also, semble, if a bare majority are purporting to do or authorise something inconsistent with the articles, though not ultra vires. Semble, one of the majority should be joined as a defendant. 5. The above are general rules strictly adhered to, but not inflexible, and any case in which the claims of justice require that an action in which the company is not plaintiff should be entertained may be made an exception. But if the case is one in which the company ought to sue, then (subject to r. 6) the shareholder must exhaust all reasonable means of obtaining the institution of an action by the company before suing himself. But if the case be one of class 4, it is idle to say that a meeting ought to be called in which the alleged wrongdoers should not vote, for that would be trying the question of fraud as a preliminary step for ascertaining the frame of the action in which it is to be tried."

I need not read r. 6 and r. 7, which follow. Subject to the doubts which I am about to mention, this passage seems to me to be a fair statement of the law on this subject.

The phrases in the passage which I have quoted most favourable to the plaintiff in the present case are the reference to " a wrong done to the corporation ", as well as cases of fraud and ultra vires, and the statement that the general rules stated are not inflexible and any case in which the claims of justice require that an action in which the company is not plaintiff should be entertained may be made an exception. It would appear that these are based on statements by Sir George Jessel, M.R., in *Russell* v. *Wakefield Waterworks Co.* (2) ((1875), L.R. 20 Eq. 474). In that case Sir George Jessel said (ibid., at p. 480) of the rule in *Foss* v. *Harbottle* (1):

> " . . . that is not a universal rule; that is, it is a rule subject to exceptions, and the exceptions depend very much on the necessity of the case; that is, the necessity for the court doing justice."

Later, Sir George Jessel said (L.R. 20 Eq. at p. 482) (after referring to *Atwool* v. *Merryweather* (3) ((1867), L.R. 5 Eq. 464 n.):

> " As I have said before, the rule is a general one, but it does not apply to a case where the interests of justice require the rule to be dispensed with. I do not intend by the observations I have made in any way to restrain the generality of the terms made use of by the learned judge who decided the case of *Foss* v. *Harbottle* (1)."

These sound very general words, but judicial expressions must be read in the context in which they occur. In *Russell* v. *Wakefield Waterworks Co.* (2), a shareholder in an incorporated company filed his bill on behalf of himself and all other shareholders against the directors and the promoters of a Bill in Parliament for a rival purpose, alleging an illegal payment of the company's money to such promoters to buy off their opposition and praying that it might be replaced. On a demurrer, Sir George Jessel held that the action was not maintainable on the allegations made, as (though the word " corrupt " was used) there was no allegation that the payments were fraudulent or ultra vires. He gave leave to amend the bill, but it is plain that he regarded the demurrer as final, unless the bill should be amended to raise a claim of fraud or ultra vires, both of which are, of course, recognised exceptions in which an action can be brought by a shareholder. It is, therefore, doubtful whether Sir George Jessel's observations should be applied to any wider field than such recognised exceptions to the rule in *Foss* v. *Harbottle* (1).

The wide expressions used in Buckley on the Companies Acts and by Sir George Jessel in the above-mentioned case are not supported by the statement of the law by Lord Davey in the Privy Council case of *Burland* v. *Earle* (4) ([1902] A.C. 83) where he says (ibid., at p. 93):

> " It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss* v. *Harbottle* (1) and *Mozley* v. *Alston* (5) ((1847), 1 Ph. 790), and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of *Menier* v. *Hooper's Telegraph Works* (6) ((1874), 9 Ch. App. 350)."

These observations, indeed, indicate how the principles involved may easily be misstated. Lord Davey refers to an action by shareholders (instead of the company) being allowed " in order to give a remedy for a wrong which would otherwise escape redress ". But he points out that this is purely a matter of procedure, and he expressly confines the cases in which such proceedings can be brought to those in which the acts complained of are of a fraudulent character (in which he includes appropriation by a majority in fraud of the minority of the shareholders) or beyond the powers of the company. Where the act complained of is within the powers of the company and the intention of the majority of the shareholders, in other cases than these exceptions the action is not maintainable. Lord Davey adds ([1902] A.C. at p. 94) that:

> " Unless otherwise provided by the regulations of the company, a shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstance of his having a particular interest in the subject-matter of the vote."

On the facts of the present case, the sale of the company's mine was not beyond the powers of the company, and it is not alleged to be ultra vires. There is no allegation of fraud on the part of the directors or appropriation of assets of the company by the majority shareholders in fraud of the minority. It was open to the company, on the resolution of a majority of the shareholders, to sell the mine at a price decided by the company in that manner, and it was open to the company by a vote of the majority to decide that, if the directors by their negligence or error of judgment had sold the company's mine at an undervalue, proceedings should not be taken by the company against the directors. Applying, therefore, the principles as stated by Lord Davey, it is impossible to see how the present action can be maintained.

I have examined again all of the large number of authorities which were cited to me in the course of the argument. Though there are to be found, in one or two instances, observations which at first sight might justify a more liberal view of the extent of minority shareholders' rights, when taken out of their context, I do not think any of the authorities justify any conclusion other than that which I have reached.

That really disposes of the matter, and it is not really necessary to consider whether, on the allegations contained in the re-amended statement of claim, the defendant directors can be said to have such control of the company as to require (in any appropriate case) the allowance of an action by a minority shareholder. The defendant directors are not in fact the holders of the shares, the voting power of which would settle the company's decision. I think that it must be admissible in certain cases to go behind the apparent ownership of shares in order to discover whether a company is in fact controlled by wrongdoers—as, for instance, in the case where the shares were held by mere nominees, bound to vote as the owners required them to vote. In the present case, the shares are held by a company of which the defendant directors were, for the greater part of the material period, not only directors, but sufficient in number to out-vote the other directors, of the shareholding company. In this manner, it is said they could prevent the shareholding company passing any resolution which might result in proceedings being taken in the name of the company which is alleged to have been injured against them. I suppose the shareholders of the shareholding company could in general meeting decide differently and disagree with the decision of the directors of that company. I am not satisfied that the defendant directors are in such control of the company as is necessary to justify an action by a minority shareholder, but I need not decide this question.

In the result, I reach the conclusion that on the facts alleged in the re-amended statement of claim the action is not maintainable by the plaintiff, and that I ought to dismiss the action under R.S.C., Ord. 25, r. 3. *Action dismissed.*

Solicitors: *E. F. Turner & Sons* (for the defendants); *Stibbard, Gibson & Co.* (for the plaintiff). [*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

DAVIS *v.* CAREW-POLE AND OTHERS.

[QUEEN'S BENCH DIVISION (Pilcher, J.), March 19, 20, 21, 26, 1956.]

Domestic Tribunal—Excess of jurisdiction—Declaration for reinstatement of person aggrieved—Whether contractual relationship necessary.

The plaintiff was a livery stable keeper. Having been required to attend before the Stewards of the National Hunt Committee on the hearing of an allegation that a horse trained by him, an unlicensed trainer, had been entered to run in a steeplechase contrary to r. 97* of the National Hunt Rules, the plaintiff submitted to the jurisdiction of the stewards. He was declared to be a disqualified person. Subsequently the plaintiff brought this action for a declaration that the decision of the stewards was ultra vires and void and for an injunction restraining the defendants from treating the plaintiff as a disqualified person. The court granted the declaration and the injunction on grounds based on the evidence in the case and the true construction of the National Hunt Rules, and further,

Held: if an association purports to exercise jurisdiction over a person subject thereto, by way of disciplinary action, e.g., disqualification, and exceeds its jurisdiction, the court has jurisdiction to make a declaration and grant an injunction appropriate to the reinstatement of that person although there is no contractual link between him and the association, but

Semble: in the present case by submitting to the jurisdiction of the stewards the plaintiff came into contractual relation with the stewards, for he impliedly agreed to abide by their finding subject to any legal right which he might have to impugn it.

Abbott v. *Sullivan* ([1952] 1 All E.R. 226) considered.

[As to the conclusiveness of decisions of domestic tribunals, see 13 HALSBURY'S LAWS (2nd Edn.) 451, para. 510; and for cases on the subject, see 21 DIGEST 238, 239, *676-683*.]

Cases referred to:

(1) *Russell* v. *Norfolk* (*Duke*), [1949] 1 All E.R. 109; 12 Digest (Repl.) 693, *5321*.

(2) *Abbott* v. *Sullivan*, [1952] 1 All E.R. 226; [1952] 1 K.B. 189; 3rd Digest Supp.

(3) *Giblan* v. *National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K.B. 600; 72 L.J.K.B. 907; 89 L.T. 386; 43 Digest 118, *1226*.

(4) *Mogul S.S. Co.* v. *McGregor, Gow & Co.*, (1889), 23 Q.B.D. 598; 58 L.J.Q.B. 465; 61 L.T. 820; 53 J.P. 709; 42 Digest 968, *6*.

Action.

The plaintiff, Mr. Walter Davis, who was about forty-one years old, was a livery stable keeper carrying on his business at East Knoyle in Wiltshire. Over a period of years he had taken hunters at livery, and he had also prepared horses, which had been hunted from his own stables or from their owner's stables, for participation in point-to-point races at the end of the hunting season, but he had never held any licence or permit to train horses under the National Hunt Rules and until 1955 he had never engaged in the preparation or training of a horse for a race governed by the rules.

By r. 5 (2) of the National Hunt Rules, the Stewards of the National Hunt Committee have powers

> ". . . (c) to investigate any case which appears to them to require their interference . . . and to give a final decision thereon . . . (f) to impose any fine not exceeding one hundred sovereigns, to declare any person a

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* The relevant terms of r. 97 are printed at p. 525, letter B, post.

> ' disqualified person ', and to warn off any person from all courses where these rules are in force, for such period as they think fit."

By r. 97 a licence or permit to train is to be obtained by a person training a horse before the horse is qualified to run for any race governed by the National Hunt Rules. Rule 97 further provides:

> " Any person training or running a horse without having obtained a licence or permit [except in a specified case] shall be fined or declared a ' disqualified person ' at the discretion of the Stewards of the National Hunt Committee."

With the exception of r. 5 and rr. 163 to 167, the National Hunt Rules do not apply to point-to-point steeplechases, which are governed by regulations contained in an appendix to the National Hunt Rules. By reg. 11 of the Point-to-Point Regulations, a horse is not eligible to be entered for a point-to-point steeplechase if, since Jan. 1 of the material year, it has been trained by (a) a licensed trainer (unless he is the owner of the horse), or

> " (b) an unlicensed person (other than [its] owner, groom, or the proprietor of the stable from whence the horse has been regularly . . . hunted during the current seasons as required for a hunter's certificate)."

In February and March, 1955, a Mr. G. R. Lee entered his horse, Belljinks, which was kept at the plaintiff's stables, for Hunter Steeplechases at Worcester, run under the National Hunt Rules, but the meetings were cancelled owing to floods. In March, 1955, a Miss Spencer sent her horse, Prince Balbo, which she had hunted from her own stables, to the plaintiff's stables to be prepared for point-to-point racing, and the horse subsequently ran in six point-to-point races. In the middle of March, 1955, the Duchess of Newcastle, who was the master of a pack of hounds hunting on Salisbury Plain, sent a horse called King Henry's Road to the plaintiff's establishment, apparently because she desired to run the horse in point-to-point races and had no facilities at her own home for schooling or galloping the horse with other horses. During March, April and May, 1955, the horse, while in the plaintiff's care, was entered and ridden by the Duchess of Newcastle in five point-to-point races, three of which it won. She then decided to enter the horse in the West of England Hunters Steeplechase, which was to be run at Buckfastleigh, Devon, on May 30, 1955, under the National Hunt Rules, and, while the horse was still in the plaintiff's care, it was sent to Buckfastleigh to take part in the race. The plaintiff did not go to the meeting. The Duchess of Newcastle accompanied the horse and, on arrival at the course, signed a declaration form. The stewards of the meeting, after making inquiries of the Duchess of Newcastle, were satisfied that the horse had been trained by the plaintiff and, as the plaintiff had no licence or permit to train, they refused to allow the horse to run and reported the matter to the Stewards of the National Hunt Committee.

On June 13, 1955, Messrs. Weatherby & Sons, acting as secretaries to the Stewards of the National Hunt Committee, wrote the following letter to the plaintiff:

> " Dear Sir, The stewards of Buckfastleigh Whitsuntide Meeting have referred to the Stewards of the National Hunt Committee a case in which they refused permission for King Henry's Road, property of the Duchess of Newcastle, to run in the West of England Hunter Steeplechase at that meeting. The reason for this action was that the stewards were satisfied that the horse was trained by yourself, an unlicensed trainer, which is contrary to the requirements of r. 97 of National Hunt Rules. We are instructed to inform you that the Stewards of the National Hunt Committee will hear the case at this office . . . on Thursday, June 23, and your presence is required. You may bring with you any persons whose evidence you wish the Stewards of the National Hunt Committee to hear . . ."

A similar letter was sent to the Duchess of Newcastle, inviting her also to be present at the same time and place. On June 16 the plaintiff replied to Messrs. Weatherby's letter, stating that he would attend the meeting on the date indicated. On June 20 the stewards notified the Duchess of Newcastle that at the inquiry they proposed to inquire also into the arrangements which she had made for training King Henry's Road for point-to-point races.

At the inquiry the stewards dealt, not only with the plaintiff's alleged infringement of r. 97 of the National Hunt Rules in connection with King Henry's Road, but also with his alleged offences under reg. 11 of the Point-to-Point Regulations, in connection with King Henry's Road and Prince Balbo, and under r. 97 of the National Hunt Rules in connection with Belljinks. The plaintiff had received no notice that these other matters would be inquired into, but the facts regarding them were not in dispute. In their report of the inquiry which was subsequently published in the Racing Calendar, the stewards stated:

> " The Stewards of the National Hunt Committee held an inquiry on June 23, into the case reported to them by the stewards of the [Buckfastleigh] meeting. Having heard evidence they were satisfied that the Duchess of Newcastle had placed her horse, King Henry's Road, in the hands of [the plaintiff], an unlicensed person, to be trained for its engagements under National Hunt Rules. It transpired during the inquiry that [the plaintiff] had also trained Belljinks, owned by Mr. G. R. Lee, for engagements in hunter steeplechases. This was contrary to the requirements of r. 97. A further inquiry was held into the training of King Henry's Road and Prince Balbo, the property of the Duchess of Newcastle and Miss S. Spencer respectively, for races at point-to-point steeplechases. The stewards were satisfied that, although both of these horses were hunted by their owners from their own stables to obtain hunters' certificates, they were subsequently sent to [the plaintiff] to be trained for point-to-point steeplechases. The Stewards severely cautioned Mr. G. R. Lee and Miss S. Spencer for not making themselves acquainted with the rules under which their horses were to run. They considered the Duchess of Newcastle guilty of grave neglect in not making herself acquainted with the requirements of National Hunt Rules and point-to-point regulations and a fine of one hundred sovereigns was imposed. The stewards were satisfied that the [plaintiff] should have been aware of the requirements of both National Hunt Rules and point-to-point regulations for the training of horses. He was declared a disqualified person under r. 97."

No period of disqualification was specified.

The plaintiff brought an action against Sir John Carew-Pole, Mr. E. C. Paget and Lord Cadogan, as Stewards of the National Hunt Committee, on behalf of themselves and all other members of the committee, claiming (i) a declaration that the decision of the stewards declaring the plaintiff to be a disqualified person under r. 97 of the National Hunt Rules was ultra vires and void; (ii) an order ordering the defendants to expunge the name of the plaintiff from the list of disqualified persons; (iii) an injunction restraining the defendants, their servants or agents from treating the plaintiff as a disqualified person either under the National Hunt Rules or the National Hunt Regulations for point-to-point steeplechases; and (iv) damages. The claim for damages was subsequently dropped. It was contended on behalf of the plaintiff (a) that the inquiry by the stewards was not conducted in accordance with the principles of natural justice, having regard, in particular, to the fact that the plaintiff had been informed only that it was proposed to inquire into his dealings with King Henry's Road in relation to the Buckfastleigh hunter chase; (b) that in declaring the plaintiff a disqualified person the stewards were acting outside the powers conferred on them by their own rules, in that, on the face of their report, they had wrongly found him guilty of four offences (two breaches of r. 97 of the National Hunt Rules, one being in regard to King Henry's Road at Buckfastleigh, and the other in regard to the training of Belljinks; and two breaches of reg. 11 of the Point-to-Point Regulations, one being in regard to King Henry's Road, and the other in regard to Prince Balbo); and (c) that the stewards had not complied with the requirements of r. 5 (2) (f) of the National Hunt Rules, in that the period of disqualification had not been stated. It was not suggested that the stewards had acted otherwise than perfectly honestly and bona fide.

Counsel for the defendants submitted (a) that the stewards could not be shown to have acted contrary to the principles of natural justice; (b) that they complied with their own rules as properly construed; and (c) that, in the circumstances of the case, if it were found that the stewards had acted in accordance with the principles of natural justice, the plaintiff had no cause of action. It was conceded by counsel for the defendants that the plaintiff had committed no breach of r. 97 in regard to Belljinks.

In a considered judgment Pilcher, J., held (i) applying the dicta of Tucker, L.J., in *Russell* v. *Duke of Norfolk* (1) ([1949] 1 All E.R. 109 at p. 118), that the plaintiff had failed to show that the inquiry was not conducted in accordance with the principles of natural justice because, on the facts, the plaintiff was not prejudiced by the lack of notice; and (ii) that the stewards were not entitled to declare the plaintiff a " disqualified person " under r. 97 of the National Hunt Rules, because, under the rule, the sanction of disqualification could be imposed only on persons " training and running " a horse for a race governed by the National Hunt Rules and, on the facts, the Duchess of Newcastle, and not the plaintiff, was the person " running " King Henry's Road at Buckfastleigh on May 30, 1955, within the meaning of r. 97. His Lordship took the view that, on the face of their report, the stewards appeared to have declared the plaintiff a disqualified person under r. 97 because " he should have been aware of the requirements of both National Hunt Rules and point-to-point regulations for the training of horses." After pointing out that the stewards could not disqualify a person for that reason, His Lordship said that he had thought it right to construe the words " training and running " a horse, in r. 97, on the assumption that this, and not the ground stated in the report, was the reason why the stewards imposed the penalty of disqualification on the plaintiff. His Lordship further held (a) that, under r. 5 (2) (f) of the National Hunt Rules, the stewards were required to specify the period of disqualification, and (b) that neither the Point-to-Point Regulations nor any of the National Hunt Rules which applied to point-to-point races entitled the stewards to declare the plaintiff a disqualified person in respect of the alleged point-to-point offences committed by him. His Lordship then dealt with the third point submitted by counsel for the defendants, that, in the circumstances of the case, the plaintiff had no cause of action in respect of any of the remedies which he sought. This report deals only with the judgment on this point.

Gerald Gardiner, Q.C., and *Dennis Lloyd* for the plaintiff.
Cyril Salmon, Q.C., and *H. P. J. Milmo* for the defendants.

Cur. adv. vult.

Mar. 26. **PILCHER, J.,** after stating the facts and dealing with the main issues, as summarised above, continued: In the statement of claim the plaintiff, in addition to other relief, was claiming damages. In opening the case for the defendants, counsel intimated that, while he relied principally on the contention that the Stewards of the National Hunt Committee could not be shown to have acted contrary to the principles of natural justice, an issue which I have determined in his favour, he also contended that the stewards complied with their own rules as properly construed, an issue which I have found against him. He also submitted a third point, namely, that in the particular circumstances of this case, if it were found that the stewards had acted in accordance with the principles of natural justice, the plaintiff had no cause of action.

In his reply counsel for the plaintiff abandoned his claim for damages, and in the circumstances it may be that the point which counsel for the defendants desired to raise does not now arise. The point was as follows. Originally in this type of action it was necessary for the plaintiff to show, if he wished to succeed, either that some proprietary right had been infringed, or that the defendants had committed a tort such as a libel, or had been guilty of a conspiracy to injure the plaintiff, or had acted in breach of contract if the parties were linked by any contract express or implied. Counsel for the defendants submitted that in the present case it was impossible to imply any contract between the plaintiff and the National Hunt Committee or its stewards. He said that the plaintiff was a member of the public who was concerned with horses and that no contract could be implied between him and the defendants, because by concerning themselves with horses running in point-to-point races or in steeplechases, the plaintiff had brought himself into the category of persons whom the defendants under their rules were entitled to control and if necessary punish. Counsel boldly argued that, if no tort was alleged and no contract proved, the plaintiff had no remedy even if it turned out that the defendants had done him a grievous wrong.

This argument did not appeal to me. It is, no doubt, true to say that, where no tort is alleged and no contract express or implied is made out, no claim for damages can succeed in cases of this type. In this connection I refer to the decision of the Court of Appeal in *Abbott* v. *Sullivan* (2) ([1952] 1 All E.R. 226). In that case the plaintiff was a corn porter employed in removing grain from ships in London Docks. The corn porters, who belonged to the Transport and General Workers' Union, had a committee which safeguarded their interests and exercised considerable disciplinary powers over them. A complaint was lodged against the plaintiff, who was a ganger, by six members of the gang. At a meeting on Sept. 18, 1947, at which a divisional officer of the Transport and General Workers' Union, was present to advise, the corn porters' committee fined the plaintiff and ordered him to recompense the six complainants for loss of a day's work. On leaving the meeting the plaintiff struck the divisional officer while in the street. The divisional officer brought his complaint before the committee on Sept. 24, 1947, but the plaintiff refused to attend the meeting on the ground that the matter was not within the committee's jurisdiction. The committee, however, made an order which resulted in the plaintiff's loss of his position as a corn porter. An application by the plaintiff for reinstatement was only granted on July 12, 1948, subject to a satisfactory undertaking being entered into by the plaintiff. On Oct. 15, 1948, the plaintiff brought an action claiming, among other things, damages against the first two defendants as members of the corn porters' committee, on the ground that the committee had exceeded its jurisdiction by the resolution of Sept. 24, 1947, against the trade union, and against the fourth defendant, the divisional officer, for procuring the committee's ultra vires resolution. Croom-Johnson, J., made declarations that the resolution of Sept. 24, 1947, and the condition in the resolution of July 12, 1948, were not within the jurisdiction of the committee, but refused to grant damages against any of the four defendants. The plaintiff appealed, and the defendants cross-appealed against the declarations. Before the appeal and cross-appeal were heard, the corn porters' committee passed an unconditional resolution which resulted in the plaintiff's restoration to being a corn porter and made the question in regard to the resolution of July 12, 1948, academic. The Court of Appeal (Sir Raymond Evershed, M.R., and Denning and Morris, L.JJ.) held that the committee's resolution of Sept. 24, 1947, was ultra vires and that no action lay against the trade union on any ground. It was further held by Sir Raymond Evershed, M.R., and Morris, L.J.

A (DENNING, L.J., dissenting), that in acting outside their jurisdiction the committee had not acted in breach of contract, and that an order for damages could not be made against the first two defendants for the committee's ultra vires resolution or against the fourth defendant for inducing the committee to make the resolution.

The principal matter dealt with in the judgments of the court related to the B question whether it could properly be said on the facts of that case that any contract could be implied between the plaintiff and any of the defendants which would enable the plaintiff to recover damages against such defendants or any of them. SIR RAYMOND EVERSHED, M.R., and MORRIS, L.J., took the view that no contract could be implied and, therefore, no damages were recoverable. DENNING, L.J., took a contrary view. CROOM-JOHNSON, J., in the court below C had made certain declarations, one of which was that

> "as and from June 14, 1948, at latest the plaintiff was entitled to be reinstated on the corn porters' list or register with an opportunity to regain his former position as ganger in accordance with the normal procedure within the industry pursuant to the resolution of the said Area Emergency D and General Purposes Committee of that date."

MORRIS, L.J., said that he could see no objection to this declaration, although the necessity for the declaration had by that time become academic because the plaintiff had in fact been reinstated. SIR RAYMOND EVERSHED, M.R., took a similar view, and it therefore appears that the majority of the court would, if necessary, have been prepared to hold in that case that, although E there was no contractual link between the plaintiff and the corn porters' committee, none the less, the committee having purported to remove his name from the list of corn porters, the court had jurisdiction to declare that he should be reinstated on the list. The case therefore is one which, although that particular decision may not have been necessary and had become academic, none the less shows that the majority of the Court of Appeal, in a case where there was F no contractual link between the plaintiff and the committee, assented to the view that the court had jurisdiction to make the type of declaration there asked for, namely, that the corn porters' committee, in purporting to do what they had done, had exceeded their jurisdiction.

I should like to read a passage from the dissenting judgment of DENNING, L.J., in that case, because it is interesting and instructive. Dealing with the question G of damages—which is not, of course, before me now—DENNING, L.J., said ([1952] 1 All E.R. at p. 231):

> "Is the plaintiff entitled to damages for the ultra vires action of the committee? The judge thought not. He said he could not see any legal peg on which to hang an award of damages. I should be sorry to think that, H if a wrong has been done, the plaintiff is to go without a remedy simply because no one can find a peg to hang it on. That would be a reversion to the days when a man's rights depended on whether he could fit them into a prescribed form of action, whereas in these days the principle to be applied is that where there is a right there should be a remedy. It has been said by high authority that it is an actionable wrong for any man intentionally I to injure another without just cause or excuse: *Giblan* v. *National Amalgamated Labourers' Union of Great Britain & Ireland* (3) ([1903] 2 K.B. at p. 620), per ROMER, L.J.; *Mogul S.S. Co.* v. *McGregor, Gow & Co.* (4) ((1889), 23 Q.B.D. at p. 613), per BOWEN, L.J. If this is correct, there can be no doubt that the conduct of the corn porters' committee and Mr. Platt was an actionable wrong, for they intended to deprive the plaintiff of his livelihood, they succeeded in doing so, and they had no just cause or excuse for their action, because they should have known it was ultra vires. But I do not think that this wide proposition has yet been accepted into our law.

> There is, however, a narrower proposition which does seem to me to fit the case. It is this, that if the members of a tribunal take it on themselves to punish a man for real or supposed wrongdoing when they know or have the means of knowing that they have no jurisdiction in that behalf, then they are liable to him for any damage so caused even though they were not actuated by malice. But if it is a case where, on the facts as known to them, they did have jurisdiction, then they are not liable for the erroneous exercise of that jurisdiction, at any rate not unless they were actuated by malice. The form of remedy varies."

The learned lord justice proceeded to deal with the various types of case, starting with the case where the domestic tribunal or the quasi-domestic tribunal is acting under statutory power.

A glance at the statement of claim in this case will show how the learned pleader has done his best to link the plaintiff and the defendants by contract. While admiring his ingenuity, I am not prepared to hold that any implied contract could properly be inferred, at any rate until the plaintiff received the summons to attend the inquiry and submitted himself to the jurisdiction of the stewards. In *Abbott* v. *Sullivan* (2) it will be remembered that the plaintiff had refused to attend the tribunal, saying that they had no jurisdiction. In the present case the plaintiff has submitted to the jurisdiction of the Stewards of the National Hunt Committee, and, at least from the moment when he did so, impliedly agreed to abide by their finding, subject to any legal right which he might have to impugn it. From that moment it seems to me that he was in contractual relation with the Stewards of the National Hunt Committee. In those circumstances, if counsel for the plaintiff had not decided (and, I think, he decided wisely) to waive his claim for damages, he might have been entitled to recover damages. If it be necessary that the parties should be in contractual relationship (and I think that it follows from *Abbott* v. *Sullivan* (2) that, where no damages are claimed, it is not necessary), then it seems to me that there is a great deal to be said for the proposition that, once the plaintiff had submitted to the jurisdiction of the Stewards of the National Hunt Committee, they were impliedly linked by contract, and linked in such a fashion that it would certainly be inequitable, and, I think, wrong, that the defendants should be entitled to say that the plaintiff had no cause of action against them. I accordingly grant the plaintiff the declaration, the order and the injunction which he seeks, and order that he have the costs of the action.

Judgment for the plaintiff.

Solicitors: *Rider, Heaton, Meredith & Mills,* agents for *Burridge, Kent & Arkell,* Shaftesbury (for the plaintiff); *Charles Russell & Co.* (for the defendants).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

THE TIMANDRA.

OWNERS OF STEAMSHIP OR VESSEL GEORGIA *v.* OWNERS OF MOTORSHIP OR VESSEL TIMANDRA.

[Probate, Divorce and Admiralty Division (Willmer, J.), April 25, 26, 27, 1956.]

Shipping—Navigation rules—River Thames—Risk of collision when approaching or rounding a point—Port of London River Bye-Laws, 1938, *bye-law* 42 (*a*).

The Georgia, a vessel of 2,292 tons gross, was proceeding down the River Thames on a flood tide on her proper, starboard, side of the river. When approaching Jenningtree Point, a gradual bend in the river, she passed two larger ships coming up river and saw beyond the point the Timandra, a vessel of 499 tons gross, also coming up river. Having passed the two larger ships the Georgia had nothing else of materiality to consider except the Timandra, which was coming up river but on her wrong side. The Georgia starboarded slightly round the point, and, when the Georgia and the Timandra were less than three cables apart, the Timandra, although there was room to pass clear on the starboard side, altered course to starboard. Notwithstanding that the Georgia put her engines full speed astern, she and the Timandra collided. The plaintiffs, owners of the Georgia, claimed damages against the defendants, owners of the Timandra, who counterclaimed for damages alleging that the plaintiffs were negligent in that, among other things, since there was at all material times a risk of collision it was the duty of the Georgia under bye-law 42 (a)* of the Port of London River Bye-Laws, 1938, to stop and wait above the point, bearing in mind that she was proceeding against the tidal stream.

Held: although the meaning of bye-law 42 (a) was that a ship must be stopped (if necessary to avoid collision) so as not to round a sharp bend simultaneously with a vessel navigating with the tidal stream, yet, as the Georgia (the down-coming vessel) was entitled to assume that the Timandra being on the wrong side of the river would get over to the proper side in good time and as the river was broad and the curve of the bend was gradual, there was no such risk of collision as brought bye-law 42 (a) into play for so long as the Timandra could have got over to her proper side of the river; on the facts the risk of collision thus arose at a late moment and the Georgia had not waited too long before taking emergency action and accordingly the collision was solely due to the improper navigation of the Timandra.

Observations of Lord Phillimore in *S.S. Hontestroom* v. *S.S. Sagaporack, S.S. Hontestroom* v. *S.S. Durham Castle* ([1927] A.C. at pp. 55, 56) applied.

[As to Thames rules as to passing points in river, see 30 Halsbury's Laws (2nd Edn.) 799, note (s); and for cases on the subject, see 41 Digest 764, 765, *6170-6176*.]

Cases referred to:

(1) *The Libra,* (1881), 6 P.D. 139; 45 L.T. 161; 41 Digest 764, *6172*.

(2) *The Margaret,* (1884), 9 P.D. 47; 53 L.J.P. 17; 50 L.T. 447; *on appeal,* sub nom. *Cayzer* v. *Carron Co.*, (1884), 9 App. Cas. 873; 41 Digest 764, *6170*.

(3) *S.S. Hontestroom* v. *S.S. Sagaporack, S.S. Hontestroom* v. *S.S. Durham Castle,* [1927] A.C. 37; 95 L.J.P. 153; 136 L.T. 33; 41 Digest 765, *6176*.

Action.

In this case the plaintiffs claimed and the defendants counterclaimed damages in respect of a collision between the plaintiffs' ship the Georgia, and the defendants' ship the Timandra.

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* The text is printed at p. 534, letter F, post.

On Jan. 15, 1953, the Georgia, of 2,292 tons gross, was in the River Thames A in the course of a voyage from the London docks to Copenhagen. Proceeding down river in the flood tide she sighted the Leicestershire followed by the Psara proceeding up Erith Reach. Astern of those two ships was the Timandra of 499 tons gross, also coming up river. The Georgia passed the Leicestershire and the Psara and then collided with the Timandra off Jenningtree Point, the stern of the Georgia colliding with the port bow of the Timandra. Both B vessels were in charge of river pilots. The plaintiffs now claimed damages for the negligence of the defendants. The defendants counterclaimed damages against the plaintiffs on the ground of their negligence, alleging inter alia that the plaintiffs failed to comply with bye-law 42 (a) of the Port of London River Bye-Laws, 1938, whereby since there was at all material times a risk of collision, it was the duty of the Georgia to hold back and wait above the Point, bearing C in mind that she was proceeding against the tidal stream. The tide was flowing at two to two and a half knots and it was agreed that the joint speed of the ships at the moment of collision was about five knots.

J. V. Naisby, Q.C., S. Knox Cunningham and *B. C. Sheen* for the plaintiffs.

J. R. Adams, Q.C., and *J. B. Hewson* for the defendants.

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WILLMER, J., having reviewed the evidence, continued: I find that the Georgia was coming down river well over on her own side. I find that she passed the Psara and the Leicestershire about off the wood wharf, that is to say some distance above Jenningtree Point. At that time, the Leicestershire was about in the middle of the river, the Psara was on the south side of the deep-water channel, and the Georgia was about a hundred to a hundred and fifty E feet clear outside the Psara, which, in turn, would put her about a hundred and fifty feet off the lower barge-roads that lie outside the wood wharf. The Georgia's engines had been stopped some time before she passed the Psara and the Leicestershire, and at that time the Timandra was substantially below the Point in Erith Reach, something like half a mile away. The Timandra came up Erith Reach substantially the whole way well over on the south, that is to say, F the wrong side of the river. I am prepared to accept the evidence of her pilot that that was due initially to the fact of having to pass these tugs and craft at the bottom of the Reach. My inclination, however, is to say that, having done that, the Timandra deliberately stayed over on the wrong side of the river with an eye to the possibility of overtaking and passing the Psara and the Leicestershire. That, however, was prevented for her by the decision of the G Psara to use that opportunity for overtaking the Leicestershire. In order to do that, the Psara did, as is both sides' case, pull out to port in order to get past the Leicestershire, and I entertain no doubt that, seeing that manoeuvre on the part of the Psara, the pilot in charge of the Timandra was persuaded that he would have to abandon for the time being the project of himself overtaking and passing. In those circumstances I am prepared to accept that the H Timandra did reduce her way in Erith Reach for the purpose of remaining astern of the Psara and the Leicestershire.

After that I find that, for some reason or another, the head of the Timandra fell off to port. It cannot, in view of the pilot's evidence, have been due merely to the loss of steerage way; it could have been due to a deliberate act of porting, although it is denied by the pilot that any order was ever given to port I the wheel. But, whatever the cause, I find as a fact that she fell off to port sufficiently to open her green light to those on board the Georgia. One effect of that, of course, was to bring her still further over to the southward or wrong side of the river. It seems to me, in those circumstances, that the pilot of the Georgia was well-founded in saying that the Timandra got so far over as to make it possible, without danger, to pass green to green. Moreover, I do not think that his assumption that the Timandra might be bound for a wharf on the south side was, in the circumstances, unjustified. I find that the Georgia did sound a signal of one short blast, as she alleges she did, and I can see no reason why, if a good look-out was being kept, that signal should not have been heard by the pilot of the Timandra. Moreover, I accept the evidence of the Georgia that she did, as she says, begin to starboard round this bend. I do not accept the defendants' case that she ran straight on without starboarding. This limited starboarding which I find took place on the part of the Georgia was necessary for the purpose of following the bend in the river, and although at that time, as I find, the green light of the Timandra was in view on her starboard bow, I do not find, especially after consulting the Elder Brethren, that there was any danger in this act of starboarding on the part of the Georgia, so long as it was limited to what was necessary for following the normal bend in the river.

It was only after the Georgia had starboarded and had sounded her short blast that the Timandra replied with her short blast. The pilot of the Georgia estimated that at that time the vessels were some three cables apart, and it is his case that he immediately put his engines full speed astern. I am not prepared to find that the distance was as great as three cables. Though it is not possible to be precise about it, all the indications are that the distance separating the ships was more like half that distance, certainly not much more than that. There is no doubt that the action of the Timandra in starboarding at that moment and sounding the short blast did produce a situation of immediate danger. There is no doubt in my mind that the situation was promptly appreciated by the Georgia and that her engines were promptly put full speed astern. Moreover, I find that it was only after that that the Timandra woke up to the situation of danger, and I find, as was indeed her own evidence, that it was not until after the Georgia had gone full speed astern and sounded her three short blasts that the Timandra took the corresponding action. The collision happened, as it seems to me, probably in something less than a minute after that. If the time interval had been substantially more, I cannot think that the residual joint speed would have been as much as five knots. With regard to the apportionment of that speed, nobody, I think, can be precise; but I am satisfied that at the time of the collision both vessels must have had some headway, and my inclination is to say that the Timandra probably had rather more than the Georgia. It follows from what I have already said that in the result, I must substantially accept the plaintiffs' place of collision: I find that it did happen, as the plaintiffs say, within something like a cable of the light at Jenningtree Point. I am not satisfied that it happened above the Point, as the plaintiffs say, but I doubt whether that is relevant because, within a certain distance up and down the river off the Point a vessel can in any case be fairly described as being "off" the pitch of the Point, and I think that in the present case the collision did happen in a position which can fairly be described as being "off" the pitch of the Point.

In those circumstances I do not think that I need waste much time in discussing the navigation of the Timandra. It seems to me that she was at fault almost from beginning to end. She was on the wrong side of the river, she persisted in keeping on the wrong side of the river, and she persisted to such an extent that she did reach a position of safety, in my judgment, in which the vessels could have passed green to green. It was open to the Timandra, at almost any time in the course of her navigation of Erith Reach, to take appropriate action and to get over on to her proper side of the river. In my judgment, the down-coming vessel was entitled to expect that the Timandra, although originally seen to be on the wrong side of the river, would take appropriate steps under bye-law 38* of the Port of London River Bye-Laws, 1938, to get over on to her own side. That is a circumstance which becomes material to consider when I have to deal with the Georgia's navigation. For the moment, all I am concerned with is to underline the fact that the Timandra was not only wrong in getting on to the wrong side, but also failed in her duty to correct that error by getting over to her proper side in good time. Moreover, at the last it seems to me, accepting, as I do, the plaintiffs' case, that the Timandra was guilty of really a suicidal act in starboarding after she had opened her green light to the Georgia. I do not wish to be thought in any way to be recommending the desirability of even small vessels passing green to green in defiance of the rule, but it does seem to me that, thanks to the initial fault of the Timandra, these vessels did reach a position of safety in which they could have passed green to green, and that position of safety was determined by the starboard wheel action of the Timandra. That action, in its turn, was, I think, dictated by the fact that the Timandra was, as I have already said, not keeping a good look-out. It seems to me to be an obvious inference, from the evidence given by the pilot of the Timandra, that he himself had not fully observed what the Georgia was doing, and that he was not getting much assistance from anybody else in that respect. He seems to have been completely taken by surprise by what the Georgia did, although, as I have found, she was not doing anything which was in the least out of the ordinary course of navigation. As to the Georgia, the problem is much more difficult. The suggestion that she either ported or ran on on her Half-way Reach course, so as to get out into the middle of the river, I reject on the facts. I am satisfied that she was, at all material times, on her own proper side of the river and that she took the proper helm action as required by the configuration of the land to keep on her own side of the river.

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* This bye-law reads: "Every steam vessel proceeding up or down the river shall, when it is safe and practicable keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel . . ."

It seems to me, in those circumstances, that the only point which can be made against the Georgia is the suggestion that, being a ship navigating against the tidal stream, she was in breach of bye-law 42 (a) of the Port of London River Bye-Laws, 1938. That bye-law and its predecessors have been considered on a number of occasions in this court during the last century. The wording as it stands today is:

> " Every steam vessel navigating against the tidal stream shall if necessary in order to avoid risk of collision ease her speed or stop on approaching or when rounding a point or sharp bend so as to allow any vessel navigating with the tidal stream to pass clear of her."

Two points seem to me to arise in relation to that: first, what does the bye-law mean, and, secondly, does it apply to the facts of the present case ? Counsel for the plaintiffs argued that all that was required of a ship going against the tidal stream, in order to comply with the bye-law, was that she should stop her engines. No doubt he said that because, on the evidence in the present case, that is what the Georgia did. The question arises whether the word " stop " means stop the engines, or whether rather it should be interpreted as meaning stop the ship.

Having looked at a number of the older cases which arose under the predecessor to this bye-law, there is no room for doubt that the court has always interpreted the bye-law as meaning stopping the ship. The purpose of the bye-law has frequently been described, in different words but in the same sense, as being to prevent the possibility of the ship going against the tide reaching the point at the same time as the ship which is going with the tide. That, I think, is the effect of what was said many years ago by BRETT, L.J., in *The Libra* (1) ((1881), 6 P.D. 139). It is, I think, equally the effect of what was said by LORD WATSON in *The Margaret* (2) (sub nom. *Cayzer* v. *Carron Co.*) ((1884), 9 App. Cas. 873). I do not take up time by reading what was said in those cases because it seems to me that the matter is summed up neatly in the more recent case of *S.S. Hontestroom* v. *S.S. Sagaporack, S.S. Hontestroom* v. *S.S. Durham*

Castle (3) ([1927] A.C. 37) in the words used by LORD PHILLIMORE, himself, I suppose, one of the greatest possible authorities on a matter of this sort. In the course of his speech he said ([1927] A.C. at p. 55):

> " Having been long familiar with this rule, I have thought that its object was to prevent the simultaneous passing of a point by vessels, one bound up and the other down, if such simultaneous passing be dangerous, and that the expressions in the rule about navigating against or with the tide, were only inserted because, to prevent this simultaneous passing, one has to give way and the other to come on . . ."

In the light of that statement it seems to me that I must come to the conclusion that, if the bye-law applies at all, the requirement which is involved is a requirement that the ship shall be stopped, if necessary to avoid risk of collision, and stopped so as not to reach the point simultaneously with the up-coming vessel. That means to say that, if I were to hold in the present case that the bye-law applied, then prima facie I should have to say that the Georgia was in breach of it because, having regard to my finding with regard to the place of collision, she had not in fact held back or stopped above the pitch of the Point.

However, I think that one must also consider whether, in the circumstances of the present case, the bye-law applies; and I observe that in *The Hontestroom* (3) LORD PHILLIMORE went on (ibid., at p. 56), to say this, which I think is not immaterial in a case such as the present:

> " . . . a witness in the course of the case tried to throw some ridicule upon the application of the rule by saying that, if he accepted that application, he would never get down the river. There is, of course, no such meaning in the rule. Vessels may constantly pass each other at a point. If the curve is gradual, if the channel is wide, if it is not encumbered by any navigation except the two vessels which are meeting each other, if the vessels are not of great size, perhaps with any one of these conditions, there is no danger of collision. Each vessel can keep in her proper water, and there is no necessity to stop and wait."

It is perfectly true that since LORD PHILLIMORE said those words the wording of the rule has been altered, but I am far from suggesting that its general effect or its purpose have been in any way altered. Applying that, it can fairly be said that in the present case, as opposed to *The Hontestroom* (3), the river is broad, the curve is gradual and the ships concerned are not of great size. Both the Georgia and the Timandra were small, handy, vessels, and they were, at the material time, in a part of the river where there was plenty of room. It may be said that the present is a case, such as was envisaged by LORD PHILLIMORE, where the river was encumbered by navigation, having regard to the presence of the Psara, the Leicestershire and, I suppose, the tugs attendant on them. It may be said that that fact makes all the difference, and in that connection it is fair to point out, as was pointed out by counsel for the defendants in his forceful argument, that the pilot of the Georgia himself said that he recognised that the presence of the Psara and the presence of the Timandra, both of which were in view at the same time, did together constitute to his mind some risk of possible collision. I have given careful consideration to that point, but I think that the answer to it is to be found in the fact that the two large vessels, the Psara and the Leicestershire, had been safely passed by the Georgia substantially above Jenningtree Point. From that time onwards, the Timandra still being a substantial distance away, the Georgia had nothing else of materiality except the Timandra to consider in relation to her navigation.

In those circumstances, was the presence of the Timandra coming up, as she was seen to be coming up, on the wrong side of the river, a circumstance producing such a risk of collision as to call into play bye-law 42 (a), and to make it necessary, in order to avoid risk of collision, to stop the Georgia above the pitch of the Point ? It is, I think, important to observe that the rule only applies if such action is necessary to avoid risk of collision. One thing is clear, namely that, in so far as there was a risk, it was a risk of the Timandra's own making: it was her wrongful action in being on the wrong side, staying on the wrong side and coming up on the wrong side, that produced such risk of collision as there was. I appreciate that that in itself does not answer the question whether the bye-law applies; indeed, words of my own have been quoted to me this morning to the effect that it is no answer to say that the risk of collision, if such exists, is produced by the fault of the other ship. But did the risk of collision exist, within the meaning of the rule, at any time when it can fairly be said the Georgia was required to act ? It seems to me that the proper approach to the matter is to remember the well-worn maxim, that every ship is entitled up to a point to assume that every other ship will do the right thing. There must be many occasions when ships navigating the Thames observe that other ships are momentarily on the wrong side of the river. That necessarily happens in the ordinary course of navigation. Until the contrary is proved, however, it seems to me, and this has repeatedly been said by this court, that every ship is entitled to assume that the other ship, although for the moment on the wrong side of the river, will get over in good time on to her own proper side. Unless ships were entitled to act on some such assumption as that it would be impossible to carry on navigation in the river at all.

If that be right, then I think it follows that, for so long a period as it lay within the power of the Timandra, by taking the proper action, to get over to her right side of the river, it cannot be said that there was any such risk of collision as would bring this bye-law into play. On the facts which I have found—and, indeed, it must be obvious having regard to the size of the ships—the Timandra could have determined any danger by getting over on to her own side of the river up to a very late moment. I say that, bearing in mind that she is a small and handy ship. It seems to me that up to that very late moment the Georgia was entitled to expect that she would do so. After that moment passed it seems to me to follow from the findings of fact which I have already stated that that danger no longer existed in the present case because the Timandra had by then got so far over to the south side of the river that the vessels could in fact pass without danger starboard to starboard, provided that the Timandra did not then starboard. In those circumstances it seems to me that risk of collision, in the sense which is meant by this rule, only arose at a very late moment. I will not say that it arose only when the Timandra took her action of starboarding at the last moment; I think that it may be said that it arose shortly before that, when the last safe moment at which the Timandra could have starboarded back to her own side of the river had passed. When, in the judgment of a competent pilot, that moment had passed, that is to say, when it was no longer without danger for the Timandra to do the right thing, then I think bye-law 42 (a) would come into play. If that be right, I think it really follows, on the facts of the present case, that bye-law 42 (a) does not add anything to the ordinary requirements of good seamanship. I say that because it would be the duty of a competent pilot on board the Georgia in any case, in such circumstances, to take drastic action to reduce his way, and that, whether or not he was approaching a sharp bend, and whether or not he was navigating against the tide.

That is the way in which I have put the matter to myself, and it seems to me that the question to be determined is whether, in all the circumstances, the Georgia waited too long before taking the emergency action which she did in fact take. It is, of course, very easy to be wise after the event. It is easy enough to say that the fact of a collision happening proves that the Georgia did not act soon enough. But one has to look at these things through the eyes of the man who was on the bridge at the time and to size up the problem which presented itself to him. That, I suppose, is one reason why a judge of this court is given the inestimable advantage of having two Elder Brethren of the Trinity House to advise on matters of seamanship. I may say that I have taken full advantage of their presence in the present case to seek advice how the matter would appear to a pilot of competent skill on board the Georgia. The view which I have formed accords with the advice which the Elder Brethren have given to me, namely, that it would be quite impossible, in the circumstances of the present case, to find that the pilot of the Georgia was guilty of negligence in not reducing way more drastically or earlier than he did. In those circumstances I am not prepared to find any fault on the part of the plaintiffs. In my judgment, this collision was brought about solely by the improper navigation of the Timandra.

Judgment for the plaintiffs.

Solicitors: *Thomas Cooper & Co.* (for the plaintiffs); *Bentleys, Stokes & Lowless* (for the defendants).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

Re T. W. CUTTS (a bankrupt), *Ex parte* BOGNOR MUTUAL BUILDING SOCIETY *v.* TRUSTEE IN BANKRUPTCY.

[COURT OF APPEAL (Lord Evershed, M.R., Jenkins and Hodson, L.JJ.), April 19, 20, May 17, 1956.]

Bankruptcy—Fraudulent preference—Insolvent solicitor—Payment to most important client—Intention to prefer—Desire of debtor to obtain advantage for third party and for himself—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5 *c.* 59), *s.* 44 (1), *as amended by the Companies Act,* 1947 (10 *&* 11 *Geo.* 6 *c.* 47), *s.* 115 (3).

The bankrupt, a solicitor, was the director of a building society, the business of which was carried on from his office. One of his clerks was the secretary of the society, and from 1953 W., a solicitor employed by the bankrupt, was also a director of the building society. The bankrupt's firm transacted all the conveyancing business of the building society which was one of the firm's most important clients. At the beginning of 1953 the bankrupt sold a house belonging to him which was mortgaged to the building society for £3,000, and conveyed it to the purchaser free of the mortgage, handing over on completion a discharge executed by the building society in escrow for delivery against payment of the mortgage money; the bankrupt received the purchase money and applied it for his own purposes. In October, 1953, W. became aware that the bankrupt had not paid the mortgage money to the building society, and also that there were deficiencies on the firm's clients' accounts. W. did not then or at any relevant time inform the building society of the discharge of the mortgage. In November, 1953, W. gave the bankrupt six months' notice terminating his employment, and expressed the hope that the bankrupt would be able to repay the amount of the building society's mortgage. At the beginning of January, 1954, the Law Society inspected the bankrupt's books which led to an application dated Mar. 5, 1954, to the Disciplinary Committee to strike the bankrupt's name off the roll of solicitors. The Law Society was not at any relevant time aware of the bankrupt's fraud on the building society. On Mar. 12, 1954, the bankrupt (who was then unable to pay his debts as they became due) paid to the building society £3,000 together with interest. In April, 1954, W. entered into an agreement with the bankrupt that he would become the bankrupt's partner if the bankrupt were not struck off the roll or that he would acquire the firm's business if the bankrupt were struck off. On June 24, 1954, the name of the bankrupt was struck off the roll and on Sept. 6, 1954 (within six months of the payment to the building society), he was adjudged bankrupt on his own petition. His trustee in bankruptcy applied for a declaration that the payment to the building society of the £3,000 and interest was made by the bankrupt with intent to prefer the building society, his creditor, at a time when he was unable to pay his debts as they fell due, and was void against his trustee under the Bankruptcy Act, 1914, s. 44 (1) (as amended by the Companies Act, 1947, s. 115 (3))*.

Held (JENKINS, L.J., dissenting): the payment to the building society was fraudulent and void as against the trustee in bankruptcy by virtue of s. 44 (1) (as amended), because the bankrupt, although acting to some extent in collaboration with W. and possibly in some degree under W.'s influence, voluntarily made the payment with a view to preferring the building society over other creditors; and the intention to give preference to the building society was not negatived by the factor that to prefer the building society would give an advantage to W. and perhaps to the bankrupt.

Re M. Kushler, Ltd. ([1943] 2 All E.R. 22) considered.

Per JENKINS, L.J.: the view attributed to a majority of this court in the headnote to the report of *Re Cohen* ([1924] 2 Ch. 515) "that where a bankrupt in imminent expectation of bankruptcy voluntarily pays a particular creditor with the result of giving him a preference in fact, and the reason for such payment is unexplained, a prima facie case of fraudulent preference is established" is supported only by the judgment of SARGANT, L.J., and cannot be regarded as good law having regard to the observations on it made by LORD TOMLIN, with whom other Lords concurred, in *Sir William Henry Peat* v. *Gresham Trust, Ltd.* ([1934] A.C. at p. 262). See p. 545, letter G, post.

Appeal dismissed.

[As to the intent to prefer a creditor as an element in fraudulent preference, see 2 HALSBURY'S LAWS (3rd Edn.) 556-559, paras. 1103-1106; and for cases on the subject, see 5 DIGEST 864-871, *7218-7252*.

For the Bankruptcy Act, 1914, s. 44 (1) (as amended by the Companies Act, 1947, s. 115 (3)) see 2 HALSBURY'S STATUTES (2nd Edn.) 381.]

Cases referred to:

(1) *Re Cohen, Ex p. Trustee*, [1924] 2 Ch. 515; 94 L.J.Ch. 73; Digest Supp.

(2) *Peat (Sir William Henry)* v. *Gresham Trust, Ltd.*, [1934] A.C. 252; Digest Supp.

(3) *Re Kushler (M.), Ltd.*, [1943] 2 All E.R. 22; [1943] Ch. 248; 112 L.J.Ch. 194; 169 L.T. 17; 2nd Digest Supp.

(4) *Ex p. Taylor, Re Goldsmid*, (1886), 18 Q.B.D. 295; 56 L.J.Q.B. 195; 5 Digest 856, *7178*.

(5) *New, Prance & Garrard's Trustee* v. *Hunting*, [1897] 2 Q.B. 19; 66 L.J.Q.B. 554; 76 L.T. 442; *affd.* H.L. sub nom. *Sharp* v. *Jackson*, [1899] A.C. 419; 5 Digest 869, *7238*.

(6) *Ex p. Hill, Re Bird*, (1883), 23 Ch.D. 695; 52 L.J.Ch. 903; 49 L.T. 278; 5 Digest 853, *7165*.

(7) *Re Fletcher, Ex p. Suffolk*, (1891), 9 Morr. 8; 5 Digest 866, *7227*.

Appeal.

Appeal by the Bognor Mutual Building Society with leave of the Divisional Court of the Chancery Division sitting in bankruptcy from an order of the said Divisional Court (HARMAN and UPJOHN, JJ.), made on Dec. 12, 1955. On a motion in the Brighton County Court by the trustee in bankruptcy of Thomas Wintringham Cutts, His Honour JUDGE DUTTON BRIANT, Q.C., on Sept. 21, 1955, declared (among other things) that the payment by the bankrupt to the building society of £3,303 7s. 9d. on Mar. 12, 1954, which was made by him within six months before his adjudication, was made with intent to prefer the building society at a time when he was unable to pay his debts and was void against the trustee. An appeal by the building society to the Divisional Court was dismissed on Dec. 12, 1955.

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* The terms of the sub-section as so amended are printed at p. 545, letter C, post.

W. A. L. Raeburn, Q.C., and *M. Finer* for the building society.
Muir Hunter for the trustee in bankruptcy.

Cur. adv. vult.

May 17. The following judgments were read.

LORD EVERSHED, M.R.: The question in this appeal is whether a payment made on Mar. 12, 1954, of £3,303 7s. 9d. by the above-named debtor (whose adjudication occurred within six months thereafter, on Sept. 6, 1954) to the appellants, Bognor Mutual Building Society (whom I will hereafter generally call "the Society"), constituted what is commonly called a fraudulent preference within the scope of the Bankruptcy Act, 1914, s. 44 (as amended).

The facts of the case are fully set out in the judgment of JENKINS, L.J., which I have had the advantage of reading in advance; and JENKINS, L.J., has also recited extracts from the evidence given, on affidavit and orally, before the learned county court judge which I shall not take time by repeating. It will suffice, for the purposes of this judgment, to state the few essential facts with their respective dates.

The debtor, until he was struck off the roll of solicitors by order of the Disciplinary Committee of the Law Society on June 24, 1954, carried on at all material times the business of a solicitor in Bognor in Sussex. Among the clients of the debtor's firm the Society (which had been founded in the days of the debtor's father in 1909) was among the most important. Its business was at all relevant times conducted in and from the debtor's office. The debtor, as his father had been before him, became a director and the solicitor of the Society, capacities which he held at the time of the events shortly to be narrated. At that time also a clerk in the debtor's office, one Willmer, was the Society's secretary. There was also at that time as an assistant in the debtor's office Mr. R. C. Wintle, who had been admitted as a solicitor in 1950, and who was also appointed a director of the Society in February, 1953, about the same time as, or very shortly after, the sale by the debtor of the house originally called Greystones which was the occasion of the perpetration by the debtor of the fraud on the Society out of which this appeal has arisen. This house, being then subject to a mortgage in favour of the Society for £3,000, was sold by the debtor in January or February, 1953. For the purposes of completion to the purchaser, the debtor had obtained the execution of a discharge by or on behalf of the Society. It does not appear from the papers before us how this discharge was obtained or what form it took. But, in answer to inquiries which we made, we were informed during the hearing of the appeal that a discharge had been executed on behalf of the Society (not by the debtor himself or Mr. Wintle) as an escrow, and was in the debtor's hands, presumably as solicitor for the Society. On completion of the sale the debtor handed over the deeds, including the mortgage and its discharge, to the purchaser and received from him the purchase price. He did not, however, account to the Society for the sum due on the mortgage which he applied for his own purposes. He successfully concealed the fraud from the Society. Unhappily, this fraud was not the only one of the debtor's misdeeds. He had also for a substantial period failed to comply with the Solicitors' Accounts Rules and had misapplied considerable sums of his clients' moneys. These last-mentioned malpractices had come to the knowledge of the Law Society as a result of an investigation of his books conducted on the Law Society's behalf. That investigation had been completed one week before the payment challenged in these proceedings, and immediately on its completion the requisite application had been made to the Disciplinary Committee of the Law Society to strike the debtor's name off the roll. The Law Society was not then or at any relevant time aware of the debtor's fraud on the Bognor Mutual Building Society in regard to the mortgage on Greystones, nor was it at any relevant time aware of another fraud which the debtor had perpetrated on the Society which is briefly mentioned hereafter.

It is not now in doubt (it has been so found by the county court judge) that in October, 1953, Mr. Wintle became aware of the deficiencies on clients' accounts and of the debtor's misapplication of the money due on the Greystones mortgage. It is equally not in doubt and has been found that Mr. Wintle neither then nor at any other relevant time, though one of its directors, informed the Society of the facts as to the discharge of the mortgage. What passed between Mr. Wintle and the debtor from October, 1953, onwards is a matter to which much of the evidence was directed, but it is to my mind clear that the county court judge did not accept the evidence that Mr. Wintle had put pressure on or extracted promises from the debtor in regard to repayment of the £3,000 odd due to the Society. Mr. Wintle was also (necessarily) aware of the investigation carried out by the Law Society. He was aware of the result of that investigation in the first days of March, 1954, including the application that the debtor's name should be struck off the roll. At the beginning of April, 1954—that is, after the payment challenged in these proceedings had been made—Mr. Wintle entered into an agreement with the debtor in somewhat peculiar form providing that Mr. Wintle should either become the debtor's partner or acquire the firm's business—the alternatives depending on whether, as a result of the pending application to the Law Society, the debtor was or was not struck off the roll. It is, however, to be noted that Mr. Wintle's participation in the firm had been under discussion for several years, and it was not seriously suggested or argued—and certainly not found—that the payment to the Society was made as a condition of Mr. Wintle's execution of this document in April, 1954.

To one other matter I wish to refer since it does not in certain respects seem to me to be without significance. The matter of the discharge of the mortgage was not the only fraud which the debtor executed on the Society. In 1937 the debtor had obtained from the Society £850 avowedly for the purpose of advancing it on the Society's behalf to one Collis on mortgage. The debtor in fact applied it for his own purposes. This fraud—the details of which do not now matter—was successfully concealed both from the Society and from the Law Society. It came to light only on its discovery by Mr. Wintle at the end of June, 1954, and it was repaid (with all interest due) to the Society in July, 1954. When the present application came before the county court judge it included a claim also to set aside the July repayment as having been (like the payment now the subject of this appeal) a fraudulent preference. But with regard to the July repayment it is to be noted that the county court judge accepted the evidence put before him by the debtor and Mr. Wintle to the effect that it had been made under pressure and threats of criminal proceedings on the part of Mr. Wintle and the Society. The county court judge also accepted the additional explanation of the debtor that he regarded the sum in question as having been trust money in his hands, and himself, therefore, under a special obligation to make restitution. What to my mind is also by no means without some significance is this: if it is said that the true inference from the facts proved and found is that the debtor paid the £3,000 odd to the Society to avoid the risk of discovery of his fraud on the Society (unknown to the Law Society) and the serious consequences, for him, that would follow discovery—or, at least that such an inference is as legitimate as the inference of intention to prefer—then it is to be noted that the debtor at that critical time for him did not also take any steps to repay the £850, equally then unknown to the Law Society; though (apart from any disclosure that Mr. Wintle might have made) discovery of the one was not more unlikely than discovery of the other, and the consequences in either case would be equally disastrous. I do not forget Mr. Wintle's knowledge of the £3,000 matter: but, particularly since Mr. Wintle had already kept his knowledge to himself for four to five months it would, to my mind, have been highly improbable that he would have disclosed the matter to the Law Society where, for the debtor, the immediate and pressing danger lay.

The relevant words of s. 44 (1) of the Bankruptcy Act, 1914, are few and well-known. A payment deemed to be fraudulent and liable to be set aside under the sub-section is one

> ". . . made . . . by any person unable to pay his debts as they become due from his own money in favour of any creditor . . . with a view of giving such creditor . . . a preference over the other creditors . . ."

Though the language of the sub-section is, on the face of it, straightforward and simple enough, the question of the applicability of the section to the facts of particular cases has not seldom proved in practice a matter of difficulty. So much appears clearly from the number of the cases containing judicial pronouncements on the construction of the words now incorporated in s. 44, and previously found in the corresponding section (s. 48) of the Bankruptcy Act, 1883, the principle expressed by the words being indeed earlier than its statutory adoption. I shall not attempt for myself any exhaustive exposition of the requirements of the sub-section: but, so far as those requirements are in issue in the present appeal it may, I think, now be safely stated; (i) The onus is on the person alleging a "fraudulent preference" to prove to the satisfaction of the court that the payment impugned was made by the debtor "with a view of" preferring the payee over his other creditors; in other words, the onus is on the person alleging a fraudulent preference (normally, as here, the trustee in bankruptcy) to prove the fact of the debtor's requisite state of mind, that is, his intention. (ii) It is competent for the court to draw the inference of intention to prefer from all the facts of the case, particularly when there is no direct evidence of intention before it; but the inference should not be drawn, having regard to the situation of the onus of proof, unless the inference is the true and proper inference from the facts proved. Thus, it will not be drawn if the inference from the facts is equivocal, and, in particular, it will not be drawn from the mere circumstance that the creditor paid was in fact "preferred" in the sense that he was paid when other creditors were not paid and could not be paid. What I have stated in this paragraph appears to be the effect of the three cases of *Re Cohen, Ex p. Trustee* (1) ([1924] 2 Ch. 515), *Sir William Henry Peat* v. *Gresham Trust, Ltd.* (2) ([1934] A.C. 252) and *Re M. Kushler, Ltd.* (3) ([1943] 2 All E.R. 22). (iii) The words used in the section are "with a view of". I have used the word "intention" as synonymous with the word "view"; and other words—e.g., "object"—have also been used as synonyms in the cases. Whether the word used be "intention" or some other word, since it is notorious that human beings are by no means always single-minded, the intention to prefer which must be proved is the principal or dominant intention. There may also be a valid distinction for present purposes between an intention to prefer and the reason for forming and executing that intention.

It is at this point that the greatest difficulty, as it seems to me, arises, the difficulty being as often as not one of definition of the words used. If a debtor, knowing himself to be insolvent and knowing, also, that bankruptcy is imminent, deliberately elects to pay his oldest friend or his closest relative, and to leave his other creditors unpaid or with little chance of being paid, it would appear to me to be irrelevant that he made the selection because of the love he bore for his friend or relative or because of his hopes for general but unspecified favours from them in the future. I am, therefore, not prepared to accept the submission of counsel for the Society that a deliberate choice in the present case by the debtor of the Society for payment because the Society was the most important of his clients could not for that reason constitute a fraudulent preference. For if a debtor deliberately selects for payment A in preference to all his other creditors, it cannot to my mind matter, in the absence of other relevant circumstances, whether A is the debtor's oldest friend, closest relative or best client. On the other hand, where a debtor, owing money in all directions, has also robbed his employer's till, he may, knowing himself to be insolvent, elect to re-imburse the till in order that, when the crash comes, the damaging fact of his robbery may not be discovered. Or a debtor may elect to make a particular payment under pressure of some threat, or to obtain for himself some immediate and material benefit or to fulfil some particular obligation. In these cases the reason for the payment affects, essentially, the intention in making it. In the instances given, the intention, that is the real or dominant intention, will no longer be to " prefer " (i.e., to pay, as it were, out of turn) but will be to avoid the detection of a criminal act; to relieve the threat; to get the benefit and postpone the evil day; or to satisfy the particular obligation. Though the question of pressure in some form or another has, in the reported cases, often been the crux of the matter, it is plain that an inference of intention to prefer may be displaced in many other ways than by showing that the debtor acted under pressure. Examples are indeed legion. But in the present case the examples that I have given provide the closest analogies to the suggestions on the Society's side: and the real question before us is whether on the evidence and the findings of the county court judge the true inference is intention to prefer or whether an inference of some other kind similar to those in the examples given is, at the least, not equally legitimate.

There was before the learned judge direct evidence of intention in the sense that the debtor himself went into the witness-box. The learned judge having heard and observed the debtor, having heard and observed also his associate in his business, Mr. Wintle, and having had the assistance of experienced counsel, concluded that there was here an intention to prefer the Society. It is true that the evidence given by the debtor and Mr. Wintle was—not unnaturally—against an intention to prefer. Moreover the rejection of such evidence (with its inconsistencies to which the judges of the Divisional Court referred) does not of itself justify the opposite inference of intention to prefer. A judge of fact, however, hearing that evidence, may none the less legitimately and rightly find that fact of intention as a state of mind. In such circumstances I am most unwilling, unless persuaded that error has been made, to interfere with the judge's finding. So, also, were the judges of the Divisional Court. I am, however, bound to say that I share with them their regret that the county court judge was not more precise in his findings. His conclusion was cited at length by HARMAN, J., and in the circumstances I think it right to set it out again in this judgment:

> " Having considered the whole of the evidence and seen both Mr. Wintle and the bankrupt in the witness-box I am satisfied that the true position was that the bankrupt made the payment at the request of Mr. Wintle and to preserve his position with the Society as he said in his preliminary examination. It is unfortunate that Mr. Wintle was acting as solicitor for the Society, the respondents in this case, as I think there is a conflict of interest between him and the Society. He has had to admit that he failed in his duty as a director of the Society when this irregularity first came to his notice in October, 1953. Then in March, 1954, when he knew of the serious deficiencies on the bankrupt's clients' accounts, he persuaded the bankrupt or agreed with the bankrupt to make this very substantial payment with the object of concealing from the Society the fact that the bankrupt had been guilty of irregularities and so that he and Mr. Cutts should retain their directorships and the firm should retain the Society as a valuable client. In that they were successful to the extent that Mr. Wintle is still a director, and is also secretary and is still acting as solicitor to the Society. Taking all these matters into consideration, I have come to the conclusion that

> this payment of £3,300 was made with the dominant intention of preferring the Society to the exclusion of the general body of creditors and there must be a declaration to that effect."

To these conclusions it may be added that the judge, as I have earlier stated, had found as a fact that Mr. Wintle had in October, 1953, learnt of the fraud perpetrated on the Society and of the debtor's deficiencies on his clients' accounts. There is, however, no positive finding of what Mr. Wintle did or said save that he forbore to inform the Society (contrary to his duty to it) of the facts, and that he gave to the debtor six months' notice to determine his own employment with him. The judge found, further, that Mr. Wintle knew (as he clearly must have done) of the Law Society's investigations of the debtor's books and that the debtor knew in March, 1954, that he was insolvent. The learned judge clearly rejected any suggestion that pressure had been brought to bear on the debtor by the Society, as such; but unfortunately he does not say in terms whether or not he accepted the evidence of pressure by Mr. Wintle, of threats by him to disclose to the Society the true facts, unless he (the debtor) took immediate steps to repay to the Society that of which he had wrongly possessed himself; or whether or not he accepted the evidence that the debtor had promised Mr. Wintle to make arrangements for such repayment. As regards these last-mentioned matters it is important to note the period of some five months which elapsed between the date of the disclosure to Mr. Wintle of the debtor's defalcations and the repayment to the Society of the £3,000 odd which he owed to them.

It must also be conceded that the conclusions of the learned judge which I have quoted disclose some inconsistencies. For it is said at one and the same time that the payment was made at Mr. Wintle's request and in order to preserve Mr. Wintle's position with the Society (by which I understand to be meant, so that his, Mr. Wintle's, position with the Society would not be imperilled by his neglect of his duty to report his knowledge of the debtor's defalcations); and also that the payment was made with the double object or intention of preventing discovery of his (the debtor's) " irregularities " by the Society and of enabling the *debtor and Mr. Wintle* to retain their directorships of the Society. The learned judge then proceeds to state that the payment constituted a fraudulent preference within the meaning of the section, though (as it seems to me) it is by no means clear that such result would as a matter of law follow if the " object " or " intention " in making the payment was either of the last two alternatives which I have just cited.

Unless Mr. Wintle had threatened or was threatening to make disclosure, how would the payment, made when it was made, serve to prevent detection? If, in spite of appearances, the debtor after all managed to ride the storm, no question of discovery would presumably ever arise. On the other hand, if the debtor failed to survive, discovery was inevitable (as happened in fact) whether payment was made or not. Then, what of the suggestion that the debtor though not under threats or pressure from the Society itself was being threatened or pressed by Mr. Wintle? To this possibility of explanation I shall return. For the moment I confine myself to observing that, although there was undoubtedly evidence of such pressure given on the part of both the debtor and Mr. Wintle, the judge was not bound to accept that evidence and did not in terms do so even though he did not in terms reject it; and to repeating that an interval of some five months elapsed between the date when Mr. Wintle discovered the fraud and the date of payment. No doubt the payment would require some preparation, but there has been no suggestion that such preparation occupied anything like the period of five months.

Was the payment made or could it sensibly have been made with the object of gaining some present benefit for the debtor himself or of postponing the evil day? I have earlier stated that there is, in my judgment, no justification for supposing that the payment was insisted on and made as a term of Mr. Wintle's entering into the agreement of April, 1954. Even, therefore, if the debtor still thought that he might pull through (and optimism is notorious in persons in a like situation), it is difficult to see how the making of the payment, when it was made, could assist the debtor. Apart from Mr. Wintle and any threats on his part, there was no reason for the debtor to suppose, if he did survive, that the Society would ever be the wiser. The Law Society had not in fact discovered the fraud. It is difficult to see how, by making the payment, the debtor helped himself in respect of the then immediate source of danger, namely, the Disciplinary Committee of the Law Society; and equally difficult to see what present benefit in the circumstances the payment brought him—apart always from assisting Mr. Wintle. In any case the finding of the judge that the intended beneficiary was Mr. Wintle (in whose interest it clearly was in the circumstances that the payment should be made) appears to negative the conclusion that the debtor intended to benefit himself. It is somewhat tempting to suppose that in October, 1953, the debtor made a promise to Mr. Wintle of which the payment was the fulfilment. But the evidence to this effect appears not to have been accepted by the judge; and once again the supposition is presented with the difficulty of the five months' delay and the absence of any suggestion that Mr. Wintle was calling on the debtor to implement his promise.

In the circumstances, the analysis of the judgment, of the evidence, and of the possibilities seems to me to resolve itself into this; was the debtor from October, 1953, acting throughout under some form of pressure or intimidation from Mr. Wintle so that his dominant object was to relieve that pressure and so that, in effect, the debtor's intention in making the payment, when it was made, was in truth the intention, not of the debtor but of Mr. Wintle? Or did the debtor, acting no doubt to some extent in collaboration with Mr. Wintle and, it may be also, in some degree under Mr. Wintle's influence, yet in substance voluntarily and deliberately make the payment in order to prefer and with the intention of preferring the Society (that is of making to them preferential payment subject to which his other creditors would have to rank for such payment as they might get) and because, by so preferring the Society he would give an advantage to Mr. Wintle and perhaps even to some extent thereby to himself? In my judgment the learned judge who heard the witnesses interpreted the transaction in the latter sense; and I think on the whole, as the judges in the Divisional Court thought, that he was entitled so to do. Furthermore, and if I am right so far, I think with the Divisional Court judges that the result was a fraudulent preference within the meaning of the section. The essential thing, as I construe the finding, was, for the debtor, that the Society should be paid and paid in priority and preference to anyone else. Even if the debtor thought still that he might survive, the situation was desperate enough. He knew (as the judge found) that he was insolvent. He knew that the irregularities on his clients' accounts had been discovered and that proceedings had been initiated to have him struck off the roll of solicitors. If he had any hope of survival it was with Mr. Wintle only that he could survive. If he did not survive, then Mr. Wintle was the man to help, and the way to help Mr. Wintle was by preferring one particular creditor—the firm's best client of which Mr. Wintle was a director and in the payment to whom Mr. Wintle was seriously implicated and interested. *Re M. Kushler, Ltd.* (3) above mentioned seems to me to support the view that an intention to prefer a particular creditor is not negatived by the circumstance that the preference is the means of making provision also for a third party who is not himself a creditor and not therefore capable himself of being the subject of a preference. For the reasons which I have tried to state I would dismiss the appeal.

JENKINS, L.J.: This is an appeal by the Bognor Mutual Building Society from an order of the Divisional Court in Bankruptcy (HARMAN and UPJOHN, JJ.), dated Dec. 12, 1955, affirming an order made by His Honour JUDGE DUTTON

A BRIANT, Q.C., in the Brighton County Court and dated Sept. 21, 1955, whereby it was declared that the payment by the bankrupt to the appellant society of £3,303 7s. 9d. on Mar. 12, 1954, was made by the bankrupt with intent to prefer the Society, his creditor, at a time when he was unable to pay his debts as they fell due and was void as against the applicant (now respondent) as his trustee in bankruptcy.

B The county court judge's order was, as its terms sufficiently indicate, made under the Bankruptcy Act, 1914, s. 44 (1), which, as amended by the Companies Act, 1947, s. 115 (3), provides:

> " Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they C become due from his own money in favour of any creditor, or of any person in trust for any creditor, with a view of giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or suffering the same, be deemed D fraudulent and void as against the trustee in the bankruptcy."

The bankrupt presented his own petition in bankruptcy on Sept. 6, 1954, and was on the same day adjudged bankrupt thereon, so that in point of time the disputed payment, made as it was on Mar. 12, 1954, fell, albeit only by a matter of one week, within the statutory period of six months. Moreover it is not in E dispute that at the date of such payment the bankrupt was unable to pay his debts as they became due out of his own money. There remains the question whether the bankrupt made the payment to his creditor, the Society, " with a view of giving such creditor . . . a preference over the other creditors " within the meaning of s. 44 (1).

It is well settled that in proceedings under s. 44 (1) the onus is on the trustee F to prove not only that a payment was made by the bankrupt within the statutory period to a particular creditor, and that such creditor was thereby given a preference over the other creditors, but also that the bankrupt made the payment with a view of giving such creditor a preference over them: see *Ex p. Taylor, Re Goldsmid* (4) ((1886), 18 Q.B.D. 295); *Sharp* v. *Jackson* (5) ([1899] A.C. 419). The view attributed to a majority of this court in the headnote to the report of G *Re Cohen, Ex p. Trustee* (1) ([1924] 2 Ch. 516)

> " that where a bankrupt in imminent expectation of bankruptcy voluntarily pays a particular creditor with the result of giving him a preference in fact, and the reason for such payment is unexplained, a prima facie case of fraudulent preference is established."

H is supported only by the judgment of SARGANT, L.J., and cannot be regarded as good law, having regard to the observations on it made by LORD TOMLIN (with whom the other Lords concurred) in his speech in the House of Lords in *Sir William Henry Peat* v. *Gresham Trust, Ltd.* (2) ([1934] A.C. at p. 262). On the other hand, the explanation of LORD TOMLIN'S observations in the case just cited given by this court in *Re M. Kushler, Ltd.* (3) ([1943] 2 All E.R. 22) shows I that while the onus of proving not merely the fact of the payment and the resulting preference, but also the bankrupt's intent to prefer rests from first to last on the trustee, he need not in order to discharge that onus prove the bankrupt's intent to prefer by direct evidence or by circumstantial evidence of which such intent is the only possible explanation. It is enough if he proves facts of which the intent to prefer is so much the most probable of the possible explanations, that the court can on the ordinary principles governing the trial of an issue of fact properly hold it to be the true explanation. As LORD TOMLIN himself put it in *Sir William Henry Peat* v. *Gresham Trust, Ltd.* (2) ([1934] A.C. at p. 262):

> "The onus is only discharged when the court upon a review of all the circumstances is satisfied that the dominant intent to prefer was present."

A

LORD TOMLIN's reference to the "dominant" intent accords with earlier authority to the effect that it need not be shown that the payment was made with the sole view of giving a preference to the creditor provided that the giving of such preference is shown to have been the dominant or substantial view: see *Ex p. Hill, Re Bird* (6) ((1883), 23 Ch.D. 695 at pp. 704, 705). As to the substitution of "intent" for "view", which is the word actually used in s. 44 (1), "object" and "motive" have sometimes been used as other equivalents for "view"; but I think "intent" or "intention" gives the meaning best, as the bankrupt might for example very well have deliberately intended to prefer one creditor over another, and made the payment with the view of producing that result, thus plainly bringing the case within the section, although his motive or ulterior object may not have been a desire to benefit the creditor preferred, but a hope or expectation that by showing favour to such creditor he might obtain by way of quid pro quo some advantage for himself. As to the distinction between "view" and "motive" see per VAUGHAN WILLIAMS, J., in *Re Fletcher, Ex p. Suffolk* (7) ((1891), 9 Morr. 8 at p. 12) where the bankrupt's intention was to prefer, but his motive might have been said to be a desire to do what he considered fair.

B

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D

Lastly, it is clearly established by the authorities that inasmuch as preference implies selection, and selection implies freedom of choice, a payment must in order to constitute a preference be voluntarily made, and that a payment made under pressure, e.g., in the shape of proceedings actual or threatened by the creditor concerned, or fear of such proceedings, is not for this purpose a voluntary payment: see, e.g., *Ex p. Taylor* (4), *Sharp* v. *Jackson* (5) and the same case in this court sub nom. *New, Prance & Garrard's Trustee* v. *Hunting* (5) ([1897] 2 Q.B. 19).

E

In the present case, therefore, it was incumbent on the trustee to establish either by direct evidence of the bankrupt's intention or by circumstantial evidence affording the degree of proof held to be requisite in *Re M. Kushler, Ltd.* (3) that the bankrupt paid the £3,303 7s. 9d. to the Society voluntarily and with the dominant or substantial intention of giving the Society a preference over his other creditors.

F

I now turn to the facts. The Society was incorporated in 1909, one of the three original members being the bankrupt's father, who was a solicitor. Until his death in 1916 the bankrupt's father was a director of and solicitor to the Society. The bankrupt, also a solicitor, succeeded his father as solicitor to the Society and also in a considerable general practice as a solicitor in Bognor. Down to 1920 when he became a director of the Society the bankrupt also acted as its secretary. The bankrupt employed in his office one Willmer as his cashier and general clerk. Mr. Willmer succeeded the bankrupt as secretary to the Society in 1920 and continued in that capacity down to the latter part of 1954. The business of the Society was chiefly conducted by the bankrupt and Mr. Willmer from the bankrupt's office. This arrangement gave the bankrupt as a director of and solicitor to the Society, with the connivance of Mr. Willmer as its secretary, opportunities, of which he unfortunately availed himself, of using the Society's funds for his own purposes. Apart from any collateral advantages, the conveyancing work arising in the course of the Society's business formed an important part of the bankrupt's practice.

G

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Also employed in the bankrupt's office was one Wintle, who joined the bankrupt in 1946 as a conveyancing and general clerk, and thereafter served him successively as articled clerk and managing clerk and, from the date of his admission as a solicitor in June, 1950, as an assistant solicitor. In February, 1953, Mr. Wintle became a director of the Society. In 1950 the bankrupt borrowed £3,000 from the Society on the security of a mortgage of a house belonging to

A him called Greystones. In January or February, 1953, the bankrupt sold this house for £3,000, conveyed it to the purchaser free of the mortgage, handing over on completion a discharge executed by the Society in escrow for delivery against payment of the mortgage money, and received the purchase price, which he did not pay over to the Society but applied for his own purposes. This piece of flagrant dishonesty, the origin of the debt to which the present proceedings B relate, which represented the amount of the mortgage debt with interest accrued down to the date of payment to the Society, remained for the time being unknown to anyone save the bankrupt and Mr. Willmer. The bankrupt was unfortunately no more scrupulous in his general practice as a solicitor than he had been in his dealings with the Society, and by the autum of 1953 there were serious deficiencies on his clients' accounts. In October, 1953, Mr. Willmer told Mr. Wintle that the C bankrupt had not paid over the mortgage money to the Society, and also that there were deficiencies on his clients' accounts. According to his affidavit filed on behalf of the Society, Mr. Wintle raised the matter of the mortgage debt with the bankrupt in November, 1953, gave the bankrupt six months' notice to terminate his employment, and expressed the hope that the bankrupt would be able to repay the amount owing to the Society on this account. Mr. Wintle D apparently did not on this occasion raise with the bankrupt the matter of the clients' accounts, and it is clear that he did not report the matter of the mortgage money to the board of the Society or take any steps to warn clients of the firm about the state of their accounts. As a director of the Society he was clearly under a duty to report the matter of the mortgage debt to his co-directors. His proper course as regards the deficiencies on clients' accounts, of which he had been E informed in general terms by Mr. Willmer, was I think more debatable. Be that as it may, he told nobody. He said in his affidavit that in view of his association with the bankrupt he felt he owed him a certain amount of loyalty. He was certainly in a serious predicament. His fortunes were to a great extent bound up with those of the bankrupt, and one can well understand that he was anxious to help the bankrupt to put his affairs in order so far as he properly could.

F The matter of the clients' accounts was brought to a head on Dec. 24, 1953, when the Law Society notified the bankrupt that they desired to inspect his books. The inspection began on Dec. 31, 1953, and lasted a fortnight. It disclosed a state of affairs which led to an application dated Mar. 5, 1954, to strike the bankrupt's name off the roll of solicitors. The bankrupt was duly served with this application, which set forth the allegations on which it was G based. It is important to note that these allegations did not include the matter of the mortgage money, which apparently had not been brought to light by the inspection. The bankrupt's son, who was in partnership with him, dissolved partnership on hearing of the Law Society's action.

Mr. Wintle's account of what passed between himself and the bankrupt from the beginning of 1954 onwards is best given by the following extracts from his H affidavit:

> "The situation at the beginning of 1954 was therefore as follows: the bankrupt was in grave professional jeopardy. There were a number of mitigating factors, at least in my opinion, and I did not regard it as certain that the bankrupt would be struck off the roll of solicitors. I knew that I the bankrupt had not repaid the Society the advance on the Greystones transaction. No other director of the Society was aware of the fact so far as I knew, and I did not inform the Society of it at that stage. I was not acting as solicitor for the Society. The bankrupt was anxious to safeguard himself, as much as possible, so far as his professional future was concerned, and I felt that I wanted to assist him, so far as was proper, to that end. The bankrupt, from my conversations with him at this time, did not seem to regard his situation as a hopeless one, but he wanted my utmost assistance to put matters right, as far as they could be before the Law Society hearing.

> He asked me if I could assist him in any way and it was suggested that he should enter into partnership with me, should the results of that hearing still find him a solicitor. We had on previous occasions during the years 1951, 1952 and the early part of 1953 been discussing the question of partnership. I expressed my willingness to consider this but took the firm attitude, which I communicated to the bankrupt in the course of our conversation, that I would not negotiate any agreement with him regarding the practice unless he first repaid the Society the sum owing them on the Greystones transaction, which, when it was ultimately repaid, amounted to £3,303 7s. 9d. I would emphasise that this was my personal decision, and was not made on behalf of or with the knowledge of the Society, although I did very seriously point out to the bankrupt that if the truth were communicated to the directors generally they could take and no doubt would be compelled to take criminal proceedings against him . . . As a result of my discussions with the bankrupt, he did on Mar. 12, 1954, repay the Society the sum due to them as aforesaid, and thereafter, on Apr. 3, 1954, the bankrupt still not having been summoned to the Disciplinary Committee of the Law Society, the agreement mentioned in para. 7 of the applicant's said affidavit was entered into between himself and the bankrupt . . . The bankrupt paid the Society because I insisted that he should do so as the price of and a condition precedent to my entering into negotiations with him for the partnership in or sale of the practice and threatened him with exposure if he did not. The bankrupt was in a situation where he desperately needed my help, and where that help, and any measure of restitution he could make, might (as he thought) stand him in good stead with the Law Society before which he was in grave peril. I myself was anxious for the Society to be repaid, and I was anxious to be of such assistance also as I could to the bankrupt in his difficulties, and I used my position of dominance, created by all the circumstances, and magnified by the defection of the bankrupt's son, to compel that repayment . . . The bankrupt was intensely concerned with his own position, not with the Society's position, and I left him with no alternative but to repay."

The £3,303 7s. 9d. having on Mar. 12, 1954, been repaid by the bankrupt to the Society—or perhaps one should say having been made good to the Society's funds, for no one except the bankrupt, Mr. Wintle and Mr. Willmer knew that it was owing—the bankrupt and Mr. Wintle entered into the agreement of Apr. 3, 1954, referred to in Mr. Wintle's affidavit, the short effect of which was that in the event of the then pending inquiries by the Law Society not resulting in the bankrupt being struck off the roll of solicitors or being suspended from practice, he and Mr. Wintle should go into partnership as solicitors as from Apr. 1, 1954, on the terms of a draft agreement attached thereto; that in the event of the bankrupt being so suspended or struck off, or dying, he or his personal representatives should sell and Mr. Wintle should buy the bankrupt's practice; that as from Apr. 1, 1954, until one or other of the two above-mentioned alternatives took effect Mr. Wintle should be paid a salary of £1,250 a year which was to be credited on account of drawings in the event of the proposed partnership being entered into; that in the event of the death of the bankrupt before the publication of the result of the said inquiries the purchase price of the goodwill of the said practice should be twice the yearly average of the profits for the three years ending Mar. 31, 1954; and that this agreement was conditional on the bankrupt

> "making full revelation to Mr. Wintle of the financial affairs of the said practice and continuing to use his best endeavours to promote the interests of and retain the clientele of the said practice."

It will be observed that no price for the sale of the practice by the bankrupt to

Mr. Wintle was specified except in the event of the bankrupt's death before the publication of the result of the Law Society's inquiries.

The Disciplinary Committee of the Law Society met to consider the bankrupt's case on May 6 and 13, 1954, and by their findings and order dated 24, 1954, they found that the allegations against the bankrupt had been substantiated and ordered that his name should be struck off the roll of solicitors.

I should next refer to the oral evidence given by Mr. Wintle and the bankrupt before the learned county court judge in the present proceedings. Mr. Wintle said (inter alia) that he thought that the possibility of arrangements being made for payments in full would influence the Law Society; that he did not raise with the bankrupt the question of debit balances on clients' accounts in October (? November), 1953; that his reason for staying with the bankrupt was loyalty to the clients of the practice; that the bankrupt told him in February, 1954, that the Law Society had found deficiencies in his clients' accounts; that he did not tell the directors of the Society about the £3,000 when he heard of it out of loyalty to the bankrupt; and that the Society was a very valuable client of the practice and he (Mr. Wintle) was anxious to preserve the practice. Mr. Wintle also said that the price which he was to pay for the practice was not inserted in the agreement of Apr. 3, 1954, because it was not then agreed; but that he had since paid £4,600 for the practice in negotiation with the trustee in bankruptcy; and that he had paid £1,400 odd to the Society "in respect of Collis". That was a reference to another liability of the bankrupt to the Society, the discharge of which had also been made the subject of a claim of fraudulent preference. That claim was, however, rejected by the learned county court judge and there has been no appeal in regard to it. The exact sum paid by Mr. Wintle was £1,456 18s. 4d., treated as representing part of the purchase price of the practice. The fact that this payment was made is not in dispute. Indeed, the trustee founded on it the second, and now abandoned, claim of fraudulent preference. Mr. Wintle further said that he (i.e., Mr. Wintle personally) threatened criminal proceedings in the first case (which I take to mean the matter of the Greystones mortgage); that "we" (i.e., the Society) threatened in the second case; and that the "force" (which I take to mean the power behind his demands that the bankrupt should pay) was his refusal to help the bankrupt (which I take to mean his refusal to help the bankrupt unless he paid). The last quotation I need make from Mr. Wintle's evidence is the statement noted by the judge as being that he wanted the bankrupt to pay the Society "so that they should know nothing wrong" which I take to mean "so that they should not know that anything was wrong."

The bankrupt said in his evidence (inter alia) that he did not pay over the purchase money received for Greystones to the Society, and that Mr. Wintle told him that if steps were not taken to repay it, he would report him to the Society; that he, the bankrupt, did know that Mr. Wintle had not mentioned the matter to the Society. Then the bankrupt is noted by the judge as having said:

> "Primarily I paid because Mr. Wintle knew of the circumstances and had threatened disclosure. The Law Society investigation had a great effect—I thought if I could put this right it would improve my position enormously. Payment would remove risk of disclosure which would finish everything . . . I said [this refers to his preliminary examination in bankruptcy] payment to Society was at Mr. Wintle's suggestion to preserve his position as solicitor to the Society."

He also said that Mr. Wintle made it a condition of helping him that he (the bankrupt) should pay the Society and that he (the bankrupt) intended to benefit himself by the payment. The last quotation I need make is this answer:

> "A partnership with or sale to Mr. Wintle were my only hope of preserving anything from the practice."

At this point I cannot avoid quoting, though it has been quoted before, the following passage from the judgment of the learned county court judge:

> " The case for the Society rests mainly on the evidence of Mr. Wintle and the bankrupt himself and it is submitted on the Society's behalf that the bankrupt made the payment as the result of threats from Mr. Wintle to disclose the matter to the Society and that therefore it was not a voluntary payment and is protected. On behalf of the trustee it is submitted that no pressure was exercised on the bankrupt by the Society. That the directors as such had no knowledge that the money was owing and that Mr. Wintle and Mr. Cutts who were both directors concealed the matter from the rest of the board and that in making the payment it was intended to prefer the Society at the expense of the other creditors. Having considered the whole of the evidence and seen both Mr. Wintle and the bankrupt in the witness-box I am satisfied that the true position was that the bankrupt made the payment at the request of Mr. Wintle and to preserve his position with the Society as he said in his preliminary examination. It is unfortunate that Mr. Wintle was acting as solicitor for the Society in this case, as I think there is a conflict of interest between him and the Society. He has had to admit that he failed in his duty as a director of the Society when this irregularity first came to his notice in October, 1953. Then, in March, 1954, when he knew of the serious deficiencies on the bankrupt's clients' accounts he persuaded the bankrupt or agreed with the bankrupt to make this very substantial payment with the object of concealing from the Society the fact that the bankrupt had been guilty of irregularities and so that he and Mr. Cutts should retain their directorships and the firm should retain the Society as a valuable client. In that they were successful to the extent that Mr. Wintle is still a director and is also secretary and is still acting as solicitor to the Society. Taking all these matters into consideration, I have come to the conclusion that this payment of £3,300 was made with the dominant intention of preferring the Society to the exclusion of the general body of creditors and there must be a declaration to that effect."

HARMAN, J., giving the judgment of the Divisional Court, observed after quoting this passage, that it was a pity that the learned judge had not been more explicit as to the facts as he found them, an observation with which I fully agree; and continued:

> " As we understand his judgment, he impliedly negatived the view that the payment was made as the result of the alleged pressure or threats by Mr. Wintle. There was ample evidence on which he could come to that conclusion, for the evidence was not consistent and, as he saw and heard the witnesses, we think we ought not to disturb his conclusions. The payment must therefore be treated as a voluntary payment made at the request of Mr. Wintle to preserve the latter's position with the Society, and also, we would add, because it gave the bankrupt himself the best hope of retrieving his fortunes."

I agree with the Divisional Court's assessment of the findings of the county court judge as impliedly negativing the view that the payment was made as a result of the alleged pressure or threats by Mr. Wintle, and I also agree with them that his findings of fact should not be disturbed. It remains to consider whether the county court judge's findings of fact sufficed to support his conclusion that the charge of fraudulent preference was made out.

His express findings, as I understand them, come to this, that the bankrupt paid the £3,303 7s. 9d. at the request and under the persuasion or advice of Mr. Wintle: (i) In order to preserve Mr. Wintle's position with the Society, which I take to mean so as to make good to the Society a sum out of which it had been cheated by the bankrupt before the Society found out (a) that it had been so defrauded, and (b) that Mr. Wintle, after he became aware that the Society had been so defrauded, had in breach of his duty as a director of the Society failed to inform the Society of the fraud, or in other words connived at the bankrupt's misconduct in the matter; (ii) In order that the fact that the bankrupt had been "guilty of irregularities" might remain concealed from the Society. That is much the same object as the first, looked at from the bankrupt's point of view as well as Mr. Wintle's; (iii) In order that Mr. Wintle and the bankrupt might retain their directorships of the Society which they would certainly lose on the Society discovering the bankrupt's fraud and Mr. Wintle's acquiescence in it; and (iv) In order that the firm (i.e., the bankrupt and his prospective partner, Mr. Wintle) might keep the Society as a valuable client, and a client they would certainly lose if the bankrupt's fraud and Mr. Wintle's acquiescence in it were discovered.

There is no direct evidence of an intention on the part of the bankrupt to give the Society a preference over his other creditors, or (if it be material) of an intention on the part of Mr. Wintle to cause the bankrupt to give the Society such a preference. The direct evidence, for what it is worth, is all the other way. Confining myself strictly to the express findings of the judge, I find that the bankrupt paid to avoid being found out, and Mr. Wintle counselled him to pay because if the bankrupt was found out, he (Mr. Wintle) knowing what he did would be involved in the same condemnation. This, as it seems to me, was self-preservation, not preference.

Thus the trustee, to put the matter in the most favourable way from his point of view, gets no assistance from the direct evidence, and apart from such inferences as can properly be drawn from the circumstances in which according to the evidence the payment was made, has established nothing beyond the fact of the payment and the fact that it resulted in the Society gaining priority over the other creditors. It is clear on the authorities to which I have referred that this is not enough. To say that because the bankrupt's and Mr. Wintle's explanations of the reasons for making the payment, tending as they did to negative an intent to prefer, were not wholly accepted by the county court judge, therefore an intent to prefer must be inferred, is to put the onus the wrong way round. The inferences to be drawn from the circumstances in which, according to the evidence, the payment was made seem to me to negative rather than support an intention to prefer.

I have so far confined myself to the positive findings of the county court judge as they appear in the passage from his judgment quoted above. But there is also the undisputed fact that on Mar. 12, 1954, the date of the relevant payment, the bankrupt was faced with the prospect of being summoned before the Disciplinary Committee of the Law Society to meet the charges of professional misconduct which had been made against him in the application of Mar. 5, 1954. There is, moreover, the fact, accepted by the county court judge earlier in his judgment, that the application of Mar. 5, 1954, made no mention of the sum owing by the bankrupt to the Society in respect of the Greystones mortgage, and that the Law Society had no knowledge of this matter. Surely if the matter of the Greystones mortgage, as yet unknown to the Law Society, were to be brought to light and raised against him before the Disciplinary Committee, such prospect as the bankrupt might otherwise have of lenient treatment would be fatally prejudiced; and surely the most effective way of securing that this matter should not be so brought to light and raised would be to make the money good to the Society before the fraud was discovered. If it is asked why the bankrupt should attach such importance to preventing discovery of this particular fraud out of the many of which he had been guilty, the answer seems to me to be reasonably plain. This was a fraud as yet unknown to the Law Society. His frauds on his other clients had been laid bare, and he was already committed for better or for worse to facing and meeting as best he could the charges founded on them;

whereas this additional matter not yet brought to light might still pass unnoticed if the money was made good.

If it is asked why the bankrupt should feel that there was a particular risk of disclosure of the Greystones transaction unless the money was made good, seeing that the debt in question had been outstanding since January or February, 1953, and that this was not the only fraud on the Society which might be raised against him, the answer again seems to me to be reasonably plain. This particular transaction had become known to Mr. Wintle and it was Mr. Wintle's duty as a director to report it to the Society. Even though Mr. Wintle did not actually threaten to report the matter, the bankrupt could hardly fail to appreciate that unless the money was made good Mr. Wintle might well feel obliged by conscience or interest to report it. Finally, there is a matter to which the county court judge did not I think advert at all. The bankrupt had no chance of extricating himself without funds. Mr. Wintle, according to his evidence, expressed his willingness to provide what funds he could on condition that the bankrupt made good to the Society the amount owing in respect of the Greystones transaction. I see no sufficient reason for rejecting this part of Mr. Wintle's evidence, which is to some extent borne out by the fact that Mr. Wintle did pay the £1,456 to which I have already referred.

I find it impossible to hold in all the circumstances of this case that the trustee has discharged the onus which lies on him of proving by direct or circumstantial evidence to the degree of proof stated earlier in this judgment that the bankrupt made this payment with the dominant, or any, intention of giving the Society a preference over his other creditors, and in my view there was no sufficient evidence to support the county court judge's conclusion to the contrary.

The Divisional Court after saying, in the passage already quoted, that the payment must in view of the county court judge's findings be treated as a voluntary payment, and referring to *Sharp* v. *Jackson* (5), continued:

> " That (i.e., to prefer the Society to the other creditors) must have been the debtor's paramount object, but need not have been his only object. One of his objects may have been to preserve his own position, another to help Mr. Wintle, but if these two objects could only be achieved by putting the Society first, it does not matter that this preference did also achieve the other objects. The Society was, as we have said, the mainstay of the practice. The bankrupt's connection with it went back to its incorporation. It was not at all unnatural that Mr. Wintle and the bankrupt, putting their heads together to find some way out of the imbroglio which affected them both, should decide that the Society was the first dragon in the path and the first with whom it was wise to make friends. Their motives no doubt were mixed, but the upshot was that they put the Society first. The payment was therefore within the section as having been made ' with a view of giving such creditor . . . a preference over the other creditors '."

At the end of their judgment they said this:

> " In this case no pressure was exerted by any creditor. Indeed, neither the Society nor the clients were aware of their rights, but the bankrupt chose to pay one creditor rather than the others, and, once pressure was negatived on the facts and the conclusion is drawn that he did so because he saw in that course (or thought he saw) an advantage to be gained for himself and Mr. Wintle, in our judgment the judge was entitled to infer, as he did, an intention to prefer the Society, for the reasons we have indicated. We therefore dismiss the appeal with costs."

With respect to the Divisional Court, I do not think that it is enough for the present purpose to find that the motives of the bankrupt and Mr. Wintle were mixed " but the upshot was that they put the Society first ", or legitimate to adduce from that finding the conclusion that the payment was therefore within the section as having been made with a view to giving the Society a preference over the other creditors. Nor do I think that the facts warrant the inference that the bankrupt chose to pay one creditor rather than the others, because he saw in that course an advantage to himself and Mr. Wintle. To my mind the facts negative any intention on the part of the bankrupt to give the Society a preference over the other creditors. I think the proper inference to be drawn from the whole of the facts and circumstances of the case is that the bankrupt made good the money, of which he had defrauded the Society, not with the intention of giving the Society a preference and gaining from such preference an advantage for himself, but with the intention of thereby preventing discovery of the fraud, of which there was in view of Mr. Wintle's knowledge a serious risk, and avoiding the disagreeable consequences to himself which such discovery would involve, besides securing the co-operation of Mr. Wintle in saving the practice for the benefit of both of them so far as it might be possible to do so.

The Divisional Court obviously attached great importance to the county court judge's implied finding that there was no pressure by Mr. Wintle, and adduced from that implied finding the conclusion that this must be treated as a voluntary payment. It is of course true that a payment cannot constitute a fraudulent preference unless it is voluntary, but it does not follow that every voluntary payment which has the effect of giving the creditor paid a preference over the other creditors is a fraudulent preference. The question still remains what was the view or intent. Nor am I satisfied that this was for the present purpose a voluntary payment. I accept the county court judge's implied finding to the effect that there were no actual threats of disclosure by Mr. Wintle, and there was no pressure by the Society, which did not even know of the debt. Nevertheless the bankrupt was under a heavy pressure of circumstances, and in view of the obvious risk of disclosure by Mr. Wintle, and the fatal consequences such disclosure would involve, I think that the bankrupt may well have considered that in his own interests he had no option but to make good to the Society the money of which he had defrauded it in the Greystones transaction. For these reasons, I would allow this appeal.

HODSON, L.J.: I share the difficulty felt by the Divisional Court in analysing the findings of the learned county court judge. These are set out in the passage from his judgment which has been read more than once. The appellant has argued with some force that the conclusion that the payment of £3,303 7s. 9d. was made with the dominant intention of preferring the Society to the exclusion of the general body of creditors is a non sequitur having regard to the learned judge's previous findings which indicated (i) that the bankrupt made the payment at the request of Mr. Wintle to preserve the latter's position with the Society; (ii) that Mr. Wintle persuaded or agreed with the bankrupt to make the payment with the object of concealing from the Society the fact that the bankrupt had been guilty of irregularities, and that so that he and the bankrupt could retain their directorships and the firm should retain the Society as a valuable client. I think the proper conclusion to be drawn from the findings is that the judge, as he said, had taken these two matters amongst others into consideration before arriving at his conclusion but not that his conclusion followed from these matters, as indeed it could not.

The authorities show that the trustee has to prove the dominant intention to prefer and that there is a distinction between the intention and the motive for forming the intention. The existence of a dominant intention does not, however, exclude the existence of other objects. The intention to prefer can be inferred from the payment and the circumstances in which the payment was made; see *Re M. Kushler, Ltd.* (3) ([1943] 2 All E.R. 22), where LORD GREENE, M.R., at p. 27 cited the passage from LORD TOMLIN's speech in *Sir William Henry Peat* v. *Gresham Trust, Ltd.* (2), which runs as follows ([1934] A.C. 252 at p. 262):

> "The onus is only discharged when the court upon a review of all the circumstances is satisfied that the dominant intent to prefer was present."

I agree with the Divisional Court that one of the bankrupt's objects may have been to preserve his own position and another to help Mr. Wintle, but that if the objects could only be achieved by putting the Society first it does not matter that the preference did also achieve other objects.

The Society's case was that the payments were made as a result of pressure by Mr. Wintle. In his affidavit the latter deposed to pressure and in their evidence both the bankrupt and Mr. Wintle swore that the payment was made under the threat of criminal proceedings. This evidence must have been rejected by the learned judge when he reached the conclusion, as I understand his judgment, that the bankrupt and Mr. Wintle were acting in concert and that not only was there no pressure exercised by the creditor, namely, the Society, but also no pressure was exercised by Mr. Wintle in the shape of a threat of criminal proceedings.

Indeed, no pressure was exercised by any creditor and the payment must, I think, be regarded as voluntary. The bankrupt knew that he was insolvent and knew that he was in grave difficulty with the Law Society which had at the end of 1953 announced that it proposed to hold an examination of the bankrupt's books. This examination resulted in the disclosure of serious deficiencies in clients' accounts and ended by the bankrupt being struck off the roll pursuant to an application made on Mar. 5, 1954, eight days before the payment was made to the building society. The bankrupt was beset by perils on every hand, the Society was not the only victim of his fraud and, again using the language of the Divisional Court, it was not unnatural that Mr. Wintle and the bankrupt, putting their heads together to find some way out of the imbroglio which affected them both, should decide that the Society was the first dragon in the path and the first with whom it was wise to make friends. Thus they put the Society first, and in doing so were not, I think, acting with an intention different in kind from that of the debtor who, knowing himself to be insolvent, deliberately chooses to pay his old friend or near relative leaving the other creditors to suffer accordingly. I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Denis Hayes* (for the building society); *Tarry, Sherlock & King* (for the trustee in bankruptcy).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

BALFOUR *v.* BARTY-KING AND ANOTHER (HYDER & SONS (BUILDERS), LTD. Third Parties).

[QUEEN'S BENCH DIVISION (Havers, J.), April 27, 30, May 8, 1956.]

Negligence—Escape—Fire—Escape to adjoining premises—Principle in Rylands *v.* Fletcher*—Liability of occupier for acts of independent contractor.*

Premises which formed part of a large mansion house had been converted into four houses. The plaintiff owned one of these and the defendants, who were husband and wife, occupied the adjoining converted premises. A pipe in the loft of the defendants' premises became frozen and B. and R., two workmen in the employment of the third parties, came on the defendants' premises at the request of the defendants, made to the third parties as independent contractors, to unfreeze the pipe. B. and R. proceeded to thaw the pipe by applying to it the flame of a blow-lamp. Most of the pipes in the loft were lagged with felt, and some of the lagging caught alight and in turn ignited other inflammable material in the defendants' loft causing an extensive fire which spread to the plaintiff's premises. The fire so arising was not an accidental fire within s. 86 of the Fires Prevention (Metropolis) Act, 1774*, but was caused by the negligence of the workmen in using a blow-lamp for the purpose of unfreezing the pipe in the place at which the blow-lamp was used. The plaintiff claimed against the defendants in respect of the damages to his premises caused by the fire.

Held: the defendants were liable to the plaintiff on two grounds, namely, (i) because the fire had begun on the defendants' premises through negligence and the defendants failed to establish that the persons by whose negligence the fire was caused, viz., B. and R., were strangers to the defendants for this purpose (see p. 563, letter E, post).

Principle stated by BANKES, L.J., in *Musgrove* v. *Pandelis* ([1919] 2 K.B. at p. 46), and dictum of HOLT, C.J., in *Turberville* v. *Stampe* ((1697), 1 Ld. Raym. 264) applied.

(ii) because the use of the blow-lamp to thaw the pipe was in the circumstances dangerous and a non-natural use of the premises and accordingly the rule in *Rylands* v. *Fletcher* ((1868), L.R. 3 H.L. 330) applied to the creation of the fire (see p. 566, letter I, post), as also to its spreading to the plaintiff's premises, and against liability under this principle neither the Fires Prevention (Metropolis) Act, 1774, s. 86, nor the fact, if it were the fact, that the defendants had no reason to know that the blow-lamp would be used to thaw the pipe in the loft afforded a defence.

Musgrove v. *Pandelis* ([1919] 2 K.B. 43) and dictum of LORD PORTER in *Read* v. *J. Lyons & Co., Ltd.* ([1946] 2 All E.R. at p. 478) and *West* v. *Bristol Tramways Co.* ([1908] 2 K.B. 14) applied.

Semble: in the case of acts which from their nature involve in the eyes of the law special danger to others an obligation is imposed on the ultimate employers [of contractors] to take special precautions which they cannot delegate by having the work carried out by the independent contractors (see p. 563, letter A, post).

Dictum of LANGTON, J., in *Pass of Ballater S.S. Owners* v. *Cardiff Channel Dry Docks & Pontoon Co., Ltd.* ([1942] 2 All E.R. at p. 84) considered.

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* Section 86 provides:

"And . . . no action, suit or process whatever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall . . . accidentally begin . . ."

[As to negligence in regard to fire, see 23 Halsbury's Laws (2nd Edn.) 624-627, paras. 875-881; and for cases on the subject, see 36 Digest (Repl.) 76, 77, *406-414*.

As to the defence that the act was done by an independent contractor, see 23 Halsbury's Laws (2nd Edn.) 710, para. 1002.

For the Fires Prevention (Metropolis) Act, 1774, see 13 Halsbury's Statutes (2nd Edn.) 9.]

Cases referred to:

(1) *Rylands* v. *Fletcher*, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest (Repl.) 282, *334*.

(2) *Honeywill & Stein, Ltd.* v. *Larkin Bros.* (*London's Commercial Photographers*), *Ltd.*, [1934] 1 K.B. 191; 103 L.J.K.B. 74; 150 L.T. 71; Digest Supp.

(3) *Musgrove* v. *Pandelis*, [1919] 2 K.B. 43; 88 L.J.K.B. 915; 120 L.T. 601; 36 Digest (Repl.) 285, *345*.

(4) *Filliter* v. *Phippard*, (1847), 11 Q.B. 347; 17 L.J.Q.B. 89; 10 L.T.O.S. 225; 11 J.P. 903; 116 E.R. 506; 36 Digest (Repl.) 76, *407*.

(5) *Mulholland & Tedd, Ltd.* v. *Baker*, [1939] 3 All E.R. 253; 161 L.T. 20; 36 Digest (Repl.) 77, *413*.

(6) *Turberville* v. *Stampe*, (1697), 1 Ld. Raym. 264 (91 E.R. 1072); 1 Com. 32 (92 E.R. 944); 36 Digest (Repl.) 164, *870*.

(7) *Black* v. *Christchurch Finance Co.*, [1894] A.C. 48; 63 L.J.P.C. 32; 70 L.T. 77; 58 J.P. 332; 34 Digest 162, *1266*.

(8) *Laugher* v. *Pointer*, (1826), 5 B. & C. 547; 8 Dow. & Ry. K.B. 556; 108 E.R. 204; 36 Digest (Repl.) 281, *324*.

(9) *Reedie* v. *London & North Western Ry. Co.*, (1849), 4 Exch. 244; 20 L.J.Ex. 65; 154 E.R. 1201; 34 Digest 159, *1243*.

(10) *Dalton* v. *Angus*, (1881), 6 App. Cas. 740; 50 L.J.Q.B. 689; 44 L.T. 844; 46 J.P. 132; 34 Digest 158, *1234*.

(11) *Quarman* v. *Burnett*, (1840), 6 M. & W. 499; 9 L.J.Ex. 308; 151 E.R. 509; 34 Digest 125, *966*.

(12) *Hole* v. *Sittingbourne & Sheerness Ry. Co.*, (1861), 6 H. & N. 488; 30 L.J.Ex. 81; 3 L.T. 750; 158 E.R. 201; 34 Digest 162, *1263*.

(13) *Pickard* v. *Smith*, (1861), 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535; 36 Digest (Repl.) 72, *384*.

(14) *Tarry* v. *Ashton*, (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; 34 Digest 163, *1274*.

(15) *Spicer* v. *Smee*, [1946] 1 All E.R. 489; 175 L.T. 163; 2nd Digest Supp.

(16) *Job Edwards, Ltd.* v. *Birmingham Navigations*, [1924] 1 K.B. 341; 93 L.J.K.B. 261; 130 L.T. 522; 36 Digest (Repl.) 316, *628*.

(17) *Bower* v. *Peate*, (1876), 1 Q.B.D. 321; 45 L.J.Q.B. 446; 35 L.T. 321; 40 J.P. 789; 36 Digest (Repl.) 159, *841*.

(18) *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q.B. 72; 68 L.J.Q.B. 704; 80 L.T. 615; 34 Digest 161, *1260*.

(19) *Pass of Ballater S.S. Owners* v. *Cardiff Channel Dry Docks & Pontoon Co., Ltd.*, [1942] 2 All E.R. 79; sub nom. *The Pass of Ballater*, [1942] P. 112; 111 L.J.P. 61; 167 L.T. 290; 36 Digest (Repl.) 160, *847*.

(20) *Vaughan* v. *Menlove*, (1837), 3 Bing. N.C. 468; 6 L.J.C.P. 92; 132 E.R. 490; 36 Digest (Repl.) 29, *126*.

(21) *Collingwood* v. *Home & Colonial Stores, Ltd.*, [1936] 3 All E.R. 200; 155 L.T. 550; 36 Digest (Repl.) 285, *342*.

(22) *Perry* v. *Kendricks Transport, Ltd.*, [1956] 1 All E.R. 154.

(23) *Read* v. *Lyons (J.) & Co., Ltd.*, [1946] 2 All E.R. 471; [1947] A.C. 156; [1947] L.J.R. 39; 175 L.T. 413; 36 Digest (Repl.) 83, *452*.

(24) *Rickards* v. *Lothian*, [1913] A.C. 263; 82 L.J.P.C. 42; 108 L.T. 225; 36 Digest (Repl.) 37, *177*.

(25) *West* v. *Bristol Tramways Co.*, [1908] 2 K.B. 14; 77 L.J.K.B. 684; 99 L.T. 264; 72 J.P. 243; 36 Digest (Repl.) 293, *399*.

(26) *Hughes* v. *Percival*, (1883), 8 App. Cas. 443; 52 L.J.Q.B. 719; 49 L.T. 189; 47 J.P. 772; 42 Digest 982, *124*.

Action.

The plaintiff, Elliott Archibald Balfour, claimed damages against the defendants, Hugh David Barty-King and Jennifer Barty-King, his wife, in respect of damage done to the plaintiff's premises by a fire which originated on the defendants' premises and spread to the plaintiff's premises. The plaintiff's premises formed part of a large mansion house at Bitchett Wood, Sevenoaks. This mansion house had been converted into four houses, the re-construction having been carried out by the third parties, Hyder & Sons (Builders), Ltd. The premises which were owned and occupied by the plaintiff were known as White Cottage and contiguous to them were the premises known as Tudor Wing occupied by the defendants. The defendants had been living there since November, 1952. Each of these contiguous properties had a loft; that in Tudor Wing was some twenty-five feet by twelve feet with a maximum headroom of nine feet tapering down to nothing. It had a tiled roof and some of the rafters had underfelt on them. Between the rafters and the tiles there was straw or hay. There were pieces of straw all over the roof space. Inside the roof were pipes, most of which were lagged with thick felt. The fire originated in the following circumstances. A Mr. Brown, who was in the general employment of the third parties as an apprentice carpenter, had been requested by the second defendant to unfreeze some pipes in the attic of Tudor Wing, and he had been authorised to do this work by the general foreman of the third parties. Mr. Brown had certain tools with him including a blow-lamp. On the afternoon of Jan. 29, 1954, he and his mate, a Mr. Rogers, another employee of the third parties, were admitted to Tudor Wing and were told by the second defendant what the situation was concerning the frozen pipes; she also supplied them with an electric torch but did not accompany them into the attic. Mr. Brown and Mr. Rogers then proceeded to trace the pipe in order to discover which part was frozen. Having traced the part which was frozen Mr. Brown applied the blow-lamp to it while Mr. Rogers held the electric torch. Mr. Brown was able to see the straw which was all over the roof space and he saw that the rafters were covered with underfelt. As he applied the blow-lamp to a particular part of the pipe the flame touched the lagging which caught alight. There was a steady draught of air through the attic and this caused the flames to spread and rapidly to get out of control. As a result the fire spread causing very substantial damage to the defendants' premises and also damaging the plaintiff's premises. The court found that the fire originated through negligence and was not accidental within s. 86 of the Fires Prevention (Metropolis) Act, 1774*, in that it was negligent to use a blow-lamp in the place and in the manner in which it was used and that the third parties knew or ought to have known of the condition of the roof and of the danger; further that if the use of the blow-lamp was justified at all the requisite standard of care was not observed because, among other things, no precautions against fire were taken when the blow-lamp was used in the loft.

The plaintiff claimed that the second defendant, on behalf of herself and the first defendant, invited or permitted Mr. Rogers and Mr. Brown to enter her premises and that she employed, ordered, authorised or requested them to thaw out the frozen pipes. He alleged that the fire which resulted was caused by the negligence of the defendants, their servants or agents and that the fire was a nuisance for which the defendants were liable. In the further alternative he contended that the defendants brought on to Tudor Wing a dangerous thing, namely, the ignited blow-lamp, and that they caused or permitted the flame thereof to ignite the premises and to extend to his premises and that the use by the defendants' servants or agents of the blow-lamp was a non-natural user of the land. The defendants denied that they were in any way responsible for Mr. Brown and Mr. Rogers and they denied negligence. They further alleged that they claimed from underwriters pursuant to a policy of insurance and that the underwriters paid them a total of £5,875. They added the third parties and claimed against them, for the negligence of their servants or agents in using the blow-lamp, the sum of £5,875 on account of the underwriters and for the amount of any damages which might be awarded against the defendants in favour of the plaintiff.

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* See footnote p. 555, ante.

John Thompson, Q.C., and *Bernard Caulfield* for the plaintiff.

Melford Stevenson, Q.C., and *G. H. Crispin* for the defendants.

L. G. Scarman and *A. S. Orr* for the third parties.

Cur. adv. vult.

May 8. **HAVERS, J.**, in a written judgment, reviewed the evidence, stated the circumstances in which the fire originated and found that when the roof was set on fire the workmen were acting on the instructions of the third parties and Mr. Brown, who set fire to it, was acting in the course of his employment. HIS LORDSHIP continued:] I summarise the facts which I find so far as they relate to the plaintiff's case against the defendants. I find that the fire began in the loft of the defendants' premises, that it had a negligent beginning in that a blow-lamp was negligently used by Mr. Brown in the loft, as a result of which he set fire to the defendants' premises, and that this fire spread to and caused damage to the plaintiff's premises. I find that Mr. Brown and Mr. Rogers were in the loft at the invitation of the defendants as occupiers, to carry out the work that the second defendant, as agent for her husband and on her own behalf, wanted done, that is to say, for thawing out frozen pipes, and that in doing that work they caused the fire. I find that the way in which Mr. Brown and Mr. Rogers were doing the work is a recognised way of thawing frozen pipes, though there are other methods, for instance the use of hot bricks. I find that these men had used this method in a neighbour's house and that Mr. Groves, the site foreman, approved this method for her house. I find also that though the handling of the blow-lamp by Mr. Brown on behalf of the defendants was negligent in the circumstances, it was used by Mr. Brown in his capacity as a servant of the third parties, who were independent contractors, to thaw the ice in the pipe which he had instructions to do, and not for his own amusement or maliciously.

On those facts I have now to consider the law. The plaintiff put his case before me on three alternative bases: first, on the basis that the fire which caused the damage to his premises originated on the defendants' premises by the negligent conduct of persons who were there at the invitation of the defendants, and that that fire subsequently escaped to his premises; secondly, on the basis of the rule in *Rylands* v. *Fletcher* (1) ((1868), L.R. 3 H.L. 330); and, thirdly, on the general principle which is expressed in the maxim sic utere tuo ut alienum non laedas, as particularly exemplified in the decision of the Court of Appeal in *Honeywill & Stein, Ltd.* v. *Larkin Bros.* (*London's Commercial Photographers*), *Ltd.* (2) ([1934] 1 K.B. 191). The principle is that if a man does work on or near another's property which involves danger to the property, unless proper care is

A taken he is liable to the owners of the property for damage resulting to it from his failure to take proper care, and is equally liable if, instead of doing the work himself, he procures another, whether as agent, servant or otherwise, to do it for him.

I deal first of all with the first head of liability, and I refer in the first place to *Musgrove* v. *Pandelis* (3) ([1919] 2 K.B. 43). There BANKES, L.J., who gave B the leading judgment in the Court of Appeal, said this (ibid., at p. 46):

> "Section 86 of [the Fires Prevention (Metropolis) Act, 1774] was passed to take the place of a section in almost the same words of the Act of 6 Anne c. 31, s. 6. In order to see what alteration these statutes effected it is material to consider the state of the law before the earlier statute was C passed. A man was liable at common law for damage done by fire originating on his own property (1) for the mere escape of the fire; (2) if the fire was caused by the negligence of himself or his servants, or by his own wilful act; (3) upon the principle of *Rylands* v. *Fletcher* (1). This principle was not then known by that name, because *Rylands* v. *Fletcher* (1) was not then D decided; but it was an existing principle of the common law as I shall show presently. The alteration which those statutes effected was to give protection in cases falling under the first heading of liability mentioned above. It is thus stated by LORD DENMAN, C.J., in *Filliter* v. *Phippard* (4) ((1847), 11 Q.B. 347 at p. 354): 'The ancient law, or rather custom of England, appears to have been, that a person in whose house a fire originated, which E afterwards spread to his neighbour's property and destroyed it, must make good the loss'. That was the principle of the common law to which the statutes were directed. They altered the law so as to exclude the liability of a 'person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall . . . accidentally begin'. It is plain that the statutes did not touch the other heads of liability at common law."

F This was referred to by ASQUITH, J., in *Mulholland & Tedd, Ltd.* v. *Baker* (5) ([1939] 3 All E.R. 253). ASQUITH, J., said (ibid., at p. 255):

> "The plaintiffs put their claim originally on three alternative bases, (i) on the basis that the defendant negligently permitted fire to escape on to his premises, (ii) on the basis of nuisance, or (iii) on the basis of the rule in G *Rylands* v. *Fletcher* (1). During the hearing, counsel for the plaintiffs abandoned the second ground and relied only on the first and third. As to the first ground, at common law the liability for injury done to a neighbour by fire escaping from one's own premises was a strict liability, independent of negligence. However, by reason of the Fires Prevention (Metropolis) H Act, 1774, which exempts the defendant in the case of a fire beginning on his premises 'accidentally' (a term which has been construed to mean 'without negligence'), a plaintiff must now establish negligence."

I have found that the fire, which originated on the defendants' premises, did not begin accidentally within the meaning of that Act, but was due to negligence on the part of Mr. Brown, who was a servant of the third parties, they being in I these premises contractually. Counsel for the plaintiff contended that on these facts the defendants were liable, and that it was not necessary for him to prove that the negligence was the personal negligence of the defendants or their servants. He contended that the defendants were liable unless they could prove that the fire was due to the act of a stranger, or could bring themselves within one or other of the recognised exceptions to the rule in *Rylands* v. *Fletcher* (1). In *Turberville* v. *Stampe* (6) ((1697), 1 Ld. Raym. 264), HOLT, C.J., said (ibid., at p. 264):

> ". . . if a stranger set fire to my house, and it burns my neighbour's house, no action will lie against me ", A

but a man is responsible for the fault of his servant, his wife, his guest, or one entering his house with his leave or assent.

I was referred to a number of passages in SALMOND ON TORTS (11th Edn.), for clarification of who is a stranger within the meaning of this rule. At p. 135 B the learned author says, under the heading of " Cases of absolute or strict liability ":

> " Where the act which the contractor is employed to do is one of the kind which the employer does at his own peril—so that the existence of negligence is immaterial—it is no defence that the cause of the mischief was the C negligence of an independent contractor by whose agency the act was done. Thus where the owner of a factory is under an absolute statutory duty to supply certain safeguards for his workmen—e.g., to guard dangerous machinery—he is equally liable whether the failure to perform this duty is the act of himself or his servants or is the act of an independent contractor to whom the duty was delegated by him. D On the same principle a person from whose land a destructive fire spreads to the land of his neighbour cannot defend himself by the plea that the direct cause of the mischief was the negligence of his agents."

Then at p. 640 there appears this passage:

> E " The question arises: For whose negligence in the matter of fire is the occupier of the land responsible; only for his own, or also vicariously for that of other persons? This question is left open by *Filliter* v. *Phippard* (4), but receives a partial answer in the case of *Black* v. *Christchurch Finance Co.* (7) ([1894] A.C. 48) in which the occupier was held liable for the act of an independent contractor who negligently and in disregard of his instructions F lit a fire on the defendant's property at a dangerous and improper season of the year. There seems no reason for supposing that the liability of an occupier for damage by fire is any more restricted than his liability for the escape of any other dangerous substance."

At p. 641 there appears this passage: G

> " The present law is a rule of vicarious liability for the negligent acts of all persons except mere strangers—not a rule of absolute liability for accidents for which no one is to blame."

Counsel for the defendants contended before me on all these facts that the defendants were not liable to the plaintiff, and he referred me to some authorities H which he said illustrated the standard of care which it was essential to take in certain operations. One of these authorities was *Honeywill & Stein, Ltd.* v. *Larkin Bros.* (*London's Commercial Photographers*), *Ltd.* (2) ([1934] 1 K.B. 191) to which I have already referred. The headnote to that case is:

> " Where a person employs an independent contractor to do work which I involves special danger to another's premises, he must take reasonable precautions to see that the work does not cause damage to the premises. Where, therefore, the plaintiffs had procured the defendants, as independent contractors, to take photographs of the interior of a cinematograph theatre, and owing to the defendants' negligence the premises were damaged by fire:—Held, reversing the judgment of BENNETT, J., that the plaintiffs were liable to the owners of the theatre for the damage caused by the

A negligence of the defendants, and therefore were entitled to recover damages from the defendants for breach of contract or negligence in taking the photographs.

The particular passages to which I was referred were at pp. 196 and 197. There SLESSER, L.J., reading the judgment of the court, said:

> B "It is well established as a general rule of English law that an employer is not liable for the acts of his independent contractor in the same way as he is for the acts of his servants or agents, even though these acts are done in carrying out the work for his benefit under the contract. The determination whether the actual wrongdoer is a servant or agent on the one hand or an independent contractor on the other depends on whether or not the employer C not only determines what is to be done, but retains the control of the actual performance, in which case the doer is a servant or agent; but if the employer, while prescribing the work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor. Cases like *Laugher* v. *Pointer* (8) ((1826), 5 B. & C. 547) and *Reedie* v. *London & North Western Ry. Co.* (9) ((1849), 4 Exch. 244) state the general rule of law that D the ultimate employer is not responsible for the negligence of the independent contractor or his men. It was said by LORD BLACKBURN in *Dalton* v. *Angus* (10) ((1881), 6 App. Cas. 740 at p. 829): 'Ever since *Quarman* v. *Burnett* (11) ((1840), 6 M. & W. 499) it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master E and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate F for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it: *Hole* v. *Sittingbourne & Sheerness Ry. Co.* (12) ((1861), 6 H. & N. 488); *Pickard* v. *Smith* (13) ((1861), 10 C.B.N.S. 470); *Tarry* v. *Ashton* (14) ((1876), 1 Q.B.D. 314)'. But there are exceptions to this rule; it may be that, as G in other cases of vicarious liability, the tendency of the English law, as it has developed since the dates of the cases just mentioned, has been rather to enlarge the scope of these exceptions, but the development has followed certain broad lines. It is clear that the ultimate employer is not responsible for the acts of an independent contractor merely because what is to be done will involve danger to others if negligently done. The incidence of this H liability is limited to certain defined classes, and for the purpose of this case it is only necessary to consider that part of this rule of liability which has reference to extra-hazardous acts, that is, acts which, in their very nature, involve in the eyes of the law special danger to others; of such acts the causing of fire and explosion are obvious and established instances."

I SLESSER, L.J., says ([1934] 1 K.B. at p. 199):

> "The decision in this case, in our judgment, does not depend merely on the fact that the defendants were doing work on the highway, but primarily on its dangerous character, which imposes on the ultimate employers an obligation to take special precautions, and they cannot delegate this obligation by having the work carried out by independent contractors."

Then (ibid., at p. 200) he finishes up in this way:

> "The learned judge has found for the respondents because he has held

> (founding himself on the words of Lord Watson in *Dalton* v. *Angus* (10) (6 App. Cas. at p. 831) that the work to be done by the respondents for the appellants 'was not necessarily attended with risk. It was work which, as a general rule, would seem to be of quite a harmless nature'. But, with respect, he is ignoring the special rules which apply to extra-hazardous or dangerous operations. Even of these it may be predicated that if carefully and skilfully performed, no harm will follow: as instances of such operations may be given those of removing support from adjoining houses, doing dangerous work on the highway, or creating fire or explosion: hence it may be said, in one sense, that such operations are not necessarily attended with risk. But the rule of liability for independent contractors' acts attaches to these operations, because they are inherently dangerous, and hence are done at the principal employer's peril."

Counsel for the defendants was contending before me that in the light of this authority the ordering of the contractor to thaw out frozen pipes is not work from which in the natural course of things injurious consequences can be expected to flow. In support of his argument he also referred to *Spicer* v. *Smee* (15) ([1946] 1 All E.R. 489). That was a judgment of Atkinson, J., and the only passage to which I need refer is where the learned judge says (ibid., at p. 495):

> ". . . usually a man is not liable for the default of an independent contractor, but in the law of nuisance an exception exists. I have already referred to what was said by Scrutton, L.J., in *Job Edwards, Ltd.* v. *Birmingham Navigations* (16) ([1924] 1 K.B. 341). Winfield on Torts also deals with this contention and states that it does not apply in the case of nuisance. The principle which governs these cases is that which was laid down in *Bower* v. *Peate* (17) ((1876), 1 Q.B.D. 321) by Cockburn, C.J. Having explained that normally a man is not liable for the negligence of the contractor, Cockburn, C.J., goes on to say (1 Q.B.D. at pp. 325, 326) that 'this reasoning cannot prevail' where: '. . . he directs an act to be done from which injurious consequences will result unless means are taken to prevent them in the shape of additional work, but omits to direct the latter to be done as part of the work to be executed, contenting himself with securing to himself a pecuniary indemnity in the event of any claim arising from damage to the adjoining property. He is, therefore, not in the position of a man who has simply authorised and contracted for the execution of a work from which, if executed with due care, no injury can arise, and who is, therefore, not to be held responsible if, while the work is going on, injury arises from the negligence of the contractor or his servants. The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful'. I think that is the broad principle, which was approved by Lord Blackburn in *Dalton* v. *Angus* (10) (6 App. Cas. at p. 829) and in *Penny* v. *Wimbledon Urban Council* (18) ([1899] 2 Q.B. 72), that, where danger is likely to arise unless work is properly done, there is a duty to see that it is properly done."

A PROFESSOR WINFIELD at one time, in his well-known book on TORTS regarded this as a separate tort, which he described (6th Edn.), at p. 717 as the tort of dangerous operations. There has, however, since been some criticism of the theory. The principle seems to be this, that in the case of extra-hazardous acts, that is, acts which from their nature involve in the eyes of the law special danger to others, an obligation is imposed on the ultimate employers to take B special precautions which they cannot delegate by having the work carried out by independent contractors. Now, a plaintiff whose house has been damaged by an escape of fire from a neighbouring house may in some cases be able to invoke this principle. For instance, in *Pass of Ballater S.S. Owners* v. *Cardiff Channel Dry Docks & Pontoon Co., Ltd.* (19) ([1942] 2 All E.R. 79) one finds this C passage in the judgment of LANGTON, J., (ibid., at p. 84):

> ". . . where the introduction of implements or substances dangerous in themselves, such as flame-bearing instruments or explosives, are necessarily incidental to the work to be performed, a contractor is equally bound by an unescapable duty. The point may perhaps be crystallised by saying that D he has not merely a duty to take care, but a duty to provide that care is taken."

The plaintiff in this case did rely on this principle as the third basis of liability, but he is not bound to do so, and, in my view, if he proves that the fire which began on the defendants' premises or land and escaped to his own land began negligently, the defendants are liable for the negligent acts of all persons except E strangers, and, in my view, Mr. Brown and Mr. Rogers, who were there at the invitation of the second defendant, and acted as agents on behalf of herself and her husband, were not strangers within the meaning of this rule*. On this ground, therefore, I hold that the plaintiff is entitled to succeed against the defendants on the first basis of liability.

F The second head or basis of liability on which the plaintiff put his claim was this. He said that a spreading fire is in itself a *Rylands* v. *Fletcher* (1) object, but if it has its source in something which is also itself a *Rylands* v. *Fletcher* (1) object, then the statute to which I have referred does not afford a good defence, and it is not necessary for the plaintiff, it is said, to prove that the fire was not accidental. For this *Musgrove* v. *Pandelis* (3) ([1919] 2 K.B. 43) was cited as the authority. G BANKES, L.J., after expressing the view to which I have already referred, says this (ibid., at p. 47):

> " It is plain that the statutes did not touch the other heads of liability at common law. [These were (2) if the fire was caused by the negligence of himself or his servants, or by his own wilful acts; (3) upon the principle H of *Rylands* v. *Fletcher* (1).] The second head is not within the protection; that was decided by *Filliter* v. *Phippard* (4), where it was held that the Act of Geo. 3† did not apply to a fire which was caused either deliberately or negligently. Why, if that is the law as to the second head of liability, should it be otherwise as to the third head, the liability on the principle of *Rylands* v. *Fletcher* (1)? If that liability existed, there is no reason why I the statute should alter it and yet leave untouched the liability for fire caused by negligence or design. That the principle of *Rylands* v. *Fletcher* (1) existed long before that case was decided is plain. In *Vaughan* v. *Menlove* (20) ((1837), 3 Bing. N.C. 468) TINDAL, C.J., says (at p. 474): ' There is a rule of law which says you must so enjoy your own property as not to

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* I.e., it seems, the rule stated at pp. 559, 560, ante, citing *Turberville* v. *Stampe* ((1697), 1 Ld. Raym. 264).

† The Fires Prevention (Metropolis) Act, 1774; compare footnote, p. 555, ante.

> injure that of another '. Park, J., says: ' Although the facts in this case are new in specie, they fall within a principle long established, that a man must so use his own property as not to injure that of others '. *Rylands* v. *Fletcher* (1) is merely an illustration of that old principle, and in my opinion Lush, J., was right in saying that this case, if it falls within that principle, is not within the protection of the statute."

Warrington, L.J., after citing *Turberville* v. *Stampe* (6), to which I have already referred, says this ([1919] 2 K.B. at p. 49): " The Act of Geo. 3 is no protection against that liability ". Duke, L.J. (at p. 50) says:

> " I agree. I do not see how this case can be taken out of the principle of *Rylands* v. *Fletcher* (1), which was thus stated by Lord Cairns, L.C., in the very words of Blackburn, J.",

and then he sets out the classic passage*. He then says (ibid., at p. 51):

> " That was no new principle. It is summed up in the maxim usually expressed in Latin, but found in *Filliter* v. *Phippard* (4) and *Vaughan* v. *Menlove* (20), that a man must so use his own property that he does not hurt the property of his neighbour."

That decision was followed also by Asquith, J., in the case, to which I have already referred, of *Mulholland & Tedd, Ltd.* v. *Baker* (5), in which he says ([1939] 3 All E.R. at p. 256):

> " If I am wrong in finding that the fire was caused by the negligence of the defendant, I still think that the plaintiffs are in this case entitled to succeed on the principle of *Rylands* v. *Fletcher* (1). The Fires Prevention (Metropolis) Act, 1774, which in effect provides that negligence is a condition of liability in the case of a fire spreading from a defendant's premises to a plaintiff's, has been held not to apply in cases in which the defendant has brought on his premises an object likely to do damage if it is not kept under control and that object catches fire or causes a fire: *Musgrove* v. *Pandelis* (3). In that case, it was held that a motor car containing petrol and ready to start was such an object. Fire originated somehow in the carburettor, without negligence, and spread to a whole garage, including the part occupied by the plaintiff, who sued and recovered. Paraffin is no doubt considerably less inflammable than petrol, yet it seems to me that twenty gallons of paraffin collected in a drum on the defendant's premises constituted a thing likely to do damage unless kept under proper control, and that the rule of strict liability laid down in *Rylands* v. *Fletcher* (1) applies."

Counsel for the defendants called my attention to a passage in the judgment of Romer, L.J., in *Collingwood* v. *Home & Colonial Stores, Ltd.* (21) ([1936] 3 All E.R. 200). The judgment of Romer, L.J., is at p. 208, and he says:

> " I only desire to add this. I think at some time it will be desirable if the House of Lords would consider the case of *Musgrove* v. *Pandelis* (3), so far as the decision in that case was based upon *Rylands* v. *Fletcher* (1). Of course the rule in *Rylands* v. *Fletcher* (1), as is well known, is a rule which relates to the escape from somebody's premises of a dangerous animal or thing brought by the owner upon those premises, and does not relate to a case like the present, or a case like the Court of Appeal had to deal with in *Musgrove* v. *Pandelis* (3), where there had been an escape of nothing from the defendant's premises. But the rule in *Rylands* v. *Fletcher* (1), as has

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* See p. 565, letter H, post.

> frequently been pointed out, is based upon a much wider principle, namely, the principle ' Sic utere tuo ut alienum non laedas ', and there is no doubt in *Musgrove* v. *Pandelis* (3) the Court of Appeal were referring to *Rylands* v. *Fletcher* (1) as being based upon that wider principle. But what will have to be considered is whether *Musgrove* v. *Pandelis* (3), so far as it purports to be based on that larger principle, can be supported seeing that the decision involves these two propositions, (i) that a motor car is—I am quoting from the judgment of Bankes, L.J., a dangerous thing to bring into a garage, and (ii) that the use of one's land for the purpose of erecting a garage and keeping a motor car there, is not an ordinary and proper user of the land—two propositions which, but for that authority, I should myself respectfully have doubted."

However, in a recent case in the Court of Appeal Parker, L.J., referred to this criticism. That was in *Perry* v. *Kendricks Transport, Ltd.* (22) ([1956] 1 All E.R. 154). The judgment of Parker, L.J., is at p. 160, where he says:

> "I agree and I would only add a word in deference to the argument of counsel for the plaintiff in regard to the rule in *Rylands* v. *Fletcher* (1). Although the decision in *Musgrove* v. *Pandelis* (3) has been the subject of some criticism (see the speech of Lord Porter in *Read* v. *J. Lyons & Co., Ltd.* (23), [1946] 2 All E.R. 471 at p. 479), it is still binding on this court. Accordingly, I feel bound to approach the matter on the basis that the facts here bring the case within the rule in *Rylands* v. *Fletcher* (1): nor do I think it is open to this court to hold that the rule only applies to damage to adjoining land or to a proprietary interest in land and not to personal injury. It is true that in *Read* v. *J. Lyons & Co., Ltd.* (23), Lord Macmillan, Lord Porter and Lord Simonds all doubted whether the rule extended to cover personal injuries, but the final decision in the matter was expressly left over and, as the matter stands at present, I think we are bound to hold that the defendants are liable in this case, quite apart from negligence, unless they can bring themselves within one of the well-known exceptions to the rule."

As Parker, L.J., points out, *Musgrove* v. *Pandelis* (3) is binding on the Court of Appeal, and of course it is binding on me.

The next point taken by counsel for the defendants was that a blow-lamp, and a fortiori an unlighted blow-lamp, is not an object of the class to which the rule in *Rylands* v. *Fletcher* (1) applies, that is to say, a dangerous thing, so that the defendants were not under an obligation under this rule to prevent it or the dangerous element in it from escaping on to a neighbour's land and doing damage there. The classic passage from the judgment of Blackburn, J., cited and approved in the speech of Lord Cairns, was in these terms (L.R. 3 H.L. at p. 339):

> " 'We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape '."

The question I have to consider, therefore, is: is a blow-lamp—and for this purpose I have to consider an ignited blow-lamp because it was ignited and used in this loft—an object of the class to which the rule in *Rylands* v. *Fletcher* (1) applies? There are some helpful observations in the speech of Lord Porter in *Read* v. *J. Lyons & Co., Ltd.* (23) ([1946] 2 All E.R. 471), and the passage in the speech to which I wish to refer is at p. 478. Lord Porter says:

> "To make the rule [that is the rule in *Rylands* v. *Fletcher* (1)] applicable it is at least necessary for the person whom it is sought to hold liable to have brought on to his premises, or, at any rate, to some place over which he has a measure of control, something which is dangerous in the sense that, if it escapes, it will do damage. Possibly a further requisite is that to bring the thing to the position in which it is found is to make a non-natural use of that place. Such, at any rate, appears to have been the opinion of Lord Cairns, and this limitation has more than once been repeated and approved: see *Rickards* v. *Lothian* (24) ([1913] A.C. 263 at p. 280, per Lord Moulton). Manifestly, these requirements must give rise to difficulty in applying the rule in individual cases and necessitate at least a decision as to what can be dangerous and what is a non-natural use. Indeed, there is a considerable body of case law dealing with these questions and a series of findings or assumptions as to what is sufficient to establish their existence. Among dangerous objects have been held to be included, gas, explosive substances, electricity, oil, fumes, rusty wire, poisonous vegetation, vibrations, a flag-pole and even dwellers in caravans. Furthermore, in *Musgrove* v. *Pandelis* (3) it was held that a motor car brought into a garage with full tanks was a dangerous object, a conclusion, which, as Romer, L.J., pointed out in *Collingwood* v. *Home & Colonial Stores, Ltd.* (21) ([1936] 3 All E.R. 200 at p. 209) involves the propositions that a motor car is a dangerous thing to bring into a garage and that the use of one's land for the purpose of erecting a garage and keeping a motor car there is not an ordinary or proper use of the land. My Lords, if these questions ever come directly before this House it may become necessary to lay down principles for their determination. For the present I need only say that each seems to be a question of fact subject to a ruling of the judge whether the particular object can be dangerous or the particular use can be non-natural, and in deciding this question I think that all the circumstances of the time and place and practice of mankind must be taken into consideration so that what might be regarded as dangerous or non-natural may vary according to those circumstances."

I, therefore, apply the rule which Lord Porter suggests as the appropriate test for a judge to take, that is, to have regard to all the circumstances of the time and place and practice of mankind. It appears that although the user of a blow-lamp for the purpose of thawing out a pipe is a recognised method of thawing out a pipe in an appropriate place and appropriate circumstances, yet in other places it is not only not a recognised practice but also an extremely dangerous practice, and one which no prudent workman or contractor would have adopted. I have to have regard to all the circumstances of time and place and the practice of the trade, and, applying that test, I feel constrained to come to the conclusion that the user of the blow-lamp in these particular circumstances in this loft, so close to all this combustible material, did constitute the blow-lamp an object of the class to which the rule in *Rylands* v. *Fletcher* (1) applies. I hold, therefore, in so far as it is a question of law for me, that the user of the blow-lamp in this place by Mr. Brown in these circumstances was dangerous and that it was likely to do mischief if the dangerous element in it, that is to say the fire, escaped. I also hold, if it is a necessary requisite for the application of the rule in *Rylands* v. *Fletcher* (1) to this case, that to bring the blow-lamp to this position in which it was ignited and used was to make a non-natural user of that place. It was a special user, bringing with it increased danger to others, and was not merely the ordinary user of the land. I hold, therefore, that the blow-lamp was, in the circumstances, an object of the class to which the rule in *Rylands* v. *Fletcher* (1) applies.

The next point taken by counsel for the defendants was that there was an onus on the plaintiff to prove that the defendants knew that Mr. Brown and Mr. Rogers were bringing the blow-lamp on to their premises, and that as this was not proved, the rule in *Rylands* v. *Fletcher* (1) had no application. There was some conflict of evidence in regard to the facts on this issue.

[His Lordship then reviewed the evidence which showed that Mr. Brown had a blow-lamp in his hand with him when he came on to the second defendant's premises on the afternoon of Jan. 29, 1954. The evidence also showed that the second defendant did not know how Mr. Brown and Mr. Rogers were going to thaw the pipe and that she might well not have appreciated that they were going to use a blow-lamp. His Lordship drew the conclusion that the second defendant had not consciously directed her mind to the question at all but had left the question of how the thawing out was to be effected to the persons she considered fit to do it. His Lordship continued:]

In those circumstances, I have some sympathy with the argument of counsel for the defendants on this point, but it would seem to me that I am constrained by authority to find against him on this point. The point arose in *West* v. *Bristol Tramways Co.* (25) ([1908] 2 K.B. 14). The headnote to that case is:

> "The defendants, a tramway company, who were by their special Act under an obligation to pave certain parts of a road, on which their tramway was laid, with wood paving, used for that purpose wood blocks coated with creosote. The fumes given off by the creosote injured plants and shrubs belonging to the plaintiff, a market gardener, whose premises were near the road. There was another kind of wood paving in use which the defendants might have used, and which could not have caused injury to the plaintiff's plants and shrubs. In an action by the plaintiff in respect of the damage caused as above mentioned, the jury found that it was reasonably necessary for the defendants to pave the road as they did according to their knowledge at the time, but that in the light of the evidence given at the trial it was not reasonably necessary:—Held (affirming the decision of a Divisional Court), that the defendants were not authorised by their special Act to use the particular kind of wood paving which they had used, and that, although they did not know that the use of creosoted wood might cause damage, and were not guilty of negligence, they were, upon the principle laid down in *Rylands* v. *Fletcher* (1) liable to the plaintiff in respect of the damage sustained by him."

The judgment of Phillimore, J., who gave the leading judgment in the Divisional Court in that case, appears in the footnote ([1908] 2 K.B. at p. 16). He says:

> "In these circumstances the onus is on the defendants to justify the use of this particular kind of wood pavement; but, where a man uses his land or his chattel in such a way as to injure his neighbour's property, it is not a justification to say that he had no intention of causing the injury complained of, or that he did not know, or even that there was no reason why he should know, that the injury would be caused."

Lord Alverstone, C.J., who gave the leading judgment in the Court of Appeal, cites ([1908] 2 K.B. at pp. 19, 20) the statement in Garrett on Nuisances (2nd Edn.) at p. 129:

> "'Where the owner of land uses his land for any purpose for which it may in the ordinary course of enjoyment of land be used, he will not, in the absence of negligence on his part, be liable, though damage result to his

> neighbour in the ordinary enjoyment by the latter of his property; for it lies with the latter to protect himself from the operation of natural laws. But, if the owner of land uses it for any purpose which from its character may be called non-natural or extraordinary user, such as, for example, the introduction on to the land of something which in the natural condition of the land is not upon it, he does so at his peril, and is liable if sensible damage results to his neighbour's land from its escape, or if the latter's legitimate enjoyment of his land is thereby materially curtailed.' If the contention of the defendants' counsel in this case is correct, this last proposition is stated much too widely; for they contend that the owner of land who has so acted has not done so at his peril, and is not liable, unless the plaintiff shows that the thing introduced on to the land was, to the knowledge of the defendant, likely to escape and cause damage. The authorities do not, in my opinion, support the suggestion that this onus is cast on the party injured."

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In those circumstances, I find myself unable to accept the argument of counsel for the defendants, and I hold that the plaintiff is entitled to succeed on the basis of the rule in *Rylands* v. *Fletcher* (1). D

In those circumstances, it is not necessary for me to determine the third basis on which the plaintiff put his case, which was on the broad maxim, sic utere tuo ut alienum non laedas, as exemplified in the case of *Honeywill & Stein, Ltd.* v. *Larkin Bros.* (*London's Commercial Photographers*), *Ltd.* (2) ([1934] 1 K.B. 191), and also in *Hughes* v. *Percival* (26) ((1883), 8 App. Cas. 443). It follows therefore that the plaintiff is entitled to judgment against the defendants for the agreed sum of £3,140 5s. It follows also that the defendants are entitled to judgment against the third parties for £5,875. E

Judgment for the plaintiff against the defendants. Judgment for the defendants against the third parties. F

Solicitors: *Barlow, Lyde & Gilbert* (for the plaintiff); *Boodle, Hatfield & Co.* (for the defendants); *Oswald Hickson, Collier & Co.*, agents for *Bracher, Son & Miskin*, Maidstone (for the third parties).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

A SIMONS v. W. H. RHODES & SON, LTD. AND ANOTHER.

[COURT OF APPEAL (Singleton, Morris and Romer, L.JJ.), May 7, 8, 1956.]

Dock—Discharging ship's cargo—Lighting of ship inefficient—Stevedore injured —Liability of shipowner and of employer—Docks Regulations, 1934 (*S.R.* B *& O.* 1934 *No.* 279), *reg.* 12, *reg.* 50.

The plaintiff was employed by the first defendants, a firm of stevedores who were engaged in discharging the cargo of the s.s. Colonial which was owned by the second defendants. On Dec. 22, 1953, after the work had been in progress for some four or five days at No. 2 hatch the plaintiff came up a ladder of the hatch in the late afternoon and at the top caught C his foot in a cleat or bolt and tripped and fell suffering slight injuries. The ship's lighting at the place of the accident was inefficient. The plaintiff sued his employers for damages, later joining the shipowners as defendants against whom alone he was awarded damages for breach by the shipowners of their duty under reg. 12 of the Docks Regulations, 1934, to light that part of the ship efficiently. On appeal by the shipowners on the ground D that the employers were also liable to the plaintiff for breach of their duty under reg. 50 to comply with reg. 12 "within the shortest time reasonably practicable" after the failure of the shipowners to comply with reg. 12,

Held: the employers were in breach of duty under reg. 50 because, after they knew or ought to have known of the breach of reg. 12 by the shipowners and after a reasonable time in which to take steps to comply with E reg. 12 had elapsed, the employers had not complied with reg. 12; in the circumstances the damages awarded to the plaintiff should be borne by the employers and the shipowners equally.

Appeal allowed.

[For the Docks Regulations, 1934, regs. 12, 50, see 8 HALSBURY'S STATUTORY INSTRUMENTS 166, 173.] F

Cases referred to:

(1) *Hanson* v. *Wearmouth Coal Co., Ltd. & Sunderland Gas Co.*, [1939] 3 All E.R. 47; Digest Supp.

(2) *Hayward* v. *Glen Line, Ltd.*, [1955] 2 Lloyd's Rep. 142.

G **Appeal.**

The shipowners, the second defendants, appealed from an order of ASHWORTH, J., at Liverpool Assizes, dated Nov. 18, 1955, whereby he held them liable in damages to the plaintiff for breach of the Docks Regulations, 1934 (S.R. & O. 1934 No. 279), reg. 12.

The facts appear in the judgment of SINGLETON, L.J.

H *D. J. Brabin, Q.C.*, and *J. M. Davies* for the shipowners, the second defendants.

H. I. Nelson, Q.C., and *G. B. H. Currie* for the employers, the first defendants.

Edward Wooll, Q.C., and *A. D. Pappworth* for the plaintiff.

SINGLETON, L.J.: This is an interesting case arising out of an accident in a ship on Dec. 22, 1953. The plaintiff, William Simons, was employed by I the first defendants, W. H. Rhodes & Son, Ltd., a firm of stevedores (hereinafter called "the employers"). They were working on the discharge of the s.s. Colonial, which was berthed at South 3 Huskisson Dock, Liverpool. The owners of the ship are the second defendants, T. & J. Harrison, Ltd. (hereinafter called "the shipowners").

The discharge of the ship had been going on for four or five days prior to Monday, Dec. 22, 1953. On Dec. 22 daylight goes fairly early. The stevedores were accustomed to working on the discharge of the ship until around 5 o'clock.

Well before 4 o'clock it would be necessary to have artificial light on deck, and, of course, artificial light was necessary in the hold of the ship where the stevedores were working. The accident with which we are concerned happened in the late afternoon fairly close to No. 2 hatch. The plaintiff was one of a gang of eight men working there. The system of lighting, in so far as it was of use to those in the forward part of the ship, was this: On the mast head there were four lights, two on each side. Two were to give light on the deck in the neighbourhood of No. 1 hatch, and the other two pointed towards the stern of the ship, and were to give light to the deck around No. 2 hatch, at which the plaintiff was working. The plaintiff came up a ladder from No. 2 hatch to get on to the deck late in the afternoon when work was ceasing for the day. At the moment when he stepped over the hatch coaming, he caught his foot and tripped and fell. He was injured to some slight extent.

The plaintiff brought an action claiming damages against the employers and the shipowners. The action was heard before ASHWORTH, J., at Liverpool on Nov. 17 and 18, 1955. The learned judge found for the plaintiff against the shipowners and awarded him £201 damages, being two-thirds of the full amount of the damages. The learned judge thought that the plaintiff was one-third responsible in that he had not taken sufficient care, and he reduced the damages accordingly. The shipowners appeal and ask that judgment should be entered for the plaintiff against both the employers and the shipowners, and that their liability be apportioned " as to such amount and costs ". That procedure is in accordance with the principle stated by GODDARD, L.J., in *Hanson* v. *Wearmouth Coal Co., Ltd. & Sunderland Gas Co.* (1) ([1939] 3 All E.R. 47 at p. 55). The action was commenced on Apr. 14, 1954. At that time it was an action against the employers alone. They put in a defence denying any breach of statutory duty or negligence, and alleging contributory negligence on the part of the plaintiff. They also alleged in para. 5 of their defence that it was the duty of the shipowners to comply with the Docks Regulations, 1934 (S.R. & O. 1934 No. 279), reg. 12, and that it was the shipowners who were responsible to the plaintiff. That caused the plaintiff's advisers to obtain leave to amend their statement of claim and to add the shipowners as defendants on Jan. 22, 1955. The defence of the shipowners was filed on Mar. 19, 1955. That meant that the shipowners did not have any claim made against them until a long time after the accident had taken place, which is a matter for regret, for it is extraordinarily difficult for them to find out the full circumstances of an accident of this kind, which was not a serious accident, many months after it has taken place.

At the time that the accident happened, the ship had on board one officer and a skeleton crew. The ship's lights were being used when necessary for the discharge of the ship. The allegation made by the plaintiff was that there was insufficient light on the deck and in the place at which the plaintiff had to work, and that that brought about his accident. The particulars of the breach of statutory duty were given in the amended statement of claim, as follows:

> " The [employers], their servants or agents, were guilty of breach of statutory duty and/or negligence in that they: (a) failed to have the said deck lit efficiently in breach of regs. 12 and 50 of the Docks Regulations, 1934; (b) failed to light the said deck properly at the said hatch. The [shipowners], their servants or agents, were guilty of breach of statutory duty and/or negligence in that they: (c) failed to light efficiently the said deck in breach of reg. 12 of the said regulations; (d) failed to warn the plaintiff of the said ring bolt and/or to light the deck in the vicinity of the said bolt when they knew or ought to have known of the said danger of which he did not know."

The bolt or cleat is the thing over which the plaintiff tripped and fell. When the case came on for trial, two witnesses were called on behalf of the plaintiff (as well as the plaintiff himself); they were the employers' men who had been working on the ship helping to discharge goods from No. 2 hatch at the time when the accident happened. They all gave evidence as to the lighting of the ship in the neighbourhood of the hatch. The plaintiff himself said that the light was not good. He said that when they came up from working below deck, a cluster of lights was brought up from below to give them more light to put the covers on. It would appear, if that answer is correct, that the lighting in the neighbourhood of No. 2 hatch was not very good, apart from the clusters which were brought up when the men had to put the hatch covers on. The plaintiff was asked in cross-examination:

> " Q.—You made no complaint about [the lighting from the mast head lights] ? A.—We made no complaint about that because, as I explained, to put the hatch covers on, we took the cluster up and gave ourselves more sufficient light. Q.—When the mast head light was working properly, did it throw a fairly good light ? A.—I never saw it working properly."

He said that unloading had been going on for five days before the accident, and the lighting, when it was used, was poor or inefficient all the time. There was another witness named McGill who said that after the accident to the plaintiff he had looked to see what he had tripped over and he could see nothing until he struck a match. If that is so, there cannot have been much light on that part of the deck from the mast head lights. Mr. McGill was asked:

> " On this occasion when you came up, did you find the light at the top of the hatch the same as usual, or was it duller than usual ? ",

and he said (as the other witness for the plaintiff said) that it was much or just as usual. On the other side Mr. George Francis Land, the " ship's foreman ", gave evidence on behalf of the employers. He was in charge (as he described it) " at the s.s. Colonial ". I take it that he was in charge of the stevedores who were working on discharging the ship. He said that the usual practice when work of that kind is going on is that there are two clusters of lights down below and the mast head lights, which were supplied by the shipowners. He said that he had had no trouble in this ship. He was asked if he had noticed any variation in the power of the lights on that day from other days, and he said:

> " To my mind, they were the usual. We only have the same any time on any ship."

He had not noticed that there was anything wrong with the lighting provided by the mast head lights. The officer of the ship, the first mate, who was called, said that the lighting from the mast head lights was in order; there was nothing wrong with it and that it was as usual.

The learned judge was satisfied that he had seen three witnesses for the plaintiff who were all honest men and who were all giving him the best information they could as to what happened. He took the same view of all the witnesses in the case. He came to the conclusion that the lighting was inefficient. He said in the course of his judgment:

> " The two lights that were intended to illuminate the hatch where the plaintiff was working, were deflected downwards over the deck, and I think that it is probably true to say that so far as the broad area round the deck they afforded reasonably sufficient light; but I am quite satisfied that that lighting was not sufficient to enable the men in the gang to put the hatch covers on with safety, nor was it sufficient to illuminate the particular part of the deck on to which the gang had to clamber, when they came up out of the hold, and I can understand the situation quite easily."

So ASHWORTH, J., was satisfied that the lighting on that part of the deck was A not sufficient to enable the men in the gang to put the hatch covers on with safety. That is a finding of fact. Later in his judgment the learned judge said:

> "It was a striking piece of evidence to find that after Mr. Simons [the plaintiff] had fallen over and hurt himself, his mate, Mr. McGill, was unable B to see what had caused Mr. Simons to fall, and had to strike a match, and there he found that Mr. Simons had tripped over a cleat which was welded into the deck, in between the two winches on the forward side of this hatch. I accept that evidence called for the plaintiff to the effect that they could not see this cleat when they came out of the hatch. Because I accept that evidence and made that finding of fact, I am constrained to hold that the C [shipowners] were in breach of the duty imposed on them by reg. 12 of the Docks Regulations."

The judge went on to point out that it was not until eleven months after the accident happened that the shipowners knew anything about a claim against them. He then proceeded to consider reg. 50 (with which I will deal in a moment), and said: D

> "It turns out that in the early stages of unloading this hatch, the aft ladder was used, and it may very well be that the lighting from the foremast was sufficient to throw light on to the area immediately at the top of that aft ladder. It would be further away from the mast. Unfortunately, in the course of unloading, that ladder became displaced or damaged, and it E became necessary to use the forward ladder. Although the evidence was not entirely certain about it, I think it right to conclude that this forward ladder had not been used in times of darkness for more than, at most, two days before the accident."

I am not sure that it is necessary to go into questions as to the use of the ladder in view of the findings generally. The judge added: F

> "It seems to me that the absence of any complaint, which indeed is conceded by the gang, to their own employers regarding the absence of lighting at the top of this forward ladder, was sufficient to allow them [the employers] to say that they had not appreciated that the situation had arisen which called for their intervention under reg. 50. Nor was it G reasonably practicable for them to comply with it after the shipowners were shown to have been at fault."

In regard to the claim against the employers, the learned judge said:

> "I feel myself that the employers were, at that stage at any rate when the accident happened, entitled to assume that the shipowners would H carry out the statutory duty which was imposed on them, and no complaint directed to the point now before me had been brought to the notice of the employers. I would have said that it is not proved that the employers were in breach of any duty. The burden is on the plaintiff to establish this case, and in my judgment, he has not discharged that burden, and I acquit the employers of all liability." I

It is on that ground that counsel bases the appeal of the shipowners, claiming, as he does, that it cannot be said on the facts found by the learned judge that the employers are entitled to be discharged from the action altogether. I have read certain passages from the judgment, before dealing with the regulations, for this reason. It is better, if one can, to have a full appreciation of the facts of the case before seeking to apply the regulations. The judgment of ASHWORTH, J., appears to me to show, first, that the lighting provided by the mast head lights was not efficient. Indeed, he found that it was inefficient. So the shipowners were at fault. Then it is said, as I shall show when I refer to the regulations, that, if that were so, there arose on the employers a duty of protecting their men under another of the Docks Regulations, 1934, and also at common law. It is claimed by counsel that the employers failed to do anything, and that, if that is a finding that the lighting provided by the ship was inefficient, and if that position had been the same for five or six days, there was a duty on the employers to take some action, and, as they took none, they must be held responsible under the judge's finding of fact. I have read other passages to show how the judge dealt with that in his judgment.

Now let me come to the regulations. There is some little difficulty in applying reg. 50 to the facts of this case. First, I go back to Part 2 of the regulations, with which it is the duty of the shipowners to comply and which is to be found in REDGRAVE'S FACTORIES, TRUCK & SHOPS ACTS (18th Edn.), p. 636 et seq. The first regulations in Part 2 are regs. 9 and 10 which are both of importance indirectly in considering this case. The next relevant regulation, which is of considerable importance, is reg. 12 which reads:

> " When the processes [for this purpose the process of unloading] are being carried on—(a) the places in the hold and on the decks where work is being carried on . . . (c) all parts of the ship to which persons employed may be required to proceed in the course of their employment, shall be efficiently lighted, due regard being had to the safety of the ship and cargo, of all persons employed and of the navigation of other vessels . . ."

The regulation is one which is made, in part at least, for the safety of persons employed. The part of the deck on which the plaintiff fell is a place within (a), or a part of the ship within (c), at which he had to work or to which he might be required to go. On the finding of the judge that the place at which this accident happened was not efficiently lighted, it is clear that the shipowners are in breach of reg. 12, and that, on the learned judge's finding, that is a cause of the accident which happened to the plaintiff.

It is on reg. 50 that the appeal turns. This provides:

> " If the persons whose duty it is to comply with regs. 9, 10 and 12 fail so to do, then it shall also be the duty of the employers of the persons employed for whose use the means of access and the lights are required, to comply with the said regulations within the shortest time reasonably practicable after such failure."

Regulations 9 and 10 deal with means of access and gangways and the like. Regulation 12 (b) provides that the places therein mentioned should be efficiently lighted by the shipowners. If the shipowners do not comply with reg. 12, the employers, whose men required proper lighting, were under a duty to comply with reg. 12, and to do that within the shortest time reasonably practicable after the failure of the shipowners to do their duty under reg. 12. ASHWORTH, J., said:

> " It seems to me that the absence of any complaint, which indeed is conceded by the gang, to [the employers] regarding the absence of lighting at the top of this forward ladder, was sufficient to allow them [the employers] to say that they had not appreciated that the situation had arisen which called for their intervention under reg. 50. Nor was it reasonably practicable for them to comply with it after the shipowners were shown to have been at fault."

As far as I know, reg. 50 has been considered only once before in court, and that was in a judgment of FINNEMORE, J., in *Hayward* v. *Glen Line, Ltd.* (2) ([1955] 2 Lloyd's Rep. 142). FINNEMORE, J., said (ibid., at p. 145):

> "I am told that there has been no decision on the meaning of those words yet. I would think that the meaning of those words is the one suggested by Mr. Donaldson, that it means as soon as possible after the employer knew, or ought to have known, that there was a breach of statutory duty by the person responsible. I find it difficult to see what other reading can really be given to the words. If one gave some other meaning it must mean that the employer has got to go regularly to see whether the safe means of access is there. It is a statutory duty on the employer to see that the regulation is carried out, but the statutory duty here is not on the employer but on the occupier of the ship, and the duty placed by statute on the shoulders of the employer becomes effective only after the other person has failed to carry his out."

Undoubtedly regard must be had to the last line of the regulation,

> "within the shortest time reasonably practicable after such failure."

To take the question of lighting, if the shipowner does not provide efficient lights, in the ordinary course it should come to the notice of the stevedores working the ship that that state of things exists, and it would be their duty within the shortest time reasonably practicable to bring about an alteration either by some arrangement with the shipowners or by doing something themselves as employers. That is the duty cast on them by the regulation. Of course, it would be difficult to do anything unless they either knew or had the opportunity of knowing of the breach, but in a case such as this the employers had just as much opportunity as the shipowners had of knowing what the state of lighting on the deck of the ship was. ASHWORTH, J., was satisfied that the lighting was not satisfactory. He was satisfied that there was a breach of reg. 12, by the shipowners, in that the places at which the stevedores had to work were not efficiently lighted. If the same condition had existed for five or six days, as no one disputes, and work (except on Saturday and Sunday) was done in the dark on each of those days, it ought to have been obvious to Mr. Land, who described himself as the ship's foreman, that that state of things existed, and he had an opportunity on behalf of the employers of complying with reg. 50. The finding of the judge that the lighting was inefficient is coupled with the fact that the evidence on which the judge found the lighting to be inefficient is the evidence of the employers' men. If their men who were called as witnesses knew that the lighting was inefficient, so ought the management of the employers, and thus something ought to have been done in order to bring about compliance with reg. 50. Once it is found (a) that the lighting was inefficient, (b) that it had been in the same condition throughout the time the employers' men were working there, and (c) that the finding of the judge was based on the evidence of the employers' men, it cannot be said that the employers did not know and had no opportunity of knowing that the lighting was inefficient. The contention on behalf of the employers, and on the part of the shipowners, was: "The lights are the ordinary, usual lights for this class of thing". Unfortunately for them, however, the learned judge found otherwise. I do not see, in the circumstances of his findings, that he could say that the employers were not to blame. They had an opportunity of complying with reg. 50, but, unfortunately for them, they did not take it. The view which the judge took that the lighting was inefficient, the finding of the judge on that ground and for the reasons which he gave seems to me to be a finding against both the shipowners and the employers, having regard to the length of time which had elapsed while the lighting was in the same condition. For those reasons, it appears to me that the appeal ought to be allowed to the extent that there ought to be judgment for the plaintiff against both the employers and the shipowners.

There now comes the question how the damages should be apportioned between the employers and the shipowners. One might have thought that the duty primarily was on the shipowners. Under reg. 12 the duty of lighting is put first on them, and the judge held that they did not perform their duty. Against that, the employers took no steps. It may be that to some extent the position was a little more dangerous than it otherwise would have been, for, a few days before this accident, they had broken the aft ladder down into the hold at No. 2 hatch so that it could not be used. If the men had been using it on the day of this accident, it is quite possible that the plaintiff would not have been in the same danger that he encountered when the aft ladder was out of order. The men used the forward ladder, and the top of that ladder was not lighted to the same extent as was the case with the other ladder. From the forward ladder the plaintiff stepped almost at once into the cleat which brought about the accident. On the whole, I do not see that much distinction is to be drawn between the position of the employers and the shipowners, and I would think that it would be fair to both if the damages, which are not large, were borne equally between them.

MORRIS, L.J.: I am entirely of the same opinion. The finding of the learned judge was clear that on parts of the ship the lighting was inefficient. That finding has not been challenged in this appeal. The learned judge held that there was not efficient lighting on the deck where the plaintiff was working. He further found that the lighting was not efficient in the parts of the ship to which the plaintiff might be required to proceed in the course of his employment. From those findings it seems to me to follow that the opening words of reg. 50 of the Docks Regulations, 1934, are satisfied, viz., the words:

> "If the persons whose duty it is to comply with regs. 9, 10 and 12 fail so to do, then it shall also be the duty of the employers of the persons employed . . ."

to do what is laid down in reg. 50. There being a breach of reg. 12, then there was in this case a duty on the employers. The regulation says that it is the duty of the employers of the persons employed

> "to comply with the said regulations within the shortest time reasonably practicable after such failure."

That might be regarded first as denoting that there is a duty, and, secondly, as denoting the time within which the duty has to be performed. That, however, is merely a matter of words. There is a duty to comply with the regulation within the shortest time reasonably practicable after such failure. The words "within the shortest time reasonably practicable" call for some test, and it seems to me that those words necessitate compliance by the employers with the regulation as soon as reasonably practicable after they know or ought to know of the breach of reg. 12. It is right to introduce that test and to judge what is the "shortest time reasonably practicable" in that way.

Counsel for the employers does not really submit that the regulation should be construed differently. What he has submitted is that, in effect, the finding of the learned judge is that there was no evidence that the employers ought to have known that there was a breach of reg. 12. I am not able to accept that submission. In the first place, the learned judge does not state his finding in those but in quite different terms. Apart from that, however, it does not seem to me that it is possible to sustain that submission. The learned judge held that the evidence of the plaintiff, of Mr. McGill and of Mr. Williams was the evidence of credible witnesses. He said:

> "I accept the evidence of these very credible witnesses, Mr. Simons and Mr. McGill, and Mr. Williams, who gave their evidence extremely well, that when they came out of this hatch, the area of the deck on to which they had to clamber was hardly lighted, if at all."

There was abundant evidence that the state of affairs there referred to by the learned judge had obtained for some days. Conditions had been the same for the previous few days before the Monday, when the accident happened. The state of affairs was constant. In those circumstances, it does not seem to me to be possible to say that there was not evidence that the employers ought to have known that there was on the part of the shipowners a breach of reg. 12. It seems, therefore, to follow that the employers failed in the duty laid down by reg. 50, because, after they knew, or ought to have known, of the breach of reg. 12, and after time had elapsed to make it reasonably practicable for them to take steps, they failed to comply with reg. 12. They were, therefore, also in breach of the regulation, and the result is, in my judgment, that the plaintiff was entitled to succeed against both the employers and the shipowners.

As to the apportionment of responsibility between the two, I see no reason to distinguish between them, and I agree that it should be equally shared.

ROMER, L.J.: I agree. It is very likely true, as counsel for the employers suggested, that nobody in the ship who took part in this operation of discharging the cargo thought that there was anything to complain about in the deck lighting until the accident happened. Unfortunately for both the employers and the shipowners, the learned judge found the contrary and held that there was inefficient lighting, so far as concerned the part of the deck where the accident took place. Moreover, the evidence is undisputed that the lighting as it existed at the time of the accident had been the same as had prevailed since the commencement of the operation. As my Lords have pointed out, the learned judge arrived at his finding as to the inefficiency of the lighting on the evidence of the stevedores themselves, and it appears to me that it must follow inescapably and logically that the employers must be taken either to have known or to have had the opportunity of knowing of the default by the shipowners of their obligations under reg. 12. Accordingly, whatever in certain circumstances may be the true interpretation of reg. 50 and its application to any particular facts, I feel no doubt that on its application to the facts of this case as found by the learned judge the employers were in default of the obligation which reg. 50 placed on them, and that the plaintiff ought to have succeeded in the action against them. From that it follows that we should hold that liability of the employers was established, and I agree with my brethren in allocating the blame between the employers and the shipowners at fifty per cent. each.

Appeal allowed.

Solicitors: *Botterell & Roche*, agents for *Weightman, Pedder & Co.*, Liverpool (for the shipowners); *Guy Williams & Co.*, Liverpool (for the employers); *Silverman & Livermore*, Liverpool (for the plaintiff).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

NOTE.

RAMLOCHAN *v.* REGINAM.

[PRIVY COUNCIL (Lord Oaksey, Lord Tucker and Lord Keith of Avonholm), March 20, 21, April 16, 17, 30, May 14, 1956.]

Criminal Law—Trial—Re-trial—Whether party entitled to copy of judge's notes of first trial.

[As to access to judge's notes of a criminal trial, see 10 HALSBURY'S LAWS (3rd Edn.) 527, para. 968.]

Case referred to:
(1) *R.* v. *Boysie Singh*, (1950), 11 Rep. T. & T. 17.

Appeal.

Appeal in forma pauperis by special leave by Ramsook Ramlochan from a judgment of the Court of Criminal Appeal for Trinidad and Tobago, dated July 29, 1955, dismissing the appellant's appeal from his conviction at the San Fernando Assizes on June 3, 1955, of murder. The facts appear in the judgment of the Board. The grounds of the appeal included, inter alia, the refusal to permit the appellant's counsel at his second trial a copy of, or access to, the judge's notes of the first trial, and this note deals only with this point.

T. O. Kellock and *S. Amerasinghe* for the appellant.
D. A. Grant for the Crown.

LORD KEITH OF AVONHOLM: The appellant was convicted on June 3, 1955, of murder by verdict of a jury after a trial held at San Fernando Assizes of the Supreme Court of Trinidad and Tobago presided over by CELESTAIN, J. The appellant appealed to the Court of Criminal Appeal for Trinidad and Tobago on various grounds. The court (PEREZ, C.J., GOMES and ARCHER, JJ.) dismissed his appeal on July 29, 1955. The appellant has obtained special leave to appeal in forma pauperis to this Board against the judgment of the Court of Criminal Appeal.

The person of whose murder the appellant was convicted was a young woman named Minwatee Ramlochan, also called Toy, thirteen years and four months old at the time of her death, whom the appellant had married by Hindu rites on May 15, 1954. He had, however, a wife at that time from whom he was living separate, so that his marriage to Toy was not a legal marriage. Toy met her death on June 12, 1954, within a month of her marriage.

The appellant had been previously tried for the murder, before DUKE, J., and a jury in March, 1955, when the jury disagreed. One of the points taken for the appellant in this appeal is that he was prejudiced in his defence at the second trial through his counsel being refused a copy of, or access to, the judge's notes of the first trial. No provision is made by the laws of Trinidad and Tobago for the taking of shorthand notes of the proceedings at the trial of a person on indictment. Section 10 of the Criminal Appeal Ordinance (c. 3, No. 2-1940) provides that, on appeal against conviction or sentence, or on application for leave to appeal, the trial judge shall furnish to the registrar, in accordance with rules of court, his notes of the trial. It will be convenient to deal with this point now.

Application for a copy of these notes appears to have been made by the appellant's counsel by letter of Apr. 26, 1955 (the terms of which are not before the Board), which was referred by the Chief Justice to DUKE, J. Intimation was made to counsel by letter from the clerk to the judges dated May 6, 1955, that DUKE, J., had refused the application. Nothing further was done in the matter until the evidence for the prosecution at the second trial was completed. Appellant's counsel then intimated that he proposed to call the clerk to the judges to prove his signature to the letter of May 6. The trial judge having indicated that this was unnecessary, some further discussion took place on the appellant's right to have the judge's notes, on the authority of *R.* v. *Boysie Singh* (1) ((1950), 11 Rep. T. & T. 17). The discussion concludes with the note: "Court states that it cannot overrule another judge's orders. Will consult him." The following day, the court informed counsel that the judge's notes had been forwarded and were now at the court's disposal. If counsel wished to know what was said by any witness, the court would consult the notes and, if it was necessary to contradict the witness, would call the registrar to put them in evidence. Appellant's counsel maintained, however, that he should have a certified copy of the notes which the court explained was impossible at that stage. Certain of the prosecution witnesses were subsequently recalled at the request of appellant's counsel and certain passages from the judge's notes were put to some of these witnesses without, in their Lordships' view, any material effect on their previous evidence. After these witnesses had left the box, appellant's counsel stated that there might be other contradictions in the notes and wished to have the judge's notes to peruse. This application was refused. Their Lordships thought fit, in the course of the hearing of this appeal, to order copies of the judge's notes to be made available to appellant's counsel and to adjourn the hearing to enable counsel to see whether the notes disclosed any material discrepancies in the evidence given by witnesses at the second trial. In the result, counsel stated that he had discovered no material discrepancy which had not been put to witnesses at the trial.

On any view their Lordships would, accordingly, find themselves unable to give any weight to this particular ground of appeal. They consider it desirable, however, to express their opinion on the point raised. No authority has been cited to show that a party is entitled as of right to access to a judge's notes in a previous trial, for use in a subsequent trial, and, in their Lordships' opinion, no such right exists, apart from any statutory provision. In *R.* v. *Boysie Singh* (1), which was relied on by appellant's counsel, it was held that:

> "Where there is a re-trial and it is desired to prove at the second trial inconsistent testimony of witnesses at the first trial it is undesirable for counsel of a prisoner at the first trial to give evidence of statements made at that trial. The judge's long-hand note of the evidence is the best evidence of such testimony."

This, in their Lordships' opinion, is a decision only on what is the best evidence of what was said at a previous trial. It does not follow that a party is entitled to demand production of a judge's notes of the evidence at the first trial for purposes of cross-examination of witnesses at the second trial, though it may be thought convenient, or proper, or desirable, in some cases to make such notes available to the parties. The Court of Criminal Appeal in their judgment took the view that it was contrary to authority to say that a judge's long-hand notes of evidence are the best evidence of the testimony given and that, on this point, *R.* v. *Boysie Singh* (1) should be overruled*. Their Lordships would reserve judgment on this point which it is not necessary to decide for the purposes of this appeal.

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* Questions of the admissibility of judges' notes in evidence have arisen particularly in trials for perjury. In *R.* v. *Child* ((1851), 5 Cox C.C. at p. 203) TALFOURD, J., said that a judge's notes stood in no other position than anyone else's notes, and were able to be used in evidence only to refresh the memory of the party taking them. At trials for perjury it is not necessary that the judge's notes of the proceedings at which the alleged perjury was committed should be produced; see *R.* v. *Morgan* ((1852), 6 Cox C.C. 107). Moreover it seems, from the decision in *R.* v. *Child* (supra), that the notes are inadmissible, and it is also objectionable that the judge or chairman presiding at the trial at which perjury is alleged to have been committed should be called as a witness at the subsequent trial; see *R.* v. *Gazard* ((1838), 8 C. & P. 595), *R.* v. *Harvey* ((1858), 8 Cox C.C. 99, 103).

Appeal dismissed.

Solicitors: *T. L. Wilson & Co.* (for the appellant); *Charles Russell & Co.* (for the Crown).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

Re ST. MARK'S CHURCH, LINCOLN.

[COURT OF ARCHES (The Dean (H. U. Willink, Q.C.)), March 27, May 15, 1956.]

Burial—Burial ground—Disused—" Building upon the land "—Roof whose supports would not touch the consecrated land—Whether a building " upon " the land—Disused Burial Grounds Act, 1884 (47 *&* 48 *Vict. c.* 72), *s.* 3.

An omnibus company proposed to establish an omnibus station on land owned by the company adjoining the western boundary of a churchyard. The boundary between the company's land and the churchyard ran in a straight line north and south, save for a rectangular piece of land, twenty-six feet by six feet, which was part of the churchyard and which projected westward. The churchyard had been closed for burials but there were no human remains in the rectangular piece of land, nor had it any amenity value. The company planned to construct a continuous pavement eight feet in width along their side of the boundary and now sought authority to use the rectangular piece of land as part of the omnibus station. The company also planned to construct a roof over the omnibus station; this roof was designed in such a way that the part of it covering the rectangular piece of land would be supported entirely from the company's own land. It was contended by the company that the roof would not constitute a building " upon any disused burial ground " and would not, therefore, contravene s. 3 of the Disused Burial Grounds Act, 1884.

Held: the court had jurisdiction by faculty to allow a disused churchyard, which had been closed for burials, to be used for a secular purpose, and this jurisdiction was not limited to questions of convenience of access to the church or churchyard: *Re Bideford Parish, Ex p. Bideford* (*Rector, etc.*) ([1900] P. 314), and observations of SIR LEWIS DIBDIN in *Corke* v. *Rainger & Higgs* ([1912] P. at p. 74) applied; observations of SIR LEWIS DIBDIN in *St. Nicholas Acons* (*Rector & Churchwardens*) v. *London County Council* ([1928] P. at p. 113) not applied; although in the present case it would be in the interest of the public, including the parishioners, to authorise the use of the rectangular piece of land as part of the omnibus station including its use as part of the pavement, yet the faculty could not be granted since the proposed roofing would be erected partly on the company's land and partly on consecrated land and its erection was, therefore, prohibited by s. 3 of the Act of 1884 (*St. Botolph, Aldersgate Without* (*Vicar*) v. *St. Botolph, Aldersgate Without* (*Parishioners*), [1900] P. 69, distinguished).

Decision of LINCOLN CONSISTORY COURT ([1955] 3 All E.R. 699) affirmed.

[As to the prohibition against building on disused burial grounds, see 4 HALSBURY'S LAWS (3rd Edn.) 88, para. 252, note (t); and for cases on the subject, see 7 DIGEST 551, 552, *291-294*.

For the Disused Burial Grounds Act, 1884, s. 3, see 2 HALSBURY'S STATUTES (2nd Edn.) 792; for the Open Spaces Act, 1887, s. 4, see ibid., 793.

For the Open Spaces Act, 1906, s. 20, see 17 HALSBURY'S STATUTES 265.

For the Town and Country Planning Act, 1947, Part 2, see 25 HALSBURY'S STATUTES (2nd Edn.) 496.]

Cases referred to:

(1) *Re Bideford Parish, Ex p. Bideford* (*Rector, etc.*), [1900] P. 314; 64 J.P. 743; 7 Digest 556, *330*.

(2) *St. Gabriel, Fenchurch Street* (*Rector, etc.*) v. *City of London Real Property Co.*, [1896] P. 95; 7 Digest 557, *337*.

(3) *Corke* v. *Rainger & Higgs*, [1912] P. 69; 7 Digest 553, *302*.

(4) *St. Nicholas Acons* (*Rector & Churchwardens*) v. *London County Council*, [1928] P. 102; *on appeal*, [1928] A.C. 469; 97 L.J.P.C. 113; 139 L.T. 530; 92 J.P. 185; Digest Supp.

(5) *Paddington Corpn.* v. *A.-G.*, [1906] A.C. 1; 75 L.J.Ch. 4; 93 L.T. 673; 70 J.P. 41; 7 Digest 553, *300*.

(6) *Bermondsey Borough Council* v. *Mortimer*, [1926] P. 87; Digest Supp.

(7) *St. Botolph, Aldersgate Without* (*Vicar*) v. *St. Botolph, Aldersgate Without* (*Parishioners*), [1900] P. 69; 7 Digest 552, *299*.

Appeal.

This was an appeal by the Lincolnshire Road Car Co., Ltd. against an order of the Chancellor (K. M. MACMORRAN, Q.C.) at Lincoln Consistory Court, dated Nov. 21, 1955, reported [1955] 3 All E.R. 699.

By a petition dated Sept. 16, 1955, the vicar and churchwardens of the parish church of St. Mark, Lincoln, and the company sought a faculty for the use of part of the churchyard as a footpath. The petition was supported by the parochial church council and was unopposed. The chancellor refused to grant a faculty ([1955] 3 All E.R. 699) because the part of a roof, which the company proposed to erect to cover the footpath, would be part of a building, or would itself constitute a building, " upon " a disused burial ground and would, therefore, contravene s. 3 of the Disused Burial Grounds Act, 1884. The company now appealed.

A plan showing the proposed footpath is printed in [1955] 3 All E.R. at p. 700.

W. S. Wigglesworth for the company.

J. H. Ellison as amicus curiae. *Cur. adv. vult.*

May 15. **THE DEAN OF THE ARCHES** (H. U. WILLINK, Q.C.) read the following judgment: The petitioners have sought authority to use a small part of a closed churchyard as part of an omnibus station. Included in the use prayed for was a proposal to roof the area in question in order that those using the station should be protected from the weather. The learned chancellor took the view that apart from the proposed roof the petition could and should be allowed, but that the proposed roof constituted such a structure as is prohibited by the combined operation of the Disused Burial Grounds Act, 1884, s. 3 and the Open Spaces Act, 1887, s. 4, and the definition of " burial ground " in the Open Spaces Act, 1906, s. 20.

The facts of the case are not in dispute, and I have not thought it necessary to require affidavits to add to the evidence, including plans, given in the consistory court by an architect employed by the British Transport Commission. The land in question is a small oblong projection, twenty-six feet by six feet, at the southern end of the western boundary of the churchyard. The churchyard was closed for burials by an order in council dated Feb. 8, 1855. There are no human remains in the area in question. The whole western wall of the churchyard is dilapidated, and if the company is permitted to carry out its plans it is prepared to undertake to rebuild its whole length together with a further length on the north side of the churchyard at a cost of about £1,000 and to a design to be approved by the parochial church council. The small piece of land has no amenity value, and the vicar and churchwardens in supporting the petition are acting with the unanimous authority of the parochial church council. The city of Lincoln has found a need to establish a comprehensive omnibus station to accommodate the large number of services that run between the city and the surrounding countryside, and the land to the west of the churchyard is designated for this purpose in the town map prepared under the Town and Country Planning Act, 1947. The land is owned by the company who plan to lay it out with island platforms but with a continuous pavement eight feet in width along the eastern boundary. The oblong projection of the churchyard constitutes an obstacle. For the comfort and convenience of their customers and staff the company wishes to cover the station and proposes that the oblong projection shall be covered in a particular manner to which I shall refer later. Although the company's project is a unified scheme in that they would be unlikely to leave part of the station uncovered, the issue before me appears to me, as it appeared to the learned chancellor, to fall into two parts. Can and if so should this area of consecrated ground be used as part of an omnibus station ? If so, is the proposed roofing permissible ?

As to the first of these issues I see no reason to differ from the learned chancellor. Until the decision of this court in *Re Bideford Parish, Ex p. Bideford* (*Rector, etc.*) (1) ([1900] P. 314) there was considerable doubt and some apparent conflict of authority whether it could be permitted that land once consecrated to a sacred use should be used for a secular purpose. That case is clear authority that when the purpose for which the ground was originally consecrated can no longer be lawfully carried out the use of it for a secular purpose may be authorised though the ownership of the land remains unaffected. *Re Bideford Parish* (1) was a case in which the wall of a churchyard was moved, part of the area of the churchyard being thrown into the highway. But the earlier case of *St. Gabriel, Fenchurch Street* (*Rector, etc.*) v. *City of London Real Property Co.* (4) ([1896] P. 95) shows that the principle is not limited to the widening of a highway: the Court of Arches in that case protected and treated as valid a faculty permitting the construction and fencing of a private pathway to be used only by a commercial concern in common with the rector and churchwardens. Counsel appearing as amicus curiae suggested that the use asked for was of a character inconsistent with the established concept of an easement in the nature of a right of way. It is not necessary in my view so to particularise. In *St. Gabriel, Fenchurch Street* (2), Lord Penzance found it unnecessary to define the exact nature of the right of user which may be authorised, and in my judgment the principle is fully stated by Sir Lewis Dibdin as Dean of the Arches in *Corke* v. *Rainger & Higgs* (3) ([1912] P. 69 at p. 74) when he says:

> " . . . having regard to the case of *Re Bideford Parish* (1), decided in this court by my learned predecessor Sir Arthur Charles, it must be taken that the Ordinary has jurisdiction by faculty to allow a disused churchyard, which has been closed for burials, to be used for a secular purpose."

In a later case, that of *St. Nicholas Acons* (*Rector & Churchwardens*) v. *London County Council* (4) ([1928] P. at p. 113) the same learned judge referring to *Re Bideford Parish* (1) suggested that

> " it is perhaps worthy of consideration whether it is applicable to cases where questions of convenience of access to the church or churchyard are not involved."

In my judgment there is no such limitation to be added as a rider to the principle as stated in *Corke* v. *Rainger & Higgs* (3). I cannot see that any question of convenience of access to church or churchyard arose in *St. Gabriel, Fenchurch Street* (2), and consider that the matter is one for judicial discretion once it is established that the land is land which may be used for some secular purpose. The question is whether permission to rebuild the churchyard wall in the new position and to use the land outside the wall as part of an omnibus station is, on the terms proposed, in the interest of the public, including the parishioners. I find as the learned chancellor found that the company successfully establish this part of their case, including their proposal that the land should be included in the area occupied by the eight foot wide pavement. Such a pavement would usually if not invariably be incidental to the extension of a highway over part of a disused churchyard and has never so far as I am aware been questioned in such a case.

By the Disused Burial Grounds Act, 1884, s. 3, it is provided that " It shall not be lawful to erect any buildings upon any disused burial ground " except for purposes irrelevant to the present case. It is conceded by the petitioners that the land in question is part of a disused burial ground. The statutes to which I have referred are closely linked with others providing for the maintenance of open spaces for the benefit of the public and I have been referred in particular to the speech of Lord Halsbury, L.C., in *Paddington Corpn.* v. *A.-G.* (5) ([1906] A.C. 1 at p. 3)—a case where a disused burial ground was being administered by the local authority as an open space. It is, however, to the language of s. 3 of the Act of 1884 that I am bound to pay particular regard together with the reported cases in some of which a proposed structure has been held to be within the prohibition and in others of which it has been permitted. In *St. Nicholas Acons* (4) the Privy Council held without hesitation that the building of a subterranean transformer chamber was prohibited; in *Bermondsey Borough Council* v. *Mortimer* (6) ([1926] P. 87) Chancellor Hansell took the same view as to the building of urinals. On the other hand in *St. Botolph, Aldersgate Without* (*Vicar*) v. *St. Botolph, Aldersgate Without* (*Parishioners*) (7) ([1900] P. 69) Chancellor Tristram authorised the construction of an arcade or covered way on the inner side of a churchyard wall and the House of Lords in *Paddington Corpn.* v. *A.-G.* (5) held that a screen erected to prevent the acquisition of rights of light over a churchyard was not a building.

No case cited to me is in my judgment at all closely analogous to that now before me and in my judgment it is necessary to specify with precision what is proposed and then to ask whether if carried out a building will have been erected on or upon the land in question. The company's scheme for roofing their proposed station is for a structure covering a considerable area. Taken as a whole I have no doubt that it is a building. It is clear, however, that in designing the building the architect had in mind the prohibition expressed in the Act of 1884. By the use of modern engineering methods he has so designed such part of the roof as would cover the land now in question that it is supported entirely from the company's own land. At its eastern extremity it is proposed to hang a vertical glazed panel in approximately the same plane as the new churchyard wall but nowhere in contact with it or with the ground. It was urged for the company that by this somewhat ingenious design they had found a means of avoiding the difficulties placed in their way by the statute: and that *St. Botolph's* case (7) in particular was authority for the contention that the roofing over of space does not necessarily constitute building on it. I cannot, however, regard *St. Botolph's* case (7), in which the arcade remained within the churchyard and was ancillary to an embellishment of the churchyard wall, as affording any guidance for the decision of the present appeal.

It is with regret that I find myself unable to allow what is sought by the company. It would be artificial to rely on the fact that the words " on " and " upon " usually imply contact; the clear intention of the Act is to prohibit all building in churchyards other than such building as is expressly permitted. Moreover I agree with the learned chancellor that it is not possible or in accord with common sense to isolate one portion of the roof on the western side of the proposed building. The proposed building would appear to be and would in fact be a building erected partly upon the company's land and partly upon consecrated land, and it is clear to me that there is no jurisdiction in this court to permit the use of a disused burial ground for the accommodation of such a building. For these reasons I find myself in agreement with the learned chancellor and obliged to dismiss the appeal with costs. *Appeal dismissed.*

Solicitors: *M. H. B. Gilmour* (for the company); *Registrar, Court of Arches.*

[*Reported by* A. T. Hoolahan, Esq., *Barrister-at-Law.*]

A ASSOCIATED ARTISTS, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[Chancery Division (Upjohn, J.), May 7, 8, 1956.]

Income Tax—Charity—“ Artistic dramatic work ”—Company incorporated to B *present such works as well as classical, cultural and educational dramatic works—A further object being to do all such things as might be thought conducive to the attainment of its objects—Whether entitled to exemption from income tax—Income Tax Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 448 (1) (*c*), (3).

Charity—“ Artistic dramatic work ”—Company incorporated to present classical, C *artistic, cultural and educational dramatic works—A further object being to do all such things as might be thought conducive to the attainment of its objects—Whether objects charitable.*

The objects in the memorandum of association of Associated Artists, Ltd. (the taxpayer), which was a company limited by guarantee, included: “ (a) To present classical, artistic, cultural and educational dramatic works D . . . (b) To foster, promote and increase the interest of the public in the dramatic art and in the co-related arts as well by the presentation of dramatic works as by other means . . . (c) To encourage and promote the creation of, and to arrange for the presentation of new dramatic works and to foster and enhance the art of affording advanced students facilities for training, and for gaining practical stage experience . . . (j) To establish, E subsidise, promote, co-operate . . . with . . . any association . . . whose objects are altogether similar to the objects of [the taxpayer] . . . (l) To do all such other things as are incidental or which [the taxpayer] may think conducive to the attainment of any of the above objects ”. The taxpayer claimed exemption from income tax under s. 448 (1) (c) of the Income Tax Act, 1952, in respect of profits derived from drama production on the ground F that the taxpayer was established for charitable purposes only.

Held: the taxpayer was not established for charitable purposes only and therefore was not entitled to exemption from income tax because

(i) object (a) stated above must be read disjunctively and the presenting of artistic dramatic works, which thus formed an independent purpose, was G too wide and vague a purpose to be charitable, and

(ii) object (l) was an independent clause and itself rendered the taxpayer an association that was not established for charitable purposes only, as things thought by the taxpayer to be conducive to the attainment of its previous objects might not be charitable, even if all the previous objects themselves had been charitable.

H *Oxford Group* v. *Inland Revenue Comrs.* ([1949] 2 All E.R. 537) followed.

Dictum of Lawrence, L.J., in *Keren Kayemeth Le Jisroel, Ltd.* v. *Inland Revenue Comrs.* ([1931] 2 K.B. at p. 482) applied.

Per Curiam: (i) to foster, promote and increase the interest of the public in the dramatic art is a way of increasing the artistic taste of the public and is not too vague to be a charitable purpose (see p. 586, letter I, to p. 587, I letter A, post).

Dictum of Lord Greene, M.R., in *Royal Choral Society* v. *Inland Revenue Comrs.* ([1943] 2 All E.R. at p. 105) applied.

(ii) if other objects than (j) were charitable, object (j) would also be charitable (see p. 587, letter C, post).

Semble: object (c) taken by itself was charitable on the authority of *Re Shakespeare Memorial Trust* ([1923] 2 Ch. 398). See p. 587, letter B, post.

Appeal dismissed.

[As to gifts for particular objects, such as the promotion of the arts, being charitable, see 4 Halsbury's Laws (3rd Edn.) 218, para. 497; and for cases on the subject, see 8 Digest (Repl.) 326-331, *91-126*.

As to the exemption of charities from income tax under Sch. D, see 17 Halsbury's Laws (2nd Edn.) 315, para. 622; and for cases on the subject, see 28 Digest 82-84, *469-483*; for the Income Tax Act, 1952, s. 448 (1) (3), see 31 Halsbury's Statutes (2nd Edn.) 429.]

Cases referred to:

(1) *Baddeley* v. *Inland Revenue Comrs.*, [1953] 2 All E.R. 233; [1953] Ch. 504; *revsd.* H.L. sub nom. *Inland Revenue Comrs.* v. *Baddeley*, [1955] 1 All E.R. 525; [1955] A.C. 572; 35 Tax Cas. 661.

(2) *Re Shakespeare Memorial Trust, Lytton* (*Earl*) v. *A.-G.*, [1923] 2 Ch. 398; 92 L.J.Ch. 551; 130 L.T. 56; Digest Supp.

(3) *Royal Choral Society* v. *Inland Revenue Comrs.*, [1943] 2 All E.R. 101; 112 L.J.K.B. 648; 169 L.T. 100; 25 Tax Cas. 263; 2nd Digest Supp.

(4) *Londonderry Presbyterian Church House Trustees* v. *Inland Revenue Comrs.*, [1946] N.I. 178; 27 Tax Cas. 431; 2nd Digest Supp.

(5) *Oxford Group* v. *Inland Revenue Comrs.*, [1949] 2 All E.R. 537; 31 Tax Cas. 221; 2nd Digest Supp.

(6) *Keren Kayemeth Le Jisroel, Ltd.* v. *Inland Revenue Comrs.*, [1931] 2 K.B. 465; 100 L.J.K.B. 596; 145 L.T. 320; *affd.* H.L., [1932] A.C. 650; 101 L.J.K.B. 459; 174 L.T. 161; 17 Tax Cas. 27; Digest Supp.

(7) *Dunne* v. *Byrne*, [1912] A.C. 407; 81 L.J.P.C. 202; 106 L.T. 394; 8 Digest (Repl.) 392, *858*.

Case Stated.

The taxpayer, which was incorporated on Jan. 23, 1946, as a company limited by guarantee, being aggrieved by a decision of the Inland Revenue Commissioners on a claim for exemption from income tax under s. 448 (1) (c) of the Income Tax Act, 1952, in respect of profits derived from drama production for 1950-51 to 1953-54 inclusive, applied to have the claim determined by the Special Commissioners of Income Tax. The Special Commissioners held that the taxpayer was not entitled to exemption because it was not established for charitable purposes only, object 3 (a) in its memorandum of association, "to present classical, artistic, cultural and educational dramatic works . . ." requiring to be read disjunctively and having a wider meaning than "educational" and so not being charitable. The taxpayer company appealed.

G. G. Honeyman, Q.C., and *D. Wilson* for the taxpayer.

Sir Lynn Ungoed-Thomas, Q.C., *Sir Reginald Hills* and *E. B. Stamp* for the Crown.

UPJOHN, J.: This is an appeal by the taxpayer, Associated Artists, Ltd. [herein called "the taxpayer"], from a decision of the Special Commissioners of Income Tax, who heard a claim for exemption from tax under s. 448 (1) (c) of the Income Tax Act, 1952, in respect of certain profits of the taxpayer which claims to be constituted for exclusively charitable purposes. The Special Commissioners held that the taxpayer was not such a body.

The question depends on the proper interpretation of the taxpayer's memorandum of association. The objects for which the taxpayer is established are:

> "(a) To present classical, artistic, cultural and educational dramatic works in the United Kingdom of Great Britain and Northern Ireland and elsewhere. (b) To foster, promote and increase the interest of the public in the dramatic art and in the co-related arts as well by the presentation of dramatic works as by other means, such as giving of lectures, the institution of competitions, the establishment of classes for instruction and study, the offering of special terms of admission to the [taxpayer's] performances or other privileges to educational establishments, and by any other lawful

> means calculated to promote any of the objects for which the [taxpayer] is established. (c) To encourage and promote the creation of, and to arrange for the presentation of new dramatic works and to foster and enhance the art of affording advanced students facilities for training, and for gaining practical stage experience . . . (f) To enter into agreements with authors composers playwrights and others for the acquisition of any rights in any classical artistic cultural or educational dramatic work or works and with artists actors theatre managers and others for the presentation, production and performance of any such work or works . . . (j) To establish, subsidise, promote, co-operate or federate with or become affiliated to, or lend money or other assistance to any association, society or other body corporate or unincorporate whose objects are altogether similar to the objects of [the taxpayer], but so far that none of the funds of [the taxpayer] shall be paid to any federated, affiliated or co-operating association society or other body which does not prohibit the payment of dividends or profits to its members to an extent at least as great as is imposed on [the taxpayer] under or by virtue of cl. 4 hereof. (k) To establish and support or aid in the establishment and support of any charitable associations or institutions and to subscribe or guarantee money for charitable purposes in any way connected with the purposes of [the taxpayer] or calculated to further any of its objects. (l) To do all such other things as are incidental or which [the taxpayer] may think conducive to the attainment of any of the above objects."

Clause 4 provided that the income and property of the taxpayer should be devoted solely towards the promotion of the objects of the taxpayer as set forth in the memorandum of association, and

> "that no portion should be paid or transferred directly or indirectly by way of dividend bonus or otherwise howsoever by way of profit to the members of the [taxpayer]."

The taxpayer was limited by guarantee, the members undertaking to subscribe such amount as might be required not exceeding £5 in the event of a winding-up. Then, on the dissolution of the taxpayer, the property and assets were to be transferred to institutions having objects similar to the objects of the taxpayer which would prohibit the distribution

> "of its or their income and property among its or their members to an extent at least as great as is imposed on [the taxpayer] under or by virtue of cl. 4 hereof."

Then it was provided that the institutions might be selected by members of the taxpayer, and in default the assets were to go as a judge of the High Court might direct to some charitable object.

The taxpayer was in fact incorporated by Mr. John Clements, who is a well known actor, in order to promote these objects, and he gave evidence before the Special Commissioners. Sir Kenneth Barnes, who for forty-six years was principal of the Royal Academy of Dramatic Art, also gave evidence. Sir Kenneth's view was that undoubtedly the productions on which the taxpayer had engaged had done much to advance the theatre and dramatic taste. No question arises that in fact all the productions, which I do not propose to describe in detail as they are fully set out in the Stated Case, have in fact had a charitable object; but that is not the point before me. The only question is whether the taxpayer is incorporated for the purpose of carrying out exclusively charitable objects.

The Special Commissioners decided that it was not incorporated exclusively for charitable objects, the opening words in cl. 2 (3) (a) requiring to be read disjunctively, and having a wider meaning than "educational". Their finding was:

> ". . . we find that the effect of the inclusion of these words allows [the

> taxpayer] to present plays that are not wholly educational and therefore not charitable."

Then they quote an extract from the speech of LORD SIMONDS in *Inland Revenue Comrs.* v. *Baddeley* (1) ([1955] 1 All E.R. 525 at p. 529).

Before me the argument has taken rather a different course. Counsel for the Crown attacks cl. 3 (a) in this way. Having regard to the Shakespeare Memorial Theatre case (*Re Shakespeare Memorial Trust, Earl Lytton* v. *A.-G.* (2), [1923] 2 Ch. 398), and the Royal Choral Society case (*Royal Choral Society* v. *Inland Revenue Comrs.* (3), [1943] 2 All E.R. 101), he does not challenge the view that, if the objects were to present " classical, cultural and educational dramatic works ", taking the clause by itself, that would be a good charitable object even reading the words disjunctively. His main attack relates to the word " artistic ".

The first matter to be considered is whether this phrase " to present classical, artistic, cultural and educational dramatic works " is to be read conjunctively so that the dramatic works must all be classical and artistic and cultural and educational, or whether it can be read disjunctively. I have been referred to some observations of ANDREWS, L.C.J., in the Irish case of *Londonderry Presbyterian Church House Trustees* v. *Inland Revenue Comrs.* (4) ((1946), 27 Tax Cas. 431), on this question of reading clauses conjunctively and disjunctively, and also to the observations of HODSON, L.J., in *Baddeley* v. *Inland Revenue Comrs.* (1) ([1953] 2 All E.R. 233 at p. 256), where he did not agree with the views of ANDREWS, L.C.J.

In each case it is a pure question of construction, and I do not think that either of those cases lays down any principle except this, that the words must be read grammatically. I think that it is not unimportant that there are commas after the words " classical, artistic ". I also bear in mind that in cl. (f) the disjunctive " or " appears. The taxpayer can enter into agreements with authors, and others " for the acquisition of any rights in any classical artistic cultural or educational dramatic work or works ".

Also I must bear this in mind. The object here is, not in terms to promote some charitable object, but to present plays. Further I have to construe the memorandum of association to see whether it would be ultra vires for the taxpayer to put on a production which, for example, was classical and artistic, but not cultural and educational. On the whole I think that the only way to read the words of cl. (a) is disjunctively, and that the taxpayer could put on a classical play, an artistic play, a cultural play, or an educational play.

Counsel for the Crown and his learned junior submitted that presenting an artistic dramatic work is so wide and vague a phrase that one could put on almost any type of play, and certainly a play which would not in any ordinary concept of the word be charitable in the sense that it would improve the public's taste in the theatre and advance the dramatic art in the theatre. I have the greatest difficulty in this context in understanding exactly what is meant by " artistic ". LORD GREENE, M.R., in *Royal Choral Society* v. *Inland Revenue Comrs.* (3) said ([1943] 2 All E.R. at p. 105):

> " In the case of artistic taste, one of the best ways of training it is by presenting works of high class and gradually training people to like them in preference to works of an inferior class."

This memorandum does not in terms state that the object is to promote artistic taste; it is to present artistic plays. I find it difficult to attach any real charitable concept to an artistic dramatic work. I think it is too wide and too vague and, therefore, is not charitable.

However, the matter does not end there. Counsel for the Crown attacks cl. (b), and he says that the words

> " To foster, promote and increase the interest of the public in the dramatic

> art and in the co-related arts as well by the presentation of dramatic works as by other means "

is of itself too vague. I do not agree with that. It seems to me that, if the object be to foster, promote and increase the interest of the public in the dramatic art, that is an excellent way of increasing the artistic taste of the public in the way LORD GREENE mentioned.

Clause (c) taken by itself seems to me to be covered by *Re Shakespeare Memorial Trust* (2).

It is said that the object in cl. (j) " To establish, subsidise, promote, co-operate or federate with " others having objects which are altogether similar is too vague and will enable the society, assuming it to have otherwise good charitable objects, to promote some non-charitable society: e.g., to expend funds on the promotion of a play to be given by members of some works theatrical society in their canteen. I do not agree with that. If a company is found aliunde to be incorporated for a charitable purpose, it seems to me that the objects of any other body which are to be altogether similar must themselves be charitable.

On cl. (l):

> " To do all such other things as are incidental or which [the taxpayer] may think conducive to the attainment of any of the above objects ",

I have the assistance of authority in *Oxford Group* v. *Inland Revenue Comrs.* (5) ([1949] 2 All E.R. 537). The memorandum of association, sub-cl. (C) set out in the headnote (ibid.) reads:

> " (9) To establish and support or aid in the establishment and support of any charitable or benevolent associations or institutions, and to subscribe or guarantee money for charitable or benevolent purposes in any way connected with the purposes of the association or calculated to further its objects. (10) To do all such other things as are incidental, or the association may think conducive, to the attainment of the above objects or any of them."

There is a complete contrast between para. (9) in *Oxford Group* v. *Inland Revenue Comrs.* (5) (which was in itself plainly non-charitable) and cl. (k) in this case, which taken by itself is plainly charitable, in that the taxpayer could only support charitable associations or institutions or subscribe to or guarantee money for charitable purposes. On the other hand, save for immaterial verbal differences, there is no difference between para. (10) in *Oxford Group* v. *Inland Revenue Comrs.* (5) and cl. (l) in this case.

The headnote continues (ibid., at p. 538):

> " The objects set forth in cl. 3 (C), paras. (9), (10), of the memorandum of association were not merely ancillary to the main objects expressed in sub-cll. (A) and (B), but themselves conferred powers on the company which were so wide that they could not be regarded as charitable."

From the judgment of CROOM-JOHNSON, J., in that case (31 Tax Cas. 221) I think it is clear that his judgment proceeded on the footing that para. (9) was plainly bad, because it permitted contributions to non-charitable institutions, and, therefore, para. (10) enabled the company to do that which was most conducive to attain any such objects, and also necessarily meant that the company could apply its funds to the non-charitable purposes of para. (9). However, when the matter came to the Court of Appeal, it seems to me that the judgment of COHEN, L.J., dealt with these paragraphs independently. He deals with para. (9) ([1949] 2 All E.R. at p. 544) and says this of para. (10) (ibid.):

> " Then, again, under para. (10) of sub-cl. (C), the association is empowered to do, not merely things which are incidental or conducive to the attainment of the main object, but also such things as the association may think conducive to it. In other words, the question which the court would have to decide, if any activity of the association was being challenged as being

> ultra vires, would be not whether, in the opinion of the court, the activity was conducive to the main object, but whether the association, in undertaking it, had thought it conducive. It seems to me that in this case the observations of Lawrence, L.J., in *Keren Kayemeth Le Jisroel, Ltd.* v. *Inland Revenue Comrs.* (6) are directly in point. He said ([1931] 2 K.B. at p. 482): ' The company can exercise any or all of these powers whenever in its opinion such an exercise would be conducive to the attainment of the so-called primary object, which from a practical point of view means that it can exercise them whenever it is minded to do so, and whether such exercise is in fact conducive to the attainment of that object or not, as neither the court nor anyone else can control the company's opinion or otherwise interfere with the manner in which it chooses to carry out its objects. It would be difficult in any case to determine whether any particular enterprise undertaken by the company under its wide powers was or was not in fact conducive to the attainment of the primary object, but when the question whether it is or is not so conducive is left to the decision of the company itself I cannot avoid the conclusion that the objects mentioned in sub-cll. 2 to 22 can be carried out by the company just as freely as the object mentioned in sub-cl. 1, and that there is no substantial difference in degree between them.' The decision of the Privy Council in *Dunne* v. *Byrne* (7) ([1912] A.C. 407) reinforces my opinion that the inclusion of para. (10) of sub-cl. (C) makes it impossible to hold that the association was established for charitable purposes only. In that case a testator had bequeathed a legacy 'to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese '. The Board held the gift to be invalid. Lord Macnaghten, in giving the opinion of the Board, said ([1912] A.C. at p. 410): ' It can hardly be disputed that a thing may be " conducive ", and in particular circumstances " most conducive ", to the good of religion in a particular diocese or in a particular district without being charitable in the sense which the court attached to the word, and indeed without being in itself in any sense religious '."

Cohen, L.J., then quoted from Lord Tomlin's speech in *Keren Kayemeth Le Jisroel, Ltd.* v. *Inland Revenue Comrs.* (6) ([1932] A.C. 650 at p. 658), and finally pointed out that in his view the powers given by the memorandum were independent, and that he could not hold paras. (9) and (10) were merely ancillary to the main objects.

It seems to me that *Oxford Group* v. *Inland Revenue Comrs.* (5) decided two things. First, it is a matter of construction in each case whether (to return momentarily to this case) cll. (a) and (l) are ancillary or independent; consistently with that case, however, I must hold them to be independent. Secondly, I think it is clear that *Oxford Group* v. *Inland Revenue Comrs.* (5) decided that para. (10) taken by itself would render the objects of the society non-charitable even had para. (9) been charitable. As I have said, Cohen, L.J., dealt with paras. (9) and (10) quite independently. That decision binds me. It seems to me consistently with that decision and with the authorities quoted by Cohen, L.J., that the presence of cl. (l) in this case is in itself and by itself sufficient to render the taxpayer non-charitable. I should add that this point for some reason was not taken before the Special Commissioners.

Accordingly, I agree with the commissioners although for rather different reasons, and I must dismiss the appeal.

Appeal dismissed.

Solicitors: *Campbell, Hooper & Todd* and *Fournier & Roberts* (for the taxpayer); *Solicitor of Inland Revenue.*

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

ROLEX WATCH CO., LTD. *v.* COMMISSIONERS OF CUSTOMS AND EXCISE.

[COURT OF APPEAL (Denning, Birkett and Parker, L.JJ.), April 27, 30, May 1, 1956.]

Customs—Duties—Valuation of goods for purposes of duties—Open market price—Importation by sole concessionaires on English market—Goods sold under well-known trade mark—Cost of advertising in England paid by concessionaires—Addition (uplift) to invoice price for advertising—Whether there should be an allowance for contractual continuity of supplies and monopoly—Customs and Excise Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 44), *Sch.* 6, *paras.* 1 (1), 2.

Swiss watches manufactured under a well-known trade name built up by extensive advertising internationally were imported by sole concessionaires on the English market, who were closely connected financially with the manufacturers and who paid the cost of advertising the watches in England. In determining the value of the watches on which customs duty should be charged, the referee on an arbitration added ten per cent. " uplift " to their invoice price as representing the additional value attributable to the advertising in England, and made no corresponding special allowance or " downfall " for the benefit of a contractual assurance of continuity of supply and monopoly which a concessionaire enjoyed over and above what would be acquired by the independent buyer deemed to be paying the open market price, who must be envisaged for the purposes of assessing value for customs duty by virtue of paras. 1 and 2 of Sch. 6 to the Customs and Excise Act, 1952*.

Held: the ten per cent. uplift had been properly added to the price, since the value of the watches had been created by advertising the trade name and if the cost of advertising had been incurred by the manufacturers it would have been taken into account in the invoice price; and, as continuity of supply could normally be expected by an independent buyer and the monopoly did not necessarily affect prices, the referee's finding on those factors would not be disturbed.

Appeal dismissed.

[For the valuation of goods for purposes of customs duties, see 28 HALSBURY'S LAWS (2nd Edn.) 314-316, paras. 584-587.

For the Customs and Excise Act, 1952, s. 258 and Sch. 6, paras. 1 and 2, see 32 HALSBURY'S STATUTES (2nd Edn.) 855, 909.]

Appeal.

The complainants were the sole concessionaires on the English market of Rolex and Tudor watches which were manufactured by Swiss companies and which had a well-known trade name built up internationally by extensive advertising. The complainants bore the cost of the advertising in England. In arriving at the value of the watches for the purpose of charging customs duty, the Commissioners of Customs and Excise added 12½ per cent. " uplift " to the invoice price to represent the additional value attributable to the complainants' advertising. On a reference to arbitration, the referee held that such an addition should be made and fixed the amount at ten per cent. and he made no special allowance for the contractual assurance of continuity of supplies and monopoly of the complainants as sole concessionaires. On Jan. 25, 1956, SELLERS, J., dismissed the complainants' appeal by way of Case Stated from that decision. The complainants appealed to the Court of Appeal.

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* The relevant terms of these paragraphs are set out at p. 590, letters H and I, post.

R. J. Parker for the complainants.

Roy Borneman, Q.C., and *C. N. Beattie* for the Commissioners of Customs and Excise.

DENNING, L.J.: This case concerns the customs duty on Rolex watches, and on Tudor watches. The complainants and their predecessors have been importing Swiss watches into England for the last fifty years. They are sole concessionaires—sole dealers—for watches made by two Swiss companies, the Montres Rolex Société Anonyme, and the Montres Tudor Société Anonyme. The complainants and the two Swiss companies are closely connected. The shares of all the companies are largely held by a Swiss charitable foundation called the Hans Wilsdorf Fondation. The Swiss companies invoice the watches to the complainants, who then sell them to the English retailers.

The name " Rolex " (and the name " Tudor " to a lesser extent) is well known on the English market. It is a trade name which has been extensively advertised over the years, with the result that, by virtue of the trade name, the watches themselves command a higher price than they would otherwise do. This trade name has been built up by extensive advertising. The cost of the international advertising, i.e., advertising in periodicals which have a world-wide circulation, has been borne by the Swiss companies. The cost of the remaining advertising in England has been borne by the complainants. The question is how the cost of advertising is to be taken into account for customs purposes.

The watches are invoiced by the Swiss companies to the complainants at a price which takes into account the cost of the international advertising which the Swiss companies have borne. Some figures were given in the Case which show that, for every one hundred Swiss francs in their cost, the Swiss companies paid 18½ francs on advertising. That cost of the international advertising is reflected in the invoice price. What is to happen about the cost of the English advertising, which is borne by the complainants? The complainants say that that ought to be disregarded for the purposes of customs duty, whereas Her Majesty's Commissioners of Customs and Excise have taken it into account, for they have in recent years added to the invoice price 12½ per cent., which they call " an uplift ". They added that uplift on to the invoice price and they charged the customs duty of 33⅓ per cent. on the total. The question is whether they were right in so doing.

The matter was referred to arbitration in accordance with the Arbitration Act, 1952, s. 260, and the referee has found that an uplift was justified but that ten per cent. is the right figure. From that decision there was a Case Stated in which SELLERS, J., upheld the decision of the referee, and now there is an appeal to this court.

The statutory provisions governing this duty are the Customs and Excise Act, 1952, s. 258 and Sch. 6, para. 1 (1) of which provides that the customs duty, which is 33⅓ per cent. on these watches, is chargeable by reference to the value of the goods, and

> " The value of any imported goods shall be taken to be the normal price, that is to say the price which they would fetch, at the time when they are entered for home use . . . on a sale in the open market between buyer and seller independent of each other."

Paragraph 2 provides:

> " A sale in the open market between buyer and seller independent of each other pre-supposes—(a) that the price is the sole consideration; and (b) that the price made is not influenced by any commercial, financial or other relationship, whether by contract or otherwise, between the seller or any person associated in business with him and the buyer or any person associated in business with him . . ."

And it is quite clear from later paragraphs in the Schedule that the right to use the trade name and the get-up of the goods is to be taken into account in assessing the price.

In this case there is no open market, there are no comparable goods, and the value of these goods must be ascertained, as well as may be, from the materials available. Counsel for the complainants argued that all the pre-suppositions of para. 2 of Sch. 6 were complied with, and that, therefore, we ought to take the invoice price alone as the value of the goods. He said that the invoice price was the sole consideration here and was not influenced by the relationship of the parties. Reading the whole of the findings of the referee, I cannot accept that view. It seems to me that the invoice price cannot be taken as the sole consideration. The transaction between these parties was a composite transaction, which cannot be split into parts. The truth is that the invoice price does not reflect all the pre-suppositions of para. 2. It is only one of the materials on which the referee has to work and to make adjustments so as to ascertain the true value, and that is what he has done.

As it appears to me, the most important thing to bear in mind is the trade name of the goods, " Rolex ". The trade name adds to the value of the goods. The value in the trade name has been created and maintained by advertising, and the cost of that advertising must be reflected in the value, because of the increased value which is obtainable on a sale in the trade name. The invoice price, in so far as it reflects the international advertising, is reflecting the value of the goods, but the invoice price does not include the cost of the English advertising. I think that it ought to be increased so as to reflect the cost of the English advertising. It is only as a result of the English advertising, coupled with the international advertising, that the Rolex watches have the value which they have. Therefore (as the referee held), the value of the goods should include the appropriate sum to repay the cost of the advertising spent in making and maintaining the market.

Counsel for the complainants next argued that " the sole concessionaire has benefits which a buyer in the open market would not have. He has a right to continuity of supplies and he has a monopoly of dealing in the goods in the English market ". He submitted that, assuming one took the cost of English advertising into account so as to increase the value, there should be a corresponding " downfall " (as he put it) to allow for those benefits which a sole concessionaire has over and above a person in the open market.

The answer seems to be that (as the referee found) the sole concession is a mutual benefit to seller and buyer, but it does not in itself necessarily affect the price of the goods in any way. A buyer in the open market, buying goods with a trade name, could reasonably expect a continuity of supplies. He could assume that there would be a normal flow of those goods into the English market on a commercial scale. In his own business interest, the seller would supply any willing buyer with whatever goods he needed so as to re-sell them in the English market. The monopoly, too, is a convenience but does not necessarily affect the price. So it seems to me that the referee was entitled simply to take the invoice price and increase it by the appropriate amount on account of the cost of the English advertising.

Lastly, counsel for the complainants said: " This was a separate parcel, and should be treated as such; whereas the referee treated it as one of a large bulk, which would have a higher value for wholesale purchasers accordingly ". I do not think it can be treated as an odd lot. A purchaser in an open market buying goods with a trade name would be entitled to expect the seller to sell to him all the goods he could, and to regard this, therefore, simply as a precursor to further dealings.

So, for all those reasons, it seems to me that there is no error in point of law in what the referee has done. The complainants are sole concessionaires, associated with Swiss sellers, and the sole concessionaires are doing the English advertising. In order to arrive at the real imported value of the goods, the referee added to the invoice price a sum to represent the cost of the English advertising. I think that was quite a proper way of arriving at the value, that there is no error in law in what he did, and I would dismiss the appeal.

BIRKETT, L.J.: I am of the same opinion. The matter comes before this court on an appeal from a judgment of SELLERS, J., given in January of this year, on a Special Case Stated by an experienced and learned referee, dealing with the question whether what was termed an "uplift" should be added to the import price of certain goods.

The complainants had long been dissatisfied with the amount of duty which they had to pay on goods imported from Switzerland. For a time they paid twenty per cent. For a period they paid nothing beyond the ordinary duty, but since 1949 they had been paying 12½ per cent. in addition to the amount levied under the statute. Ultimately they took steps to have the matter determined, and on the arbitration the learned referee found that, on the facts of the case, a further ten per cent. should be added to the ad valorem duty of 33⅓ per cent. On appeal the learned judge upheld the learned referee's findings, and this court proposes to do the same.

This decision is one on the facts of the case, as SELLERS, J., was at pains to emphasise. Thus, he said:

> "It seems to me that there might be many cases where to ascertain the expenditure on advertising, and add it on proportionately to the invoice price of the goods, would not arrive at a fair and just value of the goods assessed in accordance with the provisions of the Act or the Schedule to the Act. But it is not without significance that the very experienced and learned referee throughout this case does deal with this case as it is, and in the very question for the opinion of the court he emphasises that fact. The question is: 'Whether my said award is right in law as a proper application to the facts of this case of the provisions of Sch. 6 to the Act of 1952'."

In the Case itself, the words continue:

> "or whether I ought not to accept the claim of the respondents for an uplift on invoice prices, calculated on the basis of treating the complainants' expenditure on advertising the Swiss goods as part of the cost of the goods not included in the invoice prices of the Swiss companies and measuring that increased cost as a percentage of the complainants' total expenditure on the goods."

The learned referee was therefore saying that the question for the court was this: "Am I right on the facts of this case in saying that the proper uplift is ten per cent., or ought it to be something different?", and that is put solely on the ground of the advertising. The complainants' expenditure on advertising the Swiss goods from 1951 to 1953 was £39,000, and the purchases were £212,000 odd. On that figure the cost of the advertising came to about 17½ per cent., which was the figure Her Majesty's Customs and Excise Commissioners decided to ask for.

The learned referee gave his very careful attention to the question of the expenditure on advertising in England, and, despite the able argument of counsel for the complainants, he kept his mind on the question which he had to determine, the value in accordance with Sch. 6, although evidently in such a mass of material—the hearing occupied five days—the Case Stated might contain statements open to criticism.

To apply Sch. 6 in a case like this is not easy. Where there is a sole concessionaire such as the complainants, the open market there described does not exist, and when Sch. 6, para. 1 (1), says:

> A " The value of any imported goods shall be taken to be the normal price, that is to say the price which they would fetch, at the time when they are entered for home use (or, if they are not so entered, the time of importation), on a sale in the open market between buyer and seller independent of each other ",

B and so on, and prescribes the pre-suppositions as to what an open market means, it lays down a position which does not exist. If there is a sole concessionaire, ipso facto the free open market vanishes, and one must do the best one can, taking a notional open market, and considering all the factors bearing on the question of price.

It was argued that the monopoly value and the continuity of supplies were C in the price, but the main argument was that the cost of advertising in this country was not in the price. The findings of the referee on that were:

> " That burden had it not been borne by the complainants, would of necessity have had to be borne by the Swiss companies to make the market in their goods in England and would have added, to the extent of that additional expenditure, to their cost of these goods as exported by them. D It is admitted by the Swiss companies that they have to recover and do recover the cost of their own advertising in the prices they charge for their goods. Their invoice values do not, therefore, cover the whole value of the goods as arrived in England."

That is a finding of fact by the learned referee on the evidence given before him, and it says that, if the complainants in England had not expended this money E on advertising, the Swiss companies would have had to do it in order to maintain their prestige in the markets in this country, and, had they done it, inevitably that cost would have been added to the price. The invoice price would then contain that element which, admittedly, at the present moment it does not. The learned referee's conclusion was: " If I am asked to do my best to assess in accordance with Sch. 6 that particular matter, namely, the cost of advertising, F it is not in the price. The evidence indicated to me that it ought to be in the price, and I think it fair and proper that it should be added to the price. When I am asked to say that it should be 17½ per cent., I do not agree. When I am told that for a period of years it has been accepted and paid as 12½ per cent., I still think it is too much. The conclusion to which I have come, having considered all the facts and decided on the facts of this case in accordance with G Sch. 6, is that the additional uplift should be ten per cent."

I, too, can find no error made by the learned referee, I agree with the judgment of Sellers, J., and I agree that this appeal ought to be dismissed.

PARKER, L.J.: I also agree. Imported goods fall to be valued for the purposes of customs duty in accordance with Sch. 6 to the Customs and Excise H Act, 1952. According to that Schedule, the value is to be arrived at on the basis of a hypothetical open market sale on certain assumptions and certain pre-suppositions. The only one which to my mind is material to this case is para. 2, which reads:

> " A sale in the open market between buyer and seller independent of each other pre-supposes . . . (b) that the price made is not influenced by any I commercial, financial or other relationship, whether by contract or otherwise . . . "

between the parties.

In all cases of valuation by reference to hypothetical sales, I suppose the best evidence, if it is available, is comparable sales in the market in question. But one has only to consider the facts of this case to realise that there can be no open market in Rolex watches, and, accordingly, what I have referred to as the best evidence is not available. It is true that certain witnesses were called as to what they think they would have paid if there had been an open market. The learned referee, I think quite rightly, paid very little or no regard to such evidence. It could be of very little weight. Accordingly, in those circumstances, he was thrown back to the more indirect method of approach, namely, looking at the actual bargain made and the actual invoice price, and seeing whether, by reason of the assumptions and pre-suppositions in the Schedule, some adjustments upward or downward ought to be made in that invoice price.

Clearly the pre-suppositions in para. 2 (b) were not fulfilled, in that, first, there was a financial connection, both buyer and seller being under the same financial control, and, secondly, there was also a commercial relationship, namely, that between vendors and sole concessionaires. An adjustment accordingly fell to be made in the invoice price in so far as that financial connection or that commercial relationship affected the price. The learned referee found that, so far as the financial connection was concerned, it had not affected the price at all. On the other hand, he found—and I think it is not challenged—that the complainants, the sole concessionaires, in accordance with the ordinary practice of people in that position, had expended large sums on advertising in this country. He went on to find that, on the hypothetical sale laid down in the Schedule, on the facts of this case, a buyer who had no such relationship with the vendors would have paid the invoice price, plus an uplift (as it is called) of ten per cent., plus the forwarding charges.

The sole question for this court is whether the referee was wrong in law in holding that there should be an uplift by reason of such expenditure on advertising. No question of quantum arises. If there is to be an uplift, then whether it should be ten per cent. or any other figure is for the referee alone.

To my mind, it is not in every case (as indeed the learned judge said) that advertising expenditure of this sort will result in an uplift; still less that it will result in an uplift arrived at by a purely mathematical calculation, applying the full amount of the advertising expenditure to the full amount of the purchases. But, so far as the facts of this case are concerned, I think the referee was right in allowing an uplift on this ground. To start with, these were branded foreign goods. Moreover, the margin between the vendors' selling price and the retail price in this country was very considerable. It is also clear that, if the vendors themselves had borne the cost of advertising in this country, they would have sought to recover at least those costs in the price, as indeed they did with their international advertising, and, although there is no direct finding on the point, having regard to that very wide margin between seller's price and retail price in this country, it seems to me that they would have recovered such expenses. But, quite apart from that, the hypothetical buyers would surely say to themselves " If the complainants, as sole concessionaires, can afford to pay X by way of invoice price and Y by way of advertising and still make a profit, then surely I can afford to pay X plus Y ". That may be oversimplifying the position, but I see no answer to it.

It has been forcibly urged that, since the expense in advertising was expressly linked (if I may put it that way) with the relationship of vendor and sole concessionaire by reason of Sch. 6, it ought to be completely ignored in arriving at the open market price. Attractive as that argument is, I think it is fallacious, because one is trying to ascertain what the buyer would give in this hypothetical open market at the time of the import in question, which is at a time when all the advertising expenses have already been incurred. It is part of the conditions of the market that the expenditure has been incurred and the goods have had the benefit of that advertising.

Great reliance was put on the fact that in para. 19 the learned referee had said that the invoice prices were " the real wholesale prices ". Accordingly, it is said that, in his later paragraphs, the referee must have been trying to ascertain one of two things, either the value of the goods to the particular importers, or what would have been their value if the vendor had done certain things, namely, undertaken the advertising themselves.

It is sufficient for me to say that, reading the award as a whole, I do not think that para. 19 can be given any such meaning. I think that in para. 19 the referee is merely considering the financial control aspect of the matter, and finding that no adjustment is to be made to the invoice price on that account, and, so far as the financial connection is concerned, the invoice price is the real price and not one which falls for any adjustment.

Finally, it was urged, particularly in reply: " Be it so. If, in severing the commercial relationship of vendor and sole concessionaire in order to arrive at a price under Sch. 6, it is right to add on something for the advertising expenditure, yet there is another effect of severance, namely, that the person offering for the goods will not be in such a good position. In particular, he will not have any contractual right to supplies of the goods; nor will he have a monopoly in them ". This has seemed to me to be the strongest way in which the complainants can put their case. At first sight it would appear that, as a matter of general principle, when a relationship of this sort is severed, if anything is to be added for the burdens of the relationship, something must be deducted for its benefits. It is rather surprising that (as must be the case if the referee is right) there was no benefit at all to the complainants in this relationship, and, if there was a benefit it was something which fell to be deducted. The facts are very special, however, and I cannot say that the learned referee did not have the point in mind. He undoubtedly considered the point that the hypothetical purchaser would not have any right to continuity of supplies, and he deals with it expressly in para. 32 (7), where he says this:

> " While finding that a guarantee of continuity of supplies would assist the market in the goods, I am of opinion that the value of these trade marks lies especially in the fact that the dealer in the article knows that the goods with the respective marks have a high reputation with the public and that they can pass on to the ultimate buyers the right to use these watches so marked."

It is clear from that that it is an element which the learned referee took into consideration, and I think he must, as a result, have determined that nothing was to be deducted from the price on that account.

Finally, it is said that the learned referee was wrong in treating the hypothetical sale as a sale of eighteen parcels of watches, as I think he did in para. 33 (6); whereas he ought to have dealt with it as a sale of an isolated parcel. I think it is conceded by counsel for the respondents that on a true view you must consider each parcel, the subject of each invoice. But, to my mind, the fact that the referee may have treated it as a sale of eighteen parcels does not affect the matter, because, in this hypothetical open market, one must surely be entitled to assume at least that the other seventeen parcels are coming forward into that market, and, therefore, whether one looks at it as a sale of one parcel out of eighteen or a sale of eighteen parcels does not seem to me to affect the matter.

For these reasons I cannot see that the learned referee erred in law, and I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Barfield & Barfield* (for the complainants); *Solicitor of Customs and Excise* (for the respondents).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

A

JENKINS *v.* JENKINS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Davies, J.), May 3, 1956.]

Divorce—Conduct conducing—Desertion by other spouse—Adultery of husband—Expulsion of husband from matrimonial home—No adulterous conduct at date of expulsion or likelihood of adultery in the future. B

Justices—Husband and wife—Adultery—Conduct conducing to husband's adultery—Expulsion of husband from matrimonial home—No suspicion by wife that husband committing or likely to commit adultery—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 57), *s.* 11 (3).

Constructive desertion, unaccompanied by circumstances causing the C deserted spouse to commit adultery, does not amount to conduct conducing, just as simple desertion, unaccompanied by such circumstances, does not amount to conduct conducing; but if there are facts connected with the circumstances of the desertion which cause the deserted spouse to commit adultery, then that is capable in law of constituting conduct conducing to the adultery (see p. 602, letter C, post). D

Dictum of DENNING, L.J., in *Richards* v. *Richards* ([1952] 1 All E.R. at p. 1386) explained; *Brown* v. *Brown* (ante, p. 1) considered.

The parties were married in 1932. On Jan. 1, 1952, the wife expelled the husband from the matrimonial home. At that date she had no ground for suspecting him of adulterous conduct or that he would commit adultery if she deserted him. In about August, 1952, the husband met a Mrs. S. E In about March, 1953, he committed adultery with her and since then had been living with her in adultery. The wife applied for an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the ground that the husband had committed adultery. The husband contended that, by virtue of the Matrimonial Causes Act, 1937, s. 11 (3)*, she was not entitled to an order since she had by her misconduct F conduced to his adultery.

Held: the wife's act of expelling the husband on Jan. 1, 1952, did not in fact cause the husband to commit adultery fourteen months later and did not, therefore, amount to conduct conducing to that adultery, and she was entitled to the order sought.

Appeal dismissed. G

[As to wilful neglect or misconduct conducing to adultery, see 12 HALSBURY'S LAWS (3rd Edn.) 309, para. 618; and for cases on the subject, see 27 DIGEST (Repl.) 422-424, *3530-3547*.

For the Matrimonial Causes Act, 1937, s. 11 (3), see 11 HALSBURY'S STATUTES (2nd Edn.) 867.]

H

Cases referred to:

(1) *Brown* v. *Brown*, [1956] 2 All E.R. 1; 120 J.P. 201.

(2) *Richards* v. *Richards*, [1952] 1 All E.R. 1384; [1952] P. 307; 116 J.P. 358; 3rd Digest Supp.

(3) *Hughes* v. *Hughes*, (1866), L.R. 1 P. & D. 219; 35 L.J.P. & M. 94; 27 Digest (Repl.) 426, *3563*. I

(4) *Herod* v. *Herod*, [1938] 3 All E.R. 722; [1939] P. 11; 108 L.J.P. 27; 159 L.T. 530; 27 Digest (Repl.) 360, *2978*.

(5) *Cox* v. *Cox*, (1893), 70 L.T. 200; 27 Digest (Repl.) 423, *3544*.

Appeal.

The husband appealed against an order of the Romford justices dated Mar. 5, 1956, whereby they found him guilty of adultery and made a separation order and a maintenance order for £2 weekly in the wife's favour under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949.

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* The relevant terms of the sub-section are printed at p. 597, letter C, post.

D. H. W. Vowden for the husband.
R. L. Bayne-Powell for the wife.

LORD MERRIMAN, P.: I am asking DAVIES, J., to give the first judgment.

DAVIES, J.: The point of the appeal can be shortly stated. The husband does not dispute the adultery; indeed, he has at all material times admitted that since March, 1953, he has been living in adultery with the woman named in the wife's complaint. The complaint was dated Feb. 20, 1956, and the specific date of adultery which the wife charged was within six months of that complaint, namely, Jan. 3, 1956. The husband's defence was based on s. 11 (3) of the Matrimonial Causes Act, 1937. That sub-section provides, so far as material, that

> " On any application made by virtue of this section [i.e., by a husband or a wife on the ground of adultery] the court shall not make an order unless it is satisfied that the applicant has not . . . by his or her wilful neglect or misconduct conduced to, the adultery . . ."

As was emphasised by LORD MERRIMAN, P., in *Brown* v. *Brown* (1) (ante, p. 1 at p. 3):

> " It is to be observed at the outset that in the Divorce Court throughout the series of Matrimonial Causes Acts, now consolidated in the Act of 1950, conduct conducing to adultery has never been more than a discretionary bar to the relief of divorce, and the effect of s. 14 (1) of the Matrimonial Causes Act, 1950, replacing s. 5 of the Act of 1937, is that it also affords a discretionary bar to the relief of judicial separation. In a magistrates' court, on the other hand, conduct conducing to adultery is made, by s. 11 (3) of the Act of 1937, an absolute bar to the making of an order which, if a non-cohabitation clause is included, has the same effect as a decree of judicial separation: Summary Jurisdiction (Married Women) Act, 1895, s. 5 (a). Moreover, the onus of satisfying the court that his or her conduct has not conduced to the adultery charged is placed on the complainant, as in the case of the absolute bars to relief on a petition for divorce."

The facts in outline of the present case are as follows. The parties were married in April, 1932. There have been three children, all of whom are now grown up; and it appears from the evidence that the marriage has from time to time been somewhat stormy. On several occasions proceedings have been instituted by the wife in a court of summary jurisdiction. On three occasions she withdrew her summonses. But, according to her own evidence given before the justices on the present occasion, in or about April, 1942, before the Rochester justices her complaint of persistent cruelty was dismissed; and as recently as Feb. 11, 1952, before the Romford justices she charged her husband with wilful neglect to maintain, persistent cruelty and desertion and those complaints were dismissed. Shortly before and leading up to the last mentioned proceedings, the final parting occurred on Jan. 1, 1952, when there is no doubt, as the justices find, that the wife expelled her husband from the house. According to his evidence, which it would seem that the justices probably accepted, in or about Christmas, 1951, she locked him out of the house and he had to get the police to help him to break in, and he stayed. Finally, to use the justices' own words, the wife did

> " force her husband out, she told him to go, packed his clothes and was in a state of desertion on Jan. 1, 1952."

The justices found that after the dismissal on Feb. 11, 1952, of the wife's complaints:

> " The husband sometime about August, 1952, met Mrs. Stocker [the

> woman with whom he is now living]. He had not met her until that time. About March, 1953, the husband committed adultery with Mrs. Stocker and that adulterous intercourse has persisted ever since, and still continues. The bench find that the allegation in the complaint, viz., that the husband on Jan. 3, 1956, committed adultery with Mrs. Stocker is proved."

The evidence on which they made that finding, the facts not being in dispute, was that of an inquiry agent who gave evidence before them and produced two statements that he had taken from the husband and Mrs. Stocker respectively, on Jan. 3, 1956; and it is perfectly plain that those statements were obtained by the inquiry agent and given by the two people concerned with a view to divorce proceedings being instituted by the wife on the ground of adultery.

As LORD MERRIMAN, P., has said in the course of the argument, there is a great deal of unreality about the present case. We have listened to very interesting arguments whether or not the wife is entitled to keep her order for £2 a week made on the ground of the husband's adultery or whether she should be deprived of that order because her conduct has conduced to the adultery. For it is plain beyond dispute that the wife, on the finding of the justices, has been in desertion of the husband from Jan. 1, 1952, that is to say, for more than three years now, so that the husband can petition for divorce, asking, no doubt, for the exercise of the discretion of the court in his favour, and subject always to the question whether or not it could be said that she continued in desertion after she had knowledge of and was plainly objecting to his adultery. Conversely, the husband plainly has committed and is living in adultery, so that the wife can petition for divorce, and although she would not in her petition have to ask for the exercise of the court's discretion, her desertion would be a discretionary bar, if the court were to come to the same conclusion as did the justices on the question of desertion. Thus the position of these parties could have been finally regularised, as in the present proceedings it cannot be.

However, this matter is before us, and I think that before turning to the law I cannot do better than to continue the reading of the reasons given by the justices. Before the justices the husband was represented by a solicitor; after the justices had heard the evidence and argument they retired for over two hours and finally delivered their reasons in writing. These are the reasons which are before us now. I have already read paras. 1 and 2. Paragraph 3 reads:

> "The husband contends that the wife by her conduct conduced to husband's adultery. The husband's acquaintance with Mrs. Stocker did not commence until some time after the wife's desertion, and adultery did not commence until about fourteen months after the commencement of the desertion",

namely, in March, 1953. That is not a statement of the husband's contention; that is plainly a finding of fact. The justices go on:

> "The bench have found desertion proved against the wife but nothing more, and applying the test set out in *Richards* v. *Richards* (2) ([1952] 1 All E.R. 1384) the bench find that the husband's adultery was not conduced to by the wife's conduct."

Then they proceed to deal with a more specific point:

> "One point, in the opinion of the justices, needs to be dealt with. The wife, at the end of her cross-examination, said (in effect) that if she had turned her husband out 'He would go straight to another woman—that's the sort of man he is'. The bench do not consider that that remark, uttered by a woman who was by no means unwilling to hurt her husband in the witness-box should be taken at its face value. There is no evidence that

> A the wife had, on Jan. 1, 1952, any ground to suspect her husband of adulterous conduct, or that he would commit adultery if she left him. She was jealous, and had been unjustifiably jealous of Mrs. Cargill but she never in any way encouraged his association with Mrs. Stocker, or any other woman, or had any real ground for thinking that her husband would commit adultery with Mrs. Stocker or anyone else. The bench find that the wife has proved B her case."

If I may venture to adopt what was said by LORD MERRIMAN, P., during the argument, that last finding is intended to be a gloss on the words " but nothing more " in connection with the desertion, and deals with the question whether, when the wife turned her husband out, she was, as it were, driving him into the arms of another woman or had any real knowledge that that consequence C was likely to follow her desertion of him. The justices say that that is what she said, but add in effect: " We do not accept that. He was not a man who had been going about with other women. She did not know that he was likely to go to another woman ". Moreover, Mrs. Stocker was not on the scene. I think that they are there dealing specifically with the point whether, in addition to the expulsion, there were circumstances that ought to have led the wife D reasonably to believe, or, indeed, circumstances that would lead anyone reasonably to believe that the likely consequence would be that he would commit adultery. That the justices have expressly negatived.

A part of the attack on their decision is based on what they say in the concluding lines of the first paragraph of reason No. 3 which I have just read, namely:

E

> " The bench have found desertion proved against the wife but nothing more, and applying the test set out in *Richards* v. *Richards* (2) the bench find that the husband's adultery was not conduced to by the wife's conduct."

The criticism levelled against them is this. This was a case of constructive desertion; the wife turned the husband out. *Richards* v. *Richards* (2) on which F they purport to base themselves was a case of simple desertion, and in that case, DENNING, L.J., giving the leading judgment in the Court of Appeal, to which I will refer in a moment, did use words to the effect that desertion and nothing more cannot amount to conduct conducing to adultery by the deserted spouse. In a subsequent decision of this court, which could not have been present to the justices' minds as the judgment was not given until Mar. 16, G 1956, namely, *Brown* v. *Brown* (1) to which I have already referred, LORD MERRIMAN, P., giving the judgment of the court, expressly commented on that passage in the judgment of DENNING, L.J., in these words (ante, at p. 7):

> " We do not doubt that in using the phrase ' desertion and nothing more ' DENNING, L.J., meant to exclude cases of constructive desertion, for it is easy to imagine expulsive words or other expulsive conduct which might H very well be held to conduce to adultery."

Therefore, it is said that the justices in the present case misdirected themselves in basing themselves on *Richards* v. *Richards* (2), which was a case of simple desertion, when the law with regard to cases of constructive desertion is correctly laid down in *Brown* v. *Brown* (1).

I The second criticism of that part of the justices' decision was that they have only found constructive desertion by expulsive words and expulsive conduct on Jan. 1, 1952, but that if one looks at the evidence as a whole (and it is plain that by and large they accepted the husband's evidence and rejected the wife's) there was abundant evidence of insulting, hurtful conduct by the wife over the period before the final parting between the parties. The difficulty about this second point is that the justices have not made any specific finding about it at all. The conclusion to which they have come was that this was merely a case of constructive desertion; they have not said anything else, or put any weight on antecedent matters, which, after all, were finalised in the act of driving the husband from the home. The fact that insulting conduct might be a relevant matter in considering the question of conduct conducing was clearly present to the minds of the justices since one of the authorities at which they were invited to look was *Hughes* v. *Hughes* (3) ((1866), L.R. 1 P. & D. 219), to which I need not refer.

As the argument proceeded it seemed to me that the expressions of opinion in the Court of Appeal by Denning, L.J., and in this court by Lord Merriman, P., in the two cases to which I have referred, really are completely harmonious. It seems to me that the passage in the judgment of Denning, L.J., does not and cannot mean that in no case of simple desertion can the circumstances of the desertion ever amount to conduct conducing. The relevant passages in that judgment ([1952] 1 All E.R. at p. 1386) are:

> " In the present case, therefore, the first question is whether the husband's conduct conduced to the wife's adultery. Conduct only conduces to adultery when it is such conduct ' as is proved to have brought about the adultery ': see per Sir Boyd Merriman, P., in *Herod* v. *Herod* (4) ([1938] 3 All E.R. 722 at p. 729). There must be conduct which is closely and directly connected with the adultery, such as exposing a wife to known and obvious dangers. Applying this test, I am clearly of opinion that desertion by itself is not conduct conducing to adultery."

That is the sentence which, as I think, has been torn out of its context and used in the text-books. The judgment goes on:

> " It would be a deplorable thing if desertion by one party were thought to be an excuse for the other party to commit adultery. It may explain the adultery, but it does not excuse it. During the war it often happened that, when the husband was serving abroad, his wife at home committed adultery, and in the pension cases it was always held that the wife's adultery was not caused by the separation, but was due to her own personality and conduct. So, it seems to me, in these cases, when there is desertion and nothing more, and then the wife commits adultery, her adultery is due, not to the desertion, but to her own weakness of character, or, as, no doubt, she would prefer to put it, because she fell in love with another man. That is the case here. A year after the desertion the wife fell in love with another man and committed adultery with him. The adultery is due to her own weakness of character and not to the desertion . . . Counsel for the wife contended that in the case now before us there was something more than desertion, but it is significant that in the pleadings it is not alleged that the husband's conduct had conduced to the adultery. That does not prevent the court from considering it and it may have to do so, but, if the wife does not allege it, it goes to show that there is no substance in that suggestion. The wife was not left destitute. After her husband deserted her, she lived at home with her parents and went out to work to earn her living in the same way as she had done before the marriage. She said in evidence that she did not take proceedings before the justices against her husband for desertion because she did not want money. In those circumstances, it seems to me to be plain that his conduct did not conduce to her adultery."

That last passage seems to me to make it plain that the learned lord justice is there contemplating cases of simple desertion where the conduct of the deserting party could well be said to conduce to adultery on the part of the deserted spouse. For example, he says " This wife was not left destitute ", and I should have thought it plain that it is implicit in that that Denning, L.J., was contemplating cases of a sort with which we are all familiar, cases of simple desertion where the husband goes off and leaves the wife with probably one or more children to educate and feed, with no money, and she then forms a liaison

A with another man. Those are circumstances in which the court might, in my view, come to the conclusion that the conduct of the deserting party had conduced to the adultery on the part of the other spouse. Therefore I think it right to say that *Richards* v. *Richards* (2) does not decide that no case of simple desertion can amount to conduct conducing.

On the other hand, turning to *Brown* v. *Brown* (1) it appeared at one time, if I B may say so with respect, that counsel for the husband was asking us to say, following the judgment of LORD MERRIMAN, P., in that case that, contrary to cases of simple desertion, constructive desertion ought to be taken to amount to conduct conducing to the other spouse's adultery. In my opinion that is not right. *Brown* v. *Brown* (1) was, as was pointed out in the argument, almost the exact converse of the present case. In that case a wife brought proceedings C before the justices, as did the wife in the present case, asking for an order on the ground of the husband's adultery. The wife had formed an improper, though not an adulterous, association with a man, and in consequence, although it is perfectly plain that the husband did not know about it, he realised that her feelings were getting cold and she was becoming indifferent to him, as a result of which, and what one might call contemporaneously with the affair which his D wife was carrying on with the man, he formed an adulterous association with a woman. The justices in that case held that the wife's conduct conduced to the husband's adultery and refused an order on that ground. On appeal, this court entirely agreed with the justices that the chain of causation was unbroken, that is to say, that it was plain that the wife's conduct had caused the husband to commit adultery, but the decision of this court was that in the circumstances E the conduct complained of as conduct conducing was not such as to be capable in law of being conduct conducing. In other words, the dispute in that case was not whether the conduct caused the adultery, but whether, in law, the conduct could be interpreted as conduct conducing ? In the present case, the question is not can the wife's conduct be conduct conducing, but did it, in fact, conduce to the adultery ? I need only refer to two passages in the judgment F of LORD MERRIMAN, P., in *Brown* v. *Brown* (1). In the first he says (ante, at p. 6):

> " We feel no difficulty in holding that there was no break in the chain of causation between the association and its impact on the husband's mind and feelings. This still leaves open the question whether his alleged G reaction to the affair was justified. In other words, whether the association or its impact on the husband, taken at its highest, is capable in law of amounting to conduct conducing to his adultery."

And (ibid., at p. 10):

> " Even assuming, however, that it is implicit in the findings of the H justices that the husband suspected more than he knew, and that he was affected by what he suspected, it seems to us that the conduct alleged is so different in degree from that pleaded in *Cox* v. *Cox* (5) ((1893), 70 L.T. 200), and the impact on the husband from anything known or even suspected at the time when he committed adultery was so much less than was the I case in *Cox* v. *Cox* (5) that we should be going much further than is warranted by that case, or any other decision, if we were to hold that the facts in the present case are capable of amounting to conduct conducing. No doubt the wife's evident loss of affection and interest may have rendered the husband more susceptible to temptation, but in our opinion, even invoking the change of onus, the misconduct here found against the wife cannot in law be held to be conduct conducing to the husband's adultery."

To return from that to the present case, it may be that the justices, being ignorant of the decision in *Brown* v. *Brown* (1) were guilty of some degree of misdirection when they said:

> "applying the test set out in *Richards* v. *Richards* (2) the bench find that the husband's adultery was not conduced to by the wife's conduct"

on the ground that they found desertion proved against the wife and nothing more. They have, however, also found that the wife turned the husband out on Jan. 1, 1952; that he was not driven to another woman's arms at that time; that, contrary to what the wife said, she had no idea that he was likely to go to another woman, that he did not go to the other woman until August; that he did not commit adultery with her until March, 1953, so that the adultery did not commence until about fourteen months after the commencement of the desertion. What, in my opinion, they have found in the present case is constructive desertion by mere expulsion and nothing more. Constructive desertion and nothing more, as in the present case, does not, in my opinion, amount to conduct conducing, just as in the case of simple desertion and nothing more. If, however, there are facts connected either with the circumstances of simple desertion or with the circumstances of constructive desertion which are such as to result in causing the deserted spouse to commit adultery, then that is or may be conduct conducing. The justices in the present case have found, I think rightly, on the whole of the evidence, that the husband left because he had been turned out, but that it is impossible to say that when, months later, he formed an acquaintance with a woman who up to then was a stranger to him, and when much later he started to commit adultery and has ever since lived in adultery with her, that that adultery was conduced to by his wife's act in expelling him.

There is one other point with which I should deal. Counsel for the husband argued that the longer desertion continues, the more likely the desertion is to drive the deserted spouse to commit adultery. I do not think that it is necessary to pronounce on that as a principle. Speaking for myself, I should have thought that the circumstances of a particular desertion might wear away, and that the longer the time that has expired since the original act of desertion, the less likely it would be that the court would come to the conclusion that the act of desertion had conduced to adultery starting years afterwards. I do not think it is necessary, however, to decide that point one way or the other. It is sufficient for the purposes of the present case to say that in all the circumstances I can see no ground for saying that in the ultimate event the justices, who obviously considered the case very carefully, have come to any other than the correct conclusion. In my opinion this appeal fails and should be dismissed.

LORD MERRIMAN, P.: I agree so completely with the judgment that has been delivered that I only wish to add one sentence to show that my agreement includes the point relating to the supposed disharmony between *Richards* v. *Richards* (2) ([1952] 1 All E.R. 1384) and *Brown* v. *Brown* (1) (ante, p. 1). In my opinion, just as it is clear that the judgment of Denning, L.J., in *Richards* v. *Richards* (2) does not mean that in cases of simple desertion there can never be anything more in the nature of conduct conducing, so the passage in the judgment of this court in *Brown* v. *Brown* (1) does not mean that all cases of constructive desertion must necessarily contain something in the nature of conduct conducing. I agree that this appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Pinney, Mummery & Co.* (for the husband); *Daybell's* (for the wife).

[*Reported by* A. T. Hoolahan, Esq., *Barrister-at-Law.*]

BOARD OF GOVERNORS OF THE LONDON HOSPITAL *v.* JACOBS.

[Court of Appeal (Lord Evershed, M.R., Jenkins and Hodson, L.JJ.), May 9, 10, 1956.]

Rent Restriction—Repairs increase—Declaration that conditions justifying an increase were fulfilled—Certificate of disrepair granted by local authority—Revocation of certificate—Jurisdiction of court to determine whether conditions fulfilled—Housing Repairs and Rents Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 53), *s.* 23 (1) (*a*), *s.* 25 (1), *s.* 26.

Landlord and Tenant—Lease—Variation—Tenancy agreement under which tenant undertook responsibility for repairs—Repairs carried out by landlords for many years—Whether variation of agreement implied.

By a written agreement dated May 8, 1931, the landlords let a dwelling-house on a weekly tenancy to the deceased husband of the present statutory tenant. It was a term of the agreement that the tenant should keep the premises in good and tenantable repair, fair wear and tear excepted. Since the beginning of the original tenancy the landlords had done substantially the whole of the repairs. On May 23, 1955, the landlords served on the statutory tenant a notice of repairs increase under s. 25 of the Housing Repairs and Rents Act, 1954, claiming an increase of 12s. per week, calculated on the basis that the landlords were wholly responsible for repairs. In the accompanying declaration the landlords stated that the " conditions justifying an increase of rent ", within the meaning of s. 23 (1) (a)* of the Act of 1954, were fulfilled. On Dec. 6, 1955, the local authority, on the application of the tenant, issued a certificate of disrepair. On Feb. 8, 1956, after the landlords had done certain works, the local authority revoked the certificate. In an action by the landlords for recovery of the increased rent, the tenant pleaded that the conditions justifying the increase of rent were not fulfilled. On the questions (a) whether the statutory tenant's only remedy for challenging the landlords' declaration that the conditions justifying an increase of rent were fulfilled was to obtain a certificate of disrepair under s. 26† of the Act of 1954, with the consequence that the jurisdiction of the court would be ousted, (b) whether a transfer of the burden of the responsibility for repairs to the landlords ought to be implied from the fact that they had carried out substantially all repairs for many years, and (c) whether the notice of repairs increase was a nullity as it had proceeded on the basis that the landlords were legally responsible for substantially all repairs,

Held: (i) the statutory tenant was entitled to contest before the court the question whether the " conditions justifying an increase of rent " were fulfilled, because the Housing Repairs and Rents Act, 1954, s. 26, contained no words clearly excluding the court's jurisdiction, and

(ii) the fact that for many years the landlords had done repairs to the premises did not justify the inference that the original terms of the tenancy agreement dated May 8, 1931, had been varied by the landlords' assuming legal responsibility for doing repairs (dictum of Lord Normand in *Asher* v. *Seaford Court Estates, Ltd.*, [1950] 1 All E.R. at p. 1024, applied); but under s. 25 (4) of the Housing Repairs and Rents Act, 1954, the county court had jurisdiction to amend the notice of repairs increase and the declaration accompanying it in relation to the bona fide error of the landlords by which the notice had proceeded on the basis that they were exclusively responsible for the repairs (judgment of Scrutton, L.J., in *Bourne* v. *Litton*, [1924]

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* The text of the paragraph, so far as relevant, is printed at p. 605, letter D, post.

† The relevant provisions of the section are printed at p. 606, letter D, post.

2 K.B. at p. 18, considered), and in the circumstances of the present case the jurisdiction to amend would be exercised.

Observations on the scheme of s. 26 of the Housing Repairs and Rents Act, 1954, regarding a certificate of a local authority that the conditions justifying an increase of rent were not fulfilled (see p. 607, letters E to H, post) and observations on the onus of proof (p. 608, letters E to H, post).

Appeal allowed.

[As to transfer of burdens, see 20 HALSBURY'S LAWS (2nd Edn.) 326, para. 387; and for cases on the subject, see 31 DIGEST (Repl.) 677, 678, *7708*, *7709*, and 679, *7719-7723*.

For the Housing Repairs and Rents Act, 1954, s. 23, s. 25, s. 26, and Sch. 2, see 34 HALSBURY'S STATUTES (2nd Edn.) 346-352, 377-379.]

Cases referred to:

(1) *Asher* v. *Seaford Court Estates, Ltd.*, [1950] 1 All E.R. 1018; [1950] A.C. 508; 31 Digest (Repl.) 679, *7719*.

(2) *Bourne* v. *Litton*, [1924] 2 K.B. 10; 93 L.J.K.B. 553; 131 L.T. 169; 31 Digest (Repl.) 682, *7741*.

Appeal.

This was an appeal by the defendant, Mrs. Rose Jacobs, from a decision of His Honour JUDGE ELDER JONES, on Feb. 24, 1956, at Shoreditch County Court, giving judgment for the plaintiffs, the Board of Governors of the London Hospital, for £13 11s. 1d. arrears of rent in respect of a dwelling-house known as 33, Turner Street, Whitechapel, London, of which the plaintiffs were the landlords and the defendant was the statutory tenant. In their particulars of claim the plaintiffs averred that the premises were let by them to one Solomon Jacobs, since deceased, from Feb. 16, 1931, by an agreement in writing dated May 8, 1931, for a weekly tenancy at a rent of £2 7s. a week which had become £2 14s. 6d. a week by reason of increase in rates; that, from the death of Solomon Jacobs, his widow, the statutory tenant, remained in occupation of the premises; that, by notice in writing dated May 23, 1955, the plaintiffs gave notice to her that, pursuant to the Housing Repairs and Rents Act, 1954, the rent would be increased by 12s. a week to £3 6s. 6d. a week from July 4, 1955; and that she had failed to pay the increase in rent. The particulars of defence contained a general traverse, and, in particular, the statutory tenant alleged that the conditions justifying an increase of rent referred to in s. 23 (1) (a) of the Act of 1954 had not been fulfilled. At the hearing, counsel for the plaintiffs took the preliminary objection that, by reason of the provisions of s. 26 of the Act of 1954, it was not open to the statutory tenant to assert, by way of defence to the proceedings, that the conditions of repair had not been fulfilled, and that her only remedy was to apply to the local authority for a certificate of disrepair. It was submitted on behalf of the statutory tenant that there was no case to answer because the notice of increase was bad, being based on the assumption that the landlord was wholly responsible for repairs, while, according to the written agreement of May 8, 1931, the tenant was partly responsible for the repairs. Counsel for the plaintiffs, while submitting that this point could not be taken as it was not pleaded, called evidence to show that, notwithstanding the terms of the tenancy agreement, the landlords had done substantially all the repairs throughout the period. Counsel contended that, on the evidence, a new agreement of tenancy should be inferred, under which the whole of the liability for repair was on the landlords. The county court judge accepted the plaintiffs' submissions and gave judgment for the plaintiffs.

R. Millner for the defendant, the statutory tenant.

C. G. A. Cowan for the plaintiffs, the landlords.

LORD EVERSHED, M.R.: In these proceedings the plaintiffs, the Board of Governors of the London Hospital (to whom I will hereafter refer as "the landlords "), sued the defendant, Mrs. Rose Jacobs, for a relatively small sum for arrears of rent of premises belonging to the landlords at 33, Turner Street, Whitechapel, of which the defendant (to whom I will hereafter refer as " the statutory tenant ") was at all material times statutory tenant. The sum involved, for which judgment was given for the landlords, is only £13 11s. 1d., but the questions which have arisen are of some significance. We were informed that this was one of a number of somewhat similar proceedings brought by the landlords against other tenants, and it is probable that the decision in this case will substantially affect the decisions in other cases.

The arrears of rent sued for represent certain increases in the pre-existing rent of £2 14s. 6d. per week to which the landlords claim to be entitled as a repairs increase, under the terms of the Housing Repairs and Rents Act, 1954. The provisions relative to rent increases under that Act are contained substantially in Part 2 of the Act, beginning with s. 23, and they are, undoubtedly, somewhat complex, as I think the subject-matter almost inevitably required them to be. I am not sure that I share the criticism which the county court judge made of the combined efforts of the Parliamentary draftsman and the legislature, because I think the purpose and intendment of the sections is not seriously doubtful. Section 23 (1) states the two conditions precedent to any repairs increase which may be validly made under the Act. The first condition (which is itself twofold and is called thereafter " the conditions justifying an increase of rent ") is found in s. 23 (1) (a) and is: " (i) that the dwelling-house is in good repair; and (ii) that it is reasonably suitable for occupation . . ." The second condition precedent is found in s. 23 (1) (b) and is that, in accordance with Sch. 2 to the Act, the landlord has produced satisfactory evidence that repair work to the extent intimated has been done. Section 23 (2) provides for the quantifying of the repairs increase which can be made, and there is a proviso to the sub-section that, if in any case the landlord is only partly, instead of wholly, responsible for the repair of the dwelling-house, then the quantum of the increase has to be " reduced proportionately ". Those two last words obviously introduce an element of degree into the question of quantum where the repair liability is shared between landlord and tenant; and, although guidance is later given for the fixing of the proportions, it is plain that there must in many cases be room for some doubt what the true proportion is. To that matter I shall have to return presently.

In this court two substantial points were debated, one arising under each of the two conditions precedent; and I shall deal with them, so far as I can, separately. The first one, which affects s. 23 (1) (a), the " conditions justifying an increase of rent ", arises out of a preliminary objection taken by the landlords at the trial. The objection was that it was not open to the statutory tenant, in the circumstances, to challenge the declaration by the landlords in their notice increasing the rent that those conditions had been complied with. To make clear the nature of that point, I must embark a little further on the waters of these sections. In addition to the conditions laid down in s. 23 (1), it is also provided by s. 25 (1) that a landlord cannot recover any sum by way of repairs increase unless he has served on the tenant a notice of increase as therein defined, accompanied by declarations to the effect that both the conditions precedent which are found in paras. (a) and (b) of s. 23 (1) have been satisfied. Section 25 (2) and (3) contain provisions (into which I will not go in detail) as to the form and requirements of the notice of increase.

In the present case, the landlords possessed themselves of the appropriate form (or what, on this part of the case, was the appropriate form) and, in due compliance with it, the landlords, by their financial secretary, who was qualified to execute it, stated that at the date of the service of the notice the " conditions justifying the increase of rent " had been fulfilled; that is to say, they declared that the conditions set out in s. 23 (1) (a) had been satisfied. When the action started, the landlords, by their particulars of claim, alleged that this notice had been given, and they accordingly alleged that they were entitled to the increase. The statutory tenant, by way of defence, specifically challenged the contents of the declaration, alleging that the conditions justifying an increase of rent referred to in s. 23 (1) (a) of the Act had not been fulfilled. On request, she gave particulars of the extent to which, as she alleged, those conditions had not been satisfied. I need not go into them, because it is at this point that the preliminary objection arises. It is said that the effect of s. 26 of the Act, in the circumstances of this case, is to prevent altogether the statutory tenant from challenging the truth of this declaration. Since fulfilment of the conditions is a condition precedent to any increase of rent, it is obvious that this preliminary objection is, on the face of it, a somewhat bold one, because it involves saying that the courts are not entitled to inquire at all into the question of fact raised by the statutory tenant: Have those essential requirements been satisfied?

I must now look at s. 26. Section 26 (1) is in these terms:

> " On the service of a notice of increase under [s. 25] or at any subsequent time, the tenant . . . may apply to the local authority for a certificate that either or both of the conditions justifying an increase of rent are not fulfilled; and the local authority, if satisfied that the dwelling-house fails to fulfil either or both of the conditions, shall certify accordingly . . ."

Section 26 (2) provides that, where the local authority have granted a certificate under s. 26 (1) and the tenant has served a copy of it on the landlord, then during any period for which the certificate is in force the landlord cannot recover the repairs increase; but if the landlord, in proceedings for the recovery of the repairs increase, satisfies the court that at the time when the certificate was given the conditions had been fulfilled, the court may order that the certificate shall cease to be effective. Section 26 (4) provides that a local authority may, on the application of a landlord, revoke a certificate where work has been done by a landlord after the certificate was given. On the revocation, of course, the stop on the recovery of the repairs increase ceases. Section 26 (5) provides, further in relief of the landlord, that, in proceedings to recover the increase claimed, a landlord may challenge a refusal of the local authority to revoke the certificate.

It will be seen at once that a certificate is open to challenge by the landlord in proceedings in court, but there is no express provision in the section for the converse case. It nowhere provides that, if the local authority refuse to grant a certificate or revoke one that they have granted, a tenant may challenge the refusal of the local authority or the revocation of the certificate in proceedings in the courts. It is the basis of the contention of counsel for the landlords that we should infer from the absence of that countervailing provision that a tenant cannot challenge, in any proceedings, the refusal by a local authority to grant a certificate or its revocation when granted. Indeed, the contention goes so far as this. It is said that, when a landlord serves a notice of increase, the only remedy available to a tenant in regard to the declaration that s. 23 (1) (a) is satisfied, is to obtain, if he can, a certificate from the local authority; and that the powers of the court are wholly ousted in regard to any challenge by the tenant to a declaration of fulfilment by the landlord of what is (as I have already said) an absolute condition precedent to the landlord's right to recover any increase of rent under Part 2 of the Act. It was the view of the county court judge that such was the effect of s. 26. His Honour went so far as to say that, in his view, the contrary result would make a mockery of the Act and the scheme of these sections in it. With all respect to the learned county court judge, I entirely fail to see that that is so. Had it not been for the fact that this point had appealed to his Honour, I should have been disposed to think that the point was hardly tenable. This is not a case in which Parliament is indicating some particular tribunal and saying that that tribunal shall have exclusive jurisdiction to deal with the particular matters in question. Examples from legislation can be found for such provisions. A familiar one is under the Public Health Acts, where for certain purposes, exclusive jurisdiction is given to the justices. Indeed, in the Rent Restrictions Acts themselves, exclusive jurisdiction is given to the county courts in certain substantial respects. What is claimed here, however, is, not that exclusive jurisdiction is given to some tribunal, but that the jurisdiction of Her Majesty's courts is wholly excluded by the ipse dixit (or, indeed, the converse, the failure to speak) of an official of a local authority acting in a purely administrative capacity. The point submitted on behalf of the landlords seems to me of so far-reaching a character that I find it unnecessary to express at any length the grounds for the view that I take, grounds which rest on principles of very long standing, namely, that very clear words will be required to oust altogether the jurisdiction of the Queen's courts in matters of private rights. I would, however, point out that, if the contention of counsel for the landlords were right, it would result in a provision somewhat difficult to administer, since it would not by any means follow that a landlord would know whether a tenant had or had not made any application for a certificate. So far from the result making a mockery of the Act if the view of the statutory tenant were right, I am inclined to think that it is the contrary view which would produce a stultification of any usefulness in these provisions; for if the acts of the local authority were challengeable only by the landlord, it is not unlikely that the local authority would proceed to grant certificates whenever it was possible to do so, leaving it to the landlord to challenge them if he could. I cannot, however, see anything in the formulation of s. 26 which shows that the result is contemplated by the language of the section. What the Act is doing is surely this. It is saying, for the protection of the tenant, that the landlord must declare that this condition* precedent, i.e., " the conditions justifying an increase ", has been satisfied. I think that, if there is no challenge, it is the scheme of the Act that the landlord can then rely on the declaration in the notice and does not have to prove affirmatively what he has declared. The tenant, however, is given an opportunity of obtaining, at the price of 1s.†, a certificate, if such a certificate is justifiable, which in his hands will be prima facie evidence that a case for an increase has not been made out. It is made clear that it is not conclusive. The landlord may challenge it; but it is a quick and an inexpensive means of immediate protection for the tenant, if the circumstances warrant the grant of a certificate. That, I think, is all that the section is intended to do. In the present case the statutory tenant applied for a certificate and obtained one, but later, the landlords having done certain works which the certificate indicated should be done, the certificate was revoked; and it is on that ground that the landlords now say that the statutory tenant has exhausted all her remedies by way of challenging the first condition, which is set out in s. 23 (1) (a). I am wholly unable to find any warrant in s. 26 for such an ouster of the jurisdiction of the courts.

If any further emphasis be needed to support that conclusion, I will cite two matters. The evidence correspondingly required to support the second of the conditions (found in s. 23 (1) (b)) is a declaration in a form mentioned in Sch. 2 to the Act, the reference to Sch. 2 being also found in s. 23 (1) (b) itself. By para. 4 (1) of Sch. 2 it is provided, in plain terms, that a tenant may, within twenty-eight days, apply to the county court—not, be it observed, to an administrative authority, but to a tribunal—to determine whether in fact work of the required value, which the landlord has declared to be done, has been done. By para. 5 of Sch. 2 it is provided, also in clear terms, that, if the tenant does not avail himself of that right to go to the court, his chance of challenging the declaration as to the value of the work done is gone, if the landlord brings proceedings to recover the increase of rent. Paragraph 5 reads:

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* This is the twofold condition set out in s. 23 (1) (a) of the Housing Repairs and Rents Act, 1954.

† See s. 26 (6) of the Housing Repairs and Rents Act, 1954.

> ". . . subject as aforesaid the validity of a declaration shall not be questioned on the ground that the value of the work of repair stated in the declaration to have been carried out on the dwelling-house is less than that required by the foregoing provisions of this Schedule."

My second example I take, not from this Act, but from another Act in pari materia, namely, the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1) of which empowers the court to make an order for possession if the court thinks it reasonable to do so, and is satisfied that suitable alternative accommodation is available for the tenant. By s. 3 (2) it is further provided that a certificate of the housing authority (which is the local authority) certifying that the authority will provide suitable alternative accommodation at a specified date shall be conclusive evidence that suitable alternative accommodation will be available. To my mind, it is quite plain that, if Parliament had intended so to provide in the Housing Repairs and Rents Act, 1954, having the precedent of the Act of 1933 before it, it would have said in plain terms that a certificate of the local authority, certifying that the conditions set out in s. 23 (1) (a) had or had not been complied with, would be conclusive evidence of that matter of fact. Therefore, to my mind, it is clear that this preliminary objection was not well founded, that it was open to the statutory tenant to challenge the truth of the declaration that the conditions justifying an increase of rent had been complied with, and that, as she did challenge the declaration, giving particulars of the challenge, it was the duty of the county court judge to determine it.

In this connection, we have been asked questions about the situation of the onus of proof. I have already said that, as I understand the scheme of the Act, if notice of increase has been served containing the relevant declaration, and if the declaration is not challenged, the declaration suffices, and the landlord cannot then be called on to prove the truth of his own declaration. Where the declaration is challenged, however, the matter is otherwise. In the present case, the local authority, having given a certificate, later revoked it. It is plain to me that, assuming that any onus rested on the landlords by reason of the challenge, they would shift the onus (as they have done) by proving the local authority's revocation of the certificate. In this case, therefore, the present position is that the statutory tenant must now make good, if she can, her allegations which are contained in her particulars of defence. I would, for my part, prefer to go no further, and not to lay down some general principle or proposition as to onus of proof in these cases, because in any given case the circumstances might be such as to be inconsistent with the general rule which I had attempted to formulate. In actual practice, if the veracity of the declaration is challenged, I think the question where the onus of proof lies will not present any difficulty.

The second point of substance arises under the second of the two conditions precedent, which is found in s. 23 (1) (b). There the reference to Sch. 2 and the prescribed forms, which are mentioned also in s. 25, introduce a number of complications and also the necessity on a landlord's part for making a number of arithmetical calculations. Briefly, the point arose in this way. The form of notice which was served, and which otherwise complied in all respects with the requirements of Sch. 2 and the forms provided by the Minister, proceeded on the premise that the landlords were exclusively responsible for repairs. By the proviso to s. 23 (2), where the obligation or responsibility is divided, the amount which the landlord can claim has to be proportionately reduced. Having regard to the premise on which the notice was given, there was no proportionate or other reduction, and the full amount was claimed. In addition to her specific challenge of the declaration of compliance with s. 23 (1) (a), the statutory tenant, in her defence, generally put the landlords to proof of their claim.

The claim, so far as is relevant to this part of the case, was as follows:

> "The said premises were let by the plaintiffs to Solomon Jacobs [the deceased husband of the present tenant] from Feb. 16, 1931, by an agreement in writing dated May 8, 1931, for a weekly tenancy at a rent of £2 7s. per week. From the death of Solomon Jacobs . . . the defendant as his widow remained in occupation . . ."

Then the difference between the original figure of £2 7s. and £2 14s. 6d., which I mentioned as being the rent today (apart from the alleged increase), is accounted for by increases in rates. On the face of that pleading it is not, I should have thought, open to the smallest doubt that the landlords were saying: "The terms of the tenancy, originally contractual, now statutory, are those found in the original written contract dated May 8, 1931". The statutory tenant, apparently, had not got a copy of that document (or, if she had, she had not looked at it) until shortly before the trial, when it was obtained, and the eye of her legal advisers then fell on the somewhat striking terms for present purposes of cl. 1 (c) of the agreement. Clause 1 reads:

> "And the tenant hereby agrees . . . (c) to keep the said premises in good and tenantable repair (fair wear and tear excepted) and be responsible for and replace all broken glass and missing keys."

Armed with that piece of intelligence, counsel for the statutory tenant naturally took the point that the premise on which the notice had proceeded (namely, that the landlords were solely responsible for repairs) was ill-founded. An argument then developed on that. It was first submitted on behalf of the landlords that that defence was not open to the statutory tenant on the pleadings, and the county court judge seemed to intimate that he thought that was right. With all respect to him again, I cannot see it. I think that the statutory tenant was entitled to say that in this respect the landlords' pleading was, on the face of it, demurrable. I do not think, however, that that now matters, because the question of fact was then gone into. If the landlords wanted time to deal with this point, they could have asked for it, but they called evidence intended to show that, notwithstanding the terms of the contract which I have read and notwithstanding their pleading, the true position was that at some unspecified time and on some unspecified occasion there had been a transfer of the liability for repairs from the shoulders of the statutory tenant or her late husband, so as to rest exclusively on the shoulders of the landlords; and to that end the evidence given was to the effect that over this long period of time the landlords had done substantially the whole of the repairs. I say "substantially" because I do not forget the reminder by counsel for the statutory tenant that there were some things done (decorative, it may be, mainly) for which the statutory tenant or her late husband had provided the material. We have been given a schedule which shows that substantial repairs, decorative and otherwise, were done by the landlords from time to time over the period, as, indeed, one would expect with landlords such as the London Hospital; but it is far from clear to me whether those repairs, or any of them, were or were not within the exception of fair wear and tear. However, the evidence merely was that in actual fact over the whole period of the tenancy, the landlords had done all these repairs and had never called on the tenant to do them, or to pay for them, or to contribute to them, except to the very limited extent which I have mentioned.

That evidence having been given by the landlords' financial secretary and the surveyor, counsel for the statutory tenant submitted that on this point he had no case to answer, because, having regard to the contract which the landlords had pleaded and relied on, proof that in fact repairs had been done by the landlords did not prove any more than that the landlords might have done work which they were not bound to do. The evidence certainly did not prove that there had been any change in the original contract or any transfer of the burden. With all respect to the learned judge, I am quite unable to accept his view that this evidence compelled or entitled him to draw the inference that at some time, unspecified, there had been a change in the terms of the bargain. It is not uncommon that landlords (particularly good landlords) may do, both in their own interests and in the interests of their tenants, things which they are not bound to do; and in *Asher* v. *Seaford Court Estates, Ltd.* (1) ([1950] 1 All E.R. 1018), the House of Lords pointed out that the fact that a landlord had undertaken a burden which he was not under an obligation to bear did not produce the result that, if later the landlord contractually undertook to do those same things, there was not a transfer of the burden. As Lord Normand observed (ibid., at p. 1024):

> " The cost of supplying hot water [which was the matter then in question] was under the old lease a burden which lay on the tenant and was borne by him because he could call on no one else to bear it. The fact that the landlord bore it for him did not make it any the less the tenant's burden. On any day the landlord by his own volition could have ceased from heating the water unless the tenant agreed to pay the cost."

Those words seem to me to apply to the present case. The fact that the landlords elected to do the works which they did, assuming that the works were not covered in any case by the fair wear and tear exception, does not prove that there had been a transfer of burden from the statutory tenant to the landlords. It seems to me that the inference which the county court judge drew, therefore, cannot be sustained.

The result is that the statutory tenant, on this point (rightly, as I think), took her stand that the landlords had established no case for her to answer. That being so, what is the result? The result is that the form, the notice of increase, on the face of it fails to satisfy the provisions of the Act, because it proceeds on the assumption, expressly stated in it, that the landlords are exclusively responsible for the whole of the repairs. Counsel for the statutory tenant suggested that that was the end of the matter, that the notice was thereby rendered totally invalid and ineffectual, and that the duty of the court was to dismiss the landlords' action and cast them from the judgment seat. I am unable to accept that extreme conclusion. Under earlier legislation, a defect of this kind in the notice might well have produced such a result. Counsel referred us, very properly, to *Bourne* v. *Litton* (2) ([1924] 2 K.B. 10), a decision of this court, where, in a somewhat similar way, the notice of increase under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, mis-stated the proper proportion of the figure used to justify the rent increase. There is, however, this very marked distinction between the Act of 1920 and the Housing Repairs and Rents Act, 1954, namely, that, by s. 25 (4) of the latter, express provision is made empowering the county court, where there is any error in a notice of increase due to some bona fide mistake, to correct the error in the notice and to let the notice take effect as amended from such date as the county court judge thinks proper. The opening words of the judgment of Scrutton, L.J., in *Bourne* v. *Litton* (2) ([1924] 2 K.B. at p. 18) show quite plainly that, had there been such a saving power in the Act of 1920, then, in his view, the result in *Bourne* v. *Litton* (2) would almost certainly have been different. I have given the effect of s. 25 (4), but I should read part of the sub-section, to show how extensive the power is:

> " The county court, if satisfied that any error or omission in a notice of increase or a declaration accompanying such a notice is due to a bona fide mistake on the part of the landlord, shall have power to amend the notice or declaration by correcting any errors or supplying any omissions therein which, if not corrected or supplied, *would render the notice or declaration invalid* . . . "

The sub-section goes on to provide the terms or conditions on which the power may be exercised.

In the event, as it seems to me, the position now reached is that the landlords are entitled to ask the county court judge to make whatever amendment is required to rectify whatever bona fide error there is in their notice or in the declaration. It is plainly necessary that this matter should now go back to the county court judge. The view which I have taken on the preliminary objection, that is to say, the first of the points raised, does not mean that the statutory tenant has proved that the conditions in s. 23 (1) (a) are not satisfied. She will now have to prove that they are not, or try to do so, and she may or may not succeed. That is a matter on which the county court judge must now embark. If the statutory tenant should fail on that matter, the landlords are then entitled to deal with the question of the proportion by inviting the county court first to decide what the proper proportion is. I referred earlier in my judgment to the fact that provision is made in the Housing Repairs and Rents Act, 1954, for arriving at the true proportion, and by s. 23 (5) the question of the amount may be a matter of agreement and, failing that, determination by the county court. It was suggested that the section contemplated some preliminary procedure for that purpose, but I cannot see why the whole thing cannot be properly and sensibly done in one proceeding. Of course, if the two parties agree, that is the end of it. How much the proportion ought to be will depend on considering, as a matter of value and on expert evidence, what the liability (so to speak) of the statutory tenant, under the repairing clause in the tenancy agreement* is really worth, what proportion of the total liability for repairing, expressed in figures, ought to be treated as borne by the landlords and what proportion by the tenant. The landlords may desire, in the circumstances, to take other steps—that is a matter for them to determine—and they will, no doubt, then make such application to the county court judge as they think appropriate; but I think, as the case has to go back, that it would serve no useful purpose for this court to express any views on any of these detailed matters of quantum and so forth.

In my judgment the proper answer to this appeal is that it should be allowed, that the judgment in favour of the landlords for £13 11s. 1d. should be set aside, and that the matter should be referred back to the county court for further hearing on the outstanding questions; and the county court judge will then grant such applications as he thinks proper for amendment or otherwise, as occasion may require.

JENKINS, L.J.: I agree. Two matters were debated before us. The first was a submission by counsel for the hospital, the landlords, which commended itself to the learned county court judge, to the effect that it was not open to the defendant (the statutory tenant) to assert and seek to prove that the conditions mentioned in s. 23 (1) (a) of the Housing Repairs and Rents Act, 1954, had not been fulfilled. Those are the conditions described in the Act as " the conditions justifying an increase of rent ", the first of them being that the dwelling-house is in good repair, and the second being that it is reasonably suitable for occupation having regard to the matters specified in paras. (b) to (h) of s. 9 (1) of the Act. Prima facie, where an Act provides that if certain conditions are fulfilled an increase is to be made in the rent payable by a tenant, then in any proceedings brought against the tenant to recover the increased rent it is open to the tenant to prove, if he can, that the conditions on which the increase depends have not been fulfilled; and I think that, generally speaking, clear words would be needed in the enactment to deprive a tenant of that elementary right. Counsel for the landlords argues that this particular Act does exclude what one may call the ordinary right of a tenant to defend himself in proceedings brought against him for recovery of the increased rent. He contends that provisions having that effect are to be found in s. 26 of the Act. I find myself wholly unable to accept that argument. Section 26, as I read it, merely purports to give the tenant a cheap and simple method of repelling the landlord's claim. The tenant can, if so minded, obtain under s. 26 a certificate from the local authority, if the local authority are prepared to give it, to the effect that the conditions have not been fulfilled; and, so long as such a certificate has been issued and remains unrevoked, the landlord is precluded by s. 26 (2) from recovering the increase of rent. It by no means follows that, if a tenant does not obtain a certificate, or if a tenant obtains a certificate which is subsequently revoked, he is to be disabled from contending that the conditions justifying an increase of rent have not been fulfilled. Clear words must be found in s. 26 to justify us in giving it that effect. So far from there being any clear provision in s. 26 to support the contention of counsel for the landlords, it seems to me that it is really impossible to extract it from the language of s. 26 without doing serious violence to that language.

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* See p. 609, letter C, ante, where the relevant terms of the clause are set out.

If the contention of counsel for the landlords were accepted, somewhat remarkable results would ensue. In the first place, the local authority, an administrative body, would be given exclusive jurisdiction for the purpose of deciding that the conditions have not been fulfilled. The jurisdiction of the court so to decide would be ousted; and it is well settled that clear words are necessary to justify the imputation to the legislature of an intention to oust the jurisdiction of the court. The matter would not rest there, however. The local authority would not be made the tribunal to decide the issue of fulfilment or non-fulfilment of the conditions conclusively as regards both parties, for the position would be different for a tenant and for a landlord respectively. The refusal by the local authority to give a certificate would, apparently, be, as against a tenant, conclusive evidence that the conditions had been fulfilled, but, on the other hand, the granting and existence of a certificate would not be conclusive against a landlord that the conditions had not been fulfilled; for it is open to a landlord, under s. 26 (2), to apply to the court for an annulment of the certificate on cause shown, whereas, according to the contention of counsel for the landlords, if a certificate is refused to a tenant, he is left completely defenceless so far as this issue is concerned.

I will not elaborate the matter further, for I entirely agree with my Lord that the construction placed on s. 26, and the effect attributed to it, by the learned county court judge are clearly wrong. I will not repeat at length my Lord's references to other provisions which bear out this conclusion, but I was much impressed by the special treatment accorded to the declaration dealt with in Sch. 2 to the Act by para. 4 and para. 5 of the Schedule. The effect of those paragraphs is to curtail the tenant's right of disputing the question whether the relevant work of repair has been done, and clear and unambiguous language is used for the purpose of effecting such curtailment. There is also my Lord's reference to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (2), which is a good example of a case in which the legislature, being minded to make the decision of an extra-judicial body conclusive, has provided to that effect in express terms.

The second matter on which we have heard argument was the submission by counsel for the statutory tenant that she had no case to answer because the notice of increase and the second declaration accompanying it were framed on the footing that the landlords were solely responsible for repairs, whereas, in fact, the statutory tenant was under an obligation, whatever it might amount to, to keep the premises in good and tenantable repair, fair wear and tear excepted. The learned judge rejected that submission, partly on the ground that the point had not been taken in the statutory tenant's pleading, and also on the ground that there was evidence from which a new agreement of tenancy, whereunder the whole of the liability for repair was thrown on the landlords, could be inferred. With respect to the learned county court judge, I find myself obliged to differ on both points. As to the point of pleading, it is true that the objection was taken, but the hearing went on and evidence was led as to what had in fact been done in regard to the repairs. That being so, it seems to me difficult to justify insistence on the point of pleading. Moreover, counsel for the statutory tenant could, I think, have put this part of his case by saying that the particulars of claim were, on their face, demurrable. The particular agreement of May 8, 1931, was pleaded as a tenancy agreement in writing. That has the effect of (as it were) incorporating the tenancy agreement in the pleading. Indeed, under the High Court practice, I think I am right in saying that a document thus specifically mentioned in a pleading can be made the subject of a special order for discovery before defence. This particular tenancy agreement was pleaded and, when looked at, it is found not to cast the whole liability for repairs on the landlords. A tenancy agreement which threw part of the liability on the tenant could not suffice to support a notice of increase and declaration under the Act framed on the footing that the landlord was liable for the whole of the repairs.

In these circumstances, there being, in my view, no ground for holding that the terms of the tenancy agreement were ever altered, I think the proper way of dealing with this case is, as my Lord proposes, to send it back to the county court. The statutory tenant will then have an opportunity of calling whatever evidence may be available on the question whether the conditions justifying an increase of rent have been fulfilled or not and, on the other hand, the landlords will be able to invite the learned county court judge to determine what proportion of the full amount which the landlords could properly claim for the repairs, if they were solely responsible for them, is appropriate, having regard to such liability for repairs as is thrown on the statutory tenant under the terms of the tenancy agreement of May 8, 1931.

I agree with my Lord that this appeal should be allowed, with the consequences which he proposes.

HODSON, L.J.: I also agree. *Appeal allowed.*

Solicitors: *Pearce & Sons* (for the statutory tenant); *Hanbury, Whitting & Ingle* (for the landlords).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

LONDON INVESTMENT & MORTGAGE CO., LTD. *v.* WORTHINGTON (INSPECTOR OF TAXES).
LONDON INVESTMENT & MORTGAGE CO., LTD. *v.* INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Upjohn, J.), May 8, 9, 10, 1956.]

Income Tax—Profits—War damage value payments—Property dealing company —Damage to properties comprising stock-in-trade—Whether value payments part of trading receipts—War Damage Act, 1943 (6 *&* 7 *Geo.* 6 *c.* 21), *s.* 66 (1) *—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5 *c.* 40), *Sch.* D, *Case I—War Damage* (*Public Utility Undertakings, etc.*) *Act,* 1949 (12, 13 *&* 14 *Geo.* 6 *c.* 36), *s.* 28.

Profits Tax—Computation of profits—War damage value payments—Whether to be included in computing profits of property dealing company.

The taxpayers, a property dealing company, had some of their properties damaged by enemy action during the war. They had paid the compulsory war damage contributions and had received value payments under the War Damage Act, 1943, in respect of the damaged properties. The taxpayers had disposed of some of these properties but others were retained by them as part of their stock-in-trade and either were being re-built or would be re-built. On the question whether the value payments should be included in the receipts of their trade for the purposes of their assessment to income tax under Case I of Sch. D and to profits tax, having regard to the provisions of s. 28* of the War Damage (Public Utility Undertakings, etc.) Act, 1949, and to those of s. 66 (1) of the War Damage Act, 1943, whereby contributions made and indemnities given under Part 1 of the latter Act were to be treated for all purposes as outgoings of a capital nature, A

Held: the value payments were not part of the taxpayers' trading receipts for taxation purposes since they were received, as also the taxpayers' war damage contributions had been made by the taxpayers, in their capacity as B owners of the land, not as a part of their trading operations (see p. 624, letter F, post).

J. Gliksten & Son, Ltd. v. *Green* ([1929] A.C. 381) considered and distinguished.

Semble: no different principle would apply to cost-of-works payments (see p. 616, letter E, post). C

Appeals allowed. Cross-appeals dismissed.

[As to compensation received being a trade receipt for tax purposes, see 17 Halsbury's Laws (2nd Edn.) 126-128, paras. 237, 238; and for cases on the subject, see Digest Supp.

For Case I of Sch. D, s. 123 of the Income Tax Act, 1952, replacing Case I of Sch. D to the Income Tax Act, 1918, see 31 Halsbury's Statutes (2nd Edn.) D 116.

For the War Damage Act, 1943, s. 66 (1), and the War Damage (Public Utility Undertakings, etc.) Act, 1949, s. 28, see 26 Halsbury's Statutes (2nd Edn.) 543, 662.]

Cases referred to: E

(1) *Gliksten (J.) & Son, Ltd.* v. *Green*, [1929] A.C. 381; 98 L.J.K.B. 363; 140 L.T. 625; 14 Tax Cas. 364; Digest Supp.

(2) *Newcastle Breweries, Ltd.* v. *Inland Revenue Comrs.*, (1927), 96 L.J.K.B. 735; 137 L.T. 426; 12 Tax Cas. 927; Digest Supp.

(3) *Seaham Harbour Dock Co.* v. *Crook*, (1931), 16 Tax Cas. 333; sub nom. *Crook* v. *Seaham Harbour Dock Co.*, 96 J.P. 13; Digest Supp. F

(4) *Smith's Potato Estates, Ltd.* v. *Bolland, Smith's Potato Crisps (1929), Ltd.* v. *Inland Revenue Comrs.*, [1948] 2 All E.R. 367; [1948] A.C. 508; [1948] L.J.R. 1557; 30 Tax Cas. 267; 2nd Digest Supp.

(5) *Rushden Heel Co., Ltd.* v. *Keene, Rushden Heel Co., Ltd.* v. *Inland Revenue Comrs.*, [1947] 1 All E.R. 699; *affd.* H.L., [1948] 2 All E.R. 378; [1948] L.J.R. 1570; 30 Tax Cas. 298; 2nd Digest Supp. G

(6) *Strong & Co., Ltd.* v. *Woodifield*, [1906] A.C. 448; 75 L.J.K.B. 864; 95 L.T. 241; 5 Tax Cas. 215; 28 Digest 57, *290*.

(7) *Lincolnshire Sugar Co., Ltd.* v. *Smart*, [1937] 1 All E.R. 413; [1937] A.C. 697; 106 L.J.K.B. 185; 156 L.T. 215; sub nom. *Smart* v. *Lincolnshire Sugar Beet Co., Ltd.*, 20 Tax Cas. 643; Digest Supp.

(8) *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433; 84 L.J.K.B. H 417; 112 L.T. 651; 6 Tax Cas. 399; 28 Digest 56, *287*.

(9) *Hudson (John) & Co., Ltd.* v. *Kirkness*, [1954] 1 All E.R. 29; 3rd Digest Supp.

(10) *Canadian Eagle Oil Co., Ltd.* v. *R.*, [1945] 2 All E.R. 499; [1946] A.C. 119; 114 L.J.K.B. 451; 173 L.T. 234; 27 Tax Cas. 206; 2nd Digest Supp. I

(11) *Cape Brandy Syndicate* v. *Inland Revenue Comrs.*, [1921] 2 K.B. 403; 90 L.J.K.B. 461; 125 L.T. 108; 12 Tax Cas. 358; *affg.* S.C., [1921] 1 K.B. 64; 42 Digest 666, *765*.

Cases Stated.

The taxpayers appealed to the Special Commissioners of Income Tax against assessments to income tax under Sch. D to the Income Tax Act, 1918, made on them in the sum of £30,000 for each of the years 1948-49 and 1949-50, and against assessments to profits tax for accounting periods ending on Mar. 31, 1948, and Mar. 31, 1949, each in the sum of £7,500. The question for determination was whether value payments arising under the War Damage Acts, 1941 and 1943, made to the taxpayers, who carried on the trade of property dealing, were receipts of the taxpayers' trade to be brought into account in computing the balance of profits and gains of the taxpayers for taxation purposes, and, if so, to which of the taxpayers' trading years should the payments be assigned.

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* The relevant terms of s. 28 are printed at p. 617, letters C to H, post.

The taxpayer company was a property dealing company. During the war certain of the taxpayers' properties sustained war damage. Under the War Damage Acts, 1941 and 1943, the taxpayers had received value payments from the War Damage Commission in respect of a number of these properties. After receiving these payments the ratepayers had disposed of some of the damaged properties, freehold and leasehold, but the remainder continued as part of their stock and were either being re-built or to be re-built. In their accounts they placed any value payment received in a suspense account called the value payments account, against which they charged any money spent in making good war damage to the properties.

The taxpayers contended that, by implication from the provisions of s. 66 and s. 113 of the War Damage Act, 1943 (subsequently retrospectively replaced by s. 28 of the War Damage (Public Utility Undertakings, etc.) Act, 1949), as applied to their company, the value payments were receipts of a capital nature which ought not to be brought into their accounts as trading receipts. The Crown contended that the payments were ordinary trade receipts and that the prohibition of the deduction of war damage contributions in computing profits for income tax purposes in s. 66 (1) of the War Damage Act, 1943, made no difference to the nature of the value payments, which represented stock-in-trade of the taxpayers converted into cash. The commissioners held that the payments were prima facie to be brought into account as receipts of the taxpayers' trade, since the properties were part of their stock-in-trade, compensation for the loss of which was a trading receipt notwithstanding s. 66 (1) of the Act of 1943. But they further found that, where the taxpayers expended money on repairing or re-building properties damaged or destroyed, s. 113 of the War Damage Act, 1943, provided in effect that the expenditure was not to be deducted to the extent to which it was recouped by payments received under the Act, with the result that in effect the taxpayers would have to include them twice (if including them in their receipts and deducting the same sum from expenditure) which they held s. 113 clearly implied should not follow. They therefore held that the taxpayers should in general include payments received under the Acts but not where the property had been or was to be repaired or re-built, when the payments should not be included but should be deducted from the expenditure on re-building. The taxpayers appealed and the Crown cross-appealed.

J. Senter, Q.C., and *D. C. Miller* for the taxpayers.
Geoffrey Cross, Q.C., and *Sir Reginald Hills* for the Crown.

UPJOHN, J.: I have four appeals before me, two by the taxpayers, London Investment & Mortgage Co., Ltd., from decisions of the Special Commissioners of Income Tax, in relation to assessments on them for 1948-49 and 1949-50 for income tax and profits tax respectively. Those are appeals against the whole of the Special Commissioners' decision. The other two appeals are cross-appeals by the inspector of taxes in respect of the same assessments to income tax and profits tax, but against part only of the decision of the Special Commissioners. It is common ground that the same principles have to be applied for the purposes of computing liability to profits tax as to income tax, and the same point arises in all these appeals, and I need not further distinguish between them.

A The taxpayers carry on the trade of property dealing, and during the war some of their properties were damaged and destroyed by enemy action, and they received value payments under the War Damage Act, 1943. The question is whether those payments ought to be brought into account in computing the balance of profits against the taxpayers under Case I of Sch. D to the Income Tax Act, 1918. The relevant provision is:

B

> "Tax under this Schedule shall be charged in respect of—(a) The annual profits or gains arising or accruing . . . (ii) to any person residing in the United Kingdom from any trade . . . "

The whole question is whether these payments are such profits or gains.

C The War Damage Act, 1943, was passed in 1943, but under s. 127 (3) it had retrospective effect as though it had come into operation at the time of the War Damage Act, 1941. Section 1 lays down the cardinal purpose and object of the Act:

> "(1) There shall be made, subject to and in accordance with the provisions of Part 1 of this Act,—(a) payments by the War Damage Commission out of moneys provided by Parliament in respect of war damage to land occurring during the risk period . . . and (b) contributions by persons interested in land towards the expense of making such payments." D

E In s. 6 and s. 7 and the succeeding sections provision was made for "cost of works" payments, i.e., payments based on an estimated cost of works on reinstating the property where it was damaged, and "value payments" where the property was wholly destroyed, the value payments being the difference between the value of the hereditament immediately before war damage and its value immediately after it. I am here concerned only with value payments, although, so far as I know, no different principles would apply to cost of works payments.

F Under s. 10 (5) interest is payable on these value payments from the time of the war damage until payment. Under s. 11, there is power to increase the amount of the value payments, and in this case there was under a statutory instrument an increase of forty-five per cent. described in horrible civil service jargon as "forty-five per cent. escalation". Under s. 23, the right to payments under the Act can be assigned with the consent of the commission.

Section 36 is important:

> G "(1) The contributions to be made towards the expense of making payments under this Part of this Act in respect of war damage shall, subject to the provisions of this Part of this Act, be made in respect of the properties, being units for the purposes of Sch. A or for rating valuations, which are specified in s. 39 of this Act; and a property in respect of which such a contribution is to be made is in this Act referred to as a 'contributory property.' H
>
> "(2) The said contributions shall be made by the payment of five instalments, falling due on July 1, 1941, and each of the four following years.
>
> "(3) The amount of an instalment shall, subject to the provisions of this Part of this Act, be computed as mentioned in ss. 40-43 of this Act by reference to the assessment of the contributory property for the purposes of Sch. A or the annual value of the property shown in a valuation list in force for rating purposes; and the value by reference to which an instalment is computed is in this Act referred to as the 'contributory value' of the property." I

The amount of each instalment was 2s. in the pound. Section 66 (1) provides:

> "Contributions made and indemnities given under this Part of this Act shall be treated for all purposes as outgoings of a capital nature."

Part 2 of the Act deals with the insurance of goods against war damage. This much is common ground, that in fact the goods insured under that Part of the Act were what I may call briefly, and I hope reasonably accurately, capital goods—plant, machinery, tools, and so forth. (Goods in the nature of stock-in-trade, and so forth, were insured under another Act known as the War Risks Insurance Act, 1939.) Save in respect of goods below a certain value, the insurance of goods was compulsory, and it was provided for by premiums, as they were described, in relation to goods. Section 96 of the War Damage Act, 1943, provided that such premiums were to be treated for all purposes as being " of a capital nature ".

Section 113 has been amended, and retrospectively re-enacted in s. 28 of the War Damage (Public Utility Undertakings, etc.) Act, 1949*. Sub-section (1) provides:

> " In computing the amount of the profits or gains, or of the income from any source, of any person for any purpose of the Income Tax Acts, or the amount of the profits of any person for the purposes of the profits tax or for the purposes of excess profits tax, no sum shall be deducted in respect of any payment or expenditure to which this section applies."

Sub-section (3) defines payments to which the section applies and includes payments

> " in or towards discharge of a liability imposed by or under any provision of Part 1 of the principal Act."

The principal Act is defined as the War Damage Act, 1943. In a sense that was redundant, because it had already been made quite plain by s. 66 that all contributions made under the Act were capital. Sub-section (3) (b) repeats again in effect s. 96 in relation to the premiums payable under Part 2 of the War Damage Act, 1943.

Sub-section (4) provides:

> " Expenditure to which this section applies is—(a) any expenditure on repairing or otherwise making good war damage to land in so far as any person has received or is entitled to a payment in respect of the damage by virtue of any of the provisions of the principal Act (whether alone or as applied or modified by or under any provision of this Act), and any expenditure on making good detriment to an interest in goods caused by war damage in so far as any person has received or is entitled to a payment in respect of the detriment by virtue of any of those provisions or of a policy issued under either of the schemes operated under Part 2 of the principal Act or by virtue of s. 10 of this Act; and (b) any expenditure on repairing or otherwise making good war damage being damage of a class mentioned in any of paras. (a) to (d) of s. 1 (1) of this Act, or on measures for meeting the circumstances created by any such obstruction as is mentioned in s. 18 of this Act."

The finding of the commissioners was in these terms:

> " (1) We hold that where the appellant company has received payments under the War Damage Act, 1943, in respect of properties which have been damaged or destroyed such payments are prima facie to be brought in as receipts of its trade. The properties form part of its stock-in-trade, and on

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* Section 28 (5) provides: " the preceding provisions of this section shall have effect, and shall be deemed always to have had effect, in substitution for the provisions of s. 113 of the [War Damage Act, 1943] . . . ".

> well-known principles any sum received as compensation for their loss is a trading receipt: see *J. Gliksten & Son, Ltd.* v. *Green* (1) ((1929), 14 Tax Cas. 364), and *Newcastle Breweries, Ltd.* v. *Inland Revenue Comrs.* (2) ((1927), 12 Tax Cas. 927). We do not consider that s. 66 (1) of the War Damage Act (which provides that contributions made under that Act are to be treated for all purposes as outgoings of a capital nature) contains any sufficient implication to the contrary."

That principal finding is challenged by the taxpayers. The commissioners proceed:

> " (2) Where, however, the company expends money on repairing or re-building properties which have been damaged or destroyed, s. 113 of the War Damage Act provides in effect that such expenditure is not to be deducted in computing the profits of the company's trade to the extent that it is recouped by payments received under the Act. If in addition to deducting the payments received from its expenditure the company had to include such receipts on the credit side of its accounts they would be included twice, and we hold that s. 113 clearly implies that such a result is not to follow."

The reference to s. 113 is plainly per incuriam. It should be s. 28 of the War Damage (Public Utility Undertakings, etc.) Act, 1949, which I have just read. The second sentence of that paragraph, if read literally, is meaningless, and it is most unfortunate that the Special Commissioners have not expressed themselves more intelligibly. However, it has been agreed before me that the second sentence should read in this way: " If in addition to not being allowed to deduct the expenditure on repairs up to the amount of the value payment the company had to include the whole of the value payment, such receipts on the credit side in its accounts would be included twice, and we hold that s. 113 clearly implies that such a result is not to follow ". The commissioners continue:

> " (3) In the result we hold that the company should in general include payments received under the War Damage Act, but that where a property has been, is being, or is intended to be repaired or re-built, sums received in respect of it should not be included as receipts, but should be deducted from the amount expended on re-building."

It was that part of the finding of the commissioners which the Crown challenged. Before the commissioners the Crown maintained that nothing expended on re-building could be recovered for the purposes of tax. However, before me they have submitted a more benevolent construction of s. 28 with which I must deal later.

Counsel for the taxpayers puts his submissions in this way. He says the purpose of the legislation was to create a national fund to be used to make good war damage to land. It was compulsory on the owners of all land in England and Wales. A contribution had to be made, and under the provisions of the Act it is clear that that contribution was one contribution of a capital nature payable by five instalments. If war damage unhappily ensued, he submits that, on s. 28 of the Act of 1949, the sum received must be a capital receipt, for he is not entitled to bring into account for the purposes of tax any part expended by him on restoring the property. He says that is the plain construction of s. 28. He also says that this contribution is made as a payment received by the taxpayers, not as part of their trading operations at all, but solely in their capacity as a company, the proprietors of an interest in land, and it has nothing to do with their trading activities. Counsel points out the hardship which will arise on what he submits is the plain construction of s. 28, for, if, having received a value payment, the taxpayers expend it in restoring their stock-in-trade, i.e., their destroyed building, it is plain that they cannot deduct that when the property is realised and their profits and gains come to be computed. He says that will be most unjust if the Crown's contention is right, for this reason. If the taxpayers have to pay tax on what they get, they will have that much less to expend on the property.

When they come to sell they cannot, at any rate up to the limit of what they have received, deduct that before they realise their profit. That would manifestly have an unjust effect.

On the other hand, going forward to the argument of counsel for the Crown for a moment, he points out that an equally anomalous effect would arise if the site was sold without restoration and if the taxpayers' contention was right, for the taxpayers would then get a tax-free payment from the War Damage Commission. But they might make a loss on the sale of their site and that loss would be available to be set off on the profits made on other transactions and that would be, so to speak, unfair on the Revenue because they would be missing some tax. That shows that to regard hardships and anomalies when considering tax matters is no sure ground on which to ascertain the principle. Tax sometimes bears hardly on a section of people, and sometimes it allows another section to escape altogether. No guidance, at all events no sure guidance, is to be gained by considering hardships and anomalies.

Counsel for the taxpayers referred in support of his argument to *Seaham Harbour Dock Co.* v. *Crook* (3) ((1931), 16 Tax Cas. 333). The Seaham Harbour Dock Co. received unemployment grants and other financial assistance for the purpose of extending the Seaham Harbour dock, and it was held that those payments were not annual profits or gains liable to income tax. Lord Buckmaster said (ibid., at p. 353):

> " Now I do not myself think that the matter can be put more succinctly than it was put by [counsel] when he said: ' Was this a trade receipt ? ', and my answer is most unhesitatingly: No. It appears to me that it was nothing whatever of the kind. It was a grant which was made by a government department with the idea that by its use men might be kept in employment, and it was paid to and received by the dock company without any special allocation to any particular part of their property, either capital or revenue, and was simply to enable them to carry out the work upon which they were engaged, with the idea that by so doing people might be employed. I find myself quite unable to see that it was a trade receipt, or that it bore any resemblance to a trade receipt."

Lord Atkin said (ibid.):

> " It would appear to me to be a remarkable proposition that Parliament assented to that sum being appropriated for that purpose, but intended, in certain events at any rate, only 15s. in the £ to be appropriated for that purpose, 5s. in the £ of the full amount coming back in the way of income tax. I do not think that that was the effect. It appears to me that when these sums were granted and when they were received, they were received by the appropriate body not as part of their profits or gains or as a sum which went to make up the profits or gains of their trade. It is a receipt which is given for the express purpose which is named, and it has nothing to do with their trade in the sense in which you are considering the profits or gains of the trade."

That was a very different case, but counsel for the taxpayers naturally points out that it is a remarkable proposition that Parliament was to give you money to restore your building, but in doing so was to take away at the relevant time not merely 5s. in the £ but 10s. in the £. He says that would be a most unusual result to have been intended by Parliament.

In support of his argument as to the capacity in which the taxpayers pay, being their capacity of proprietors of an interest in land and not in their capacity as traders, he referred me to *Smith's Potato Estates, Ltd.* v. *Bolland* (4) ([1948] 2 All E.R. 367), *Rushden Heel Co., Ltd.* v. *Keene* (5) ([1948] 2 All E.R. 378), and *Strong & Co., Ltd.* v. *Woodifield* (6) ((1906), 5 Tax Cas. 215); but I think that the facts and the principle decided in that last case are sufficiently set out in a passage to which I am going to refer in Lord Greene's judgment in *Rushden Heel Co., Ltd.* v. *Keene* (5). Those cases were dealing with deductions and not with profits and gains, deductions being dealt with by r. 3 of the Rules applicable to Cases I and II of Sch. D. Nevertheless, I think they are of assistance. In *Rushden Heel Co., Ltd.* v. *Keene* (5), the question was whether the costs of litigating about taxes should be deducted as part of the expenses of the business. Lord Greene, M.R., said ([1947] 1 All E.R. at p. 701):

> " In answering the question raised I do not obtain any assistance from the cases that have been cited to us other than three to which I will now refer. Special reliance is placed by the Crown on the well-known dicta of Lord Davey in *Strong & Co., Ltd.* v. *Woodifield* (6). The deduction there claimed was in respect of the damages and costs awarded against the taxpayers (who were brewers) to a visitor at one of their licensed houses who was injured by the fall of a chimney. The only decision by the commissioners was that the deduction claimed was not allowable. Lord Davey expressed the view (5 Tax Cas. at p. 220) that the words 'for the purpose of the trade' mean 'for the purpose of enabling a person to carry on and earn profits in the trade . . . It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits'. I do not myself find in these dicta a completely satisfactory answer to the present problem. The language that we have to construe is the language of the rule and there is always the risk of finding oneself construing, not the rule, but a paraphrase of the rule expressed in a previous judgment. I should have thought that in *Strong & Co., Ltd.* v. *Woodifield* (6) it might have been said that an innkeeper who did not compensate a guest when the chimney of the inn fell on him and injured him would be likely to suffer in his trade, but the House did not accept this argument. Lord Davey's formula, however, at once confronts us with the question: 'What is the meaning of the phrase "for the purpose of enabling a person to carry on and earn profits in the trade" as applied to the present case?' It is said, and said, I think, with some force (and Atkinson, J., agreed) that the ascertainment of a trader's liabilities is essential for the successful carrying on of his trade, whether they be trading liabilities in the strict sense or tax liabilities imposed on him as a trader in respect of his trade. I find, however, in *Strong & Co., Ltd.* v. *Woodifield* (6) what appears to me to be a clear answer to the present appeal. It is, I think, a matter not of dictum, but of decision in that case that an expense is not deductible if it falls on a trader in some character other than that of a trader. This was the ground of the opinion of Lord Loreburn, L.C., with which Lord Macnaghten and Lord Atkinson agreed."

So, says counsel for the taxpayers, in this case the capacity in which the payment is made and the payment is received has nothing to do with the trading operations.

On the other side, counsel for the Crown says that the cardinal question to be asked is: is this payment when received a profit or gain of a trade? In this he is, I think, right; one must see whether it is. If it is such a profit or gain, it does not matter that the contribution was made because the taxpayers were the owners of the property. It does not matter that the payment is received because the taxpayers are the owners of property which has been destroyed.

Counsel relied on two cases to support his view that this was in fact a profit or gain. In *J. Gliksten & Son, Ltd.* v. *Green* (1), the appellants, who were timber merchants, owned a large quantity of timber (which at that time was very high in price), which had been destroyed. They received £477,000 from the insurance company under their policies of indemnity against fire. The timber stood in their books at a sum of only £160,000. The question was whether they had to bring in out of the receipts from the insurance £160,000—that was admitted by the appellants—or the whole sum of £477,000. Viscount Dunedin said (14 Tax Cas. at p. 384):

> "My Lords, I agree. In these Income Tax Act cases one has to try, as far as possible, to tread a narrow path, because there are quagmires on either side into which one can easily be led, and I think into one of these quagmires we were tempted to be led when the argument turned upon the question of what you were entitled to debit or not. I do not think this case has anything to do with debiting losses. The whole point is that the business of the company is to buy timber and to sell timber, and when they sell timber they turn it into money. This particular timber was turned into money, not because it was sold, but because it was burned and they had an insurance policy over it. The whole question comes to be whether that is a turnover in the ordinary course of their business. I think it was. They had that amount of timber, which they got rid of and for which they got a certain price, and then they could begin again. The more times you have a turnover, that is to say, the more sales you can get, provided that you are carrying on business at remunerative prices, the better for you. The result of this fire was that they got rid of so much timber and got the insurance money at that figure, and that seems to me precisely in the same position as if they got rid of it by giving it to a customer. If that is so, that is exactly the view of Rowlatt, J., and I think he arrived at the right result."

So here, says counsel for the Crown, the stock-in-trade is property. The taxpayers' business is to sell property. If it is realised otherwise than by sale through the misfortune of enemy action and they receive the money, it is just as though the property had been insured against such risks and they had received the insurance money. He says these particular houses were turned into money, not because they were sold, but because they were destroyed by enemy action. He says they had that amount not of timber but of houses which they got rid of and for which they got a certain price, and then they could begin again. There is no doubt that, had it been possible for them to have had a policy of insurance against enemy action, this case of *J. Gliksten & Son, Ltd.* v. *Green* (1) would exactly cover this case, but they did not have a policy of insurance as such a thing was impossible in the circumstances.

In *Newcastle Breweries, Ltd.* v. *Inland Revenue Comrs.* (2), which was strongly relied on by the Crown, certain stocks of incompletely treated rum belonging to the Newcastle Breweries had been requisitioned by the Admiralty, who had finished its treatment and had paid a price as compensation. Viscount Cave, L.C., said (12 Tax Cas. at p. 953):

> "Two points are made on behalf of the appellants. First, it is said that the £5,300 is not a profit from the appellants' business at all, but is a sum payable by way of compensation for the compulsory taking by the Crown of a part of the appellants' capital. I cannot agree with that contention. It is true that the rum taken by the Crown had not been refined or blended and was not, therefore, in the state in which rum was usually sold by the appellants; but it was rum which they had bought for the purposes of their business, and the cost of the rum was no doubt treated as an outgoing of the business. If the raw rum had been voluntarily sold to other traders, the price must clearly have come into the computation of the appellants' profits, and the circumstance that the sale was compulsory and was to the Crown makes no difference in principle. Both the sums received for the rum—the £10,300 and the £5,300—were in fact brought into the appellants' books under the heading 'Sales of Rum'; and although that entry may not be binding upon the appellants, it seems to me to have been correct. The transaction was a sale in the business, and although no doubt it affected the circulating capital of the appellants it was none the less proper to be brought into their profit and loss account."

So here, although this was a compulsory transaction, in the sense that everyone had to make a contribution, the payment when received was part of the trading profits, and ought, accordingly, to be brought into computation. That is how the argument runs.

Counsel for the Crown submits that the result of those authorities and of *Lincolnshire Sugar Co., Ltd.* v. *Smart* (7) ([1937] 1 All E.R. 413) (which was cited to me by counsel for the taxpayers) is to establish this. First, the fact that a payment is received under a statute does not matter. Secondly, the fact that the transaction is a compulsory one also does not affect the matter.

Counsel for the Crown put his argument in this way. Here is a realisation in course of trade. It is perfectly true you cannot deduct the expenses of a contribution, but that is because there is an express provision in the Act of Parliament preventing you from doing so. He said that there was nothing really surprising in it, for the converse was frequently true in this sense, that a man who insured his factory against fire or flood was allowed the expense of the premiums in his annual accounts, but if a disaster befell him and he received a payment, it was not in dispute that that would be a capital receipt.

He also relies on *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (8) ((1914), 6 Tax Cas. 399). Lord Atkinson said (ibid., at p. 422):

> " One must look, therefore, for the ratio decidendi, the doctrine on which the judgment of the House was founded, to the judgments of those members of the House who voted in the negative on the question put to the House, ' that the judgment appealed from be reversed '. Stated broadly, I think that that doctrine amounts to this, that where a trader bona fide creates in himself or acquires a particular estate or interest in premises wholly and exclusively for the purposes of using that interest to secure a better market for the commodities which it is part of his trade to vend, the money devoted by him to discharge a liability imposed by statute on that estate or interest, or upon him as the owner of it, should be taken to have been expended by him wholly and exclusively for the purposes of his trade. I use the word creates advisedly, in order to meet the case of a trader who lets premises he has for instance inherited, to a tenant who covenants to vend his goods in them and buy from him and none other the goods vended. The trader in such a case by the letting creates in himself the estate or interest of a lessor wholly and entirely for the purposes of his trade, namely, to provide a better market for his goods."

Counsel for the Crown summarised his argument on this part of the case in this way. He said that the authorities establish this proposition. Where a trader's stock-in-trade is turned into money, that money is a trade receipt, even though the turning into money was not in the ordinary course of business and was involuntary and against the wishes of the trader.

On s. 28, counsel's argument is this. He invites me to give what he called an equitable or benevolent construction to that section, and he invites me to read in some such words as these, if I may go again to s. 28 (4) (a): " Expenditure to which this section applies is (a) any expenditure on repairing or otherwise making good war damage to land in so far as any person has received or is entitled to a payment in respect of the damage ", and then add in the words " which does not of itself fall to be included among trade receipts ". He says that, if that construction be given to it, it is quite sensible because the root of his submission is this, that there was really a casus omissus and the legislature overlooked the fact that people are engaged in the trade of property dealing as are the taxpayers in this case. He submitted that the legislature forgot to deal with that class. But, if some such words are read into sub-s. (4), it would mean that, if and so far as the trader does expend in restoring the property the money that he has received, he can bring that into account when the property is ultimately realised in computing his profits and gains. He says that is a just effect. He further says that, if it is impossible to give that construction to the section, the Crown, by way of concession, is prepared in fact to give it that construction; this concession, however, cannot affect the true construction of the Act.

In reply, counsel for the taxpayers submitted that he could distinguish *J. Gliksten & Son, Ltd.* v. *Green* (1) and *Newcastle Breweries, Ltd.* v. *Inland Revenue Comrs.* (2). He said that in the *Gliksten* case (1) nearly all the judgments pointed out that it was part of the business to insure the goods, the timber, against fire. That appears very clearly in ROWLATT, J.'s decision in that case. The learned judge, having dealt with counsel's argument, continued (14 Tax Cas. at p. 375):

> " That may be a very attractive way of stating the respondents' contention, but the fact is that the respondents' business is to buy, hold and sell timber, and it is part of their business to insure timber while they have it, in order that if the timber is destroyed they may have the insurance money instead of the timber and, in my judgment, they must treat that money in the same way as they would have treated the timber, namely, as an item in their trading account."

Similar observations are to be found in the judgment of SARGANT, L.J. (ibid., at p. 380):

> " The company, trading as a timber company, in the ordinary course of business insured its timber against loss or damage by fire. That was an ordinary trade outgoing allowed for, of course, in the trading account. Fire is an event which has to be taken into account as an ordinary risk of a company of this kind, and in consequence of the insurance this very large sum was recovered."

LORD BUCKMASTER said (ibid., at p. 384):

> " It is quite true it has been converted into cash through the operation of the fire, which is no part of their trade, but loss due to it is protected through the usual trade insurances, and the timber has thus been realised."

Counsel says that is decisive of the distinction between the *Gliksten* case (1) and this case, for it was no part of the taxpayers' trading business to make the contribution.

Counsel says also that, if the judgments are studied carefully, the *Newcastle Breweries* case (2) establishes that it was treated as a sale, although a compulsory sale. I think LORD REID in *John Hudson & Co., Ltd.* v. *Kirkness* (9) ([1954] 1 All E.R. 29) did not quite take that view of that case. Nevertheless, the *Newcastle Breweries* case (2) did proceed on the footing that there was a sale, and, although it was a compulsory sale, the sums received for the rum had to be taken into account in computing the profits of the company.

These concise and admirable arguments have much force on either side, and I have to consider which is correct. I first have to consider whether I can give to s. 28 the construction sought for by counsel for the Crown. I have to remember the principles to be applied in taxation cases. They are set out in a well-known passage by ROWLATT, J., which was quoted with approval by LORD SIMON in the House of Lords in *Canadian Eagle Oil Co., Ltd.* v. *R.* (10) ([1945] 2 All E.R. 499 at p. 507):

> " The late ROWLATT, J., whose outstanding knowledge of this subject was coupled with a happy conciseness of phrase, said in *Cape Brandy Syndicate* v. *Inland Revenue Comrs.* (11) ([1921] 1 K.B. 64 at p. 71): ' . . . in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used '."

Applying that principle to the construction of s. 28 (4), it seems quite clear that I cannot give to it the benevolent construction for which counsel for the Crown seeks. Nor do I think I can speculate whether there was here a casus omissus, and that the legislature merely forgot to make provision for traders in property. I have to consider the Act as it stands. I have to consider its scheme and its provisions in detail, and then see whether the payment received under it is indeed a trading receipt.

With all respect to the argument of counsel for the Crown, it seems to me that his broad proposition that whenever trading stock is turned into money it is a trading receipt is too wide. In each case, one must take account of the circumstances. The question to be answered is whether the particular receipt has to be brought into account in computing the profits or gains. There is no doubt that the value payment is in a sense a realisation, and the case no doubt bears a marked resemblance to *J. Glikston & Son, Ltd.* v. *Green* (1) and *Newcastle Breweries, Ltd.* v. *Inland Revenue Comrs.* (2).

I have to consider the nature of the receipt having regard to the War Damage Act, 1943. We start, then, with this. There is nothing in the nature of a premium here. A capital payment has to be made in five instalments, and it is to be made by the owner of every acre of land in England and Wales. It seems to me quite clear on the construction of s. 28, that, if and when a payment is received, no part of that payment, even if it be expended in restoring the property to its former state, can be brought into account when the property is sold and the net profit is realised as it otherwise admittedly would have been apart from the section. I think those two factors are indications that the legislature was not considering the trading aspect of the matter at all, but was imposing on an owner of land throughout the country the obligation to contribute, with the corresponding benefit, if disaster happened, of receiving a sum of money, a value payment. I think the legislature considered that that would be altogether outside the area of trading operations. It would be very remarkable, as LORD ATKIN pointed out in *Seaham Harbour Dock Co.* v. *Crook* (3), if half of this money, which was plainly intended to be applied in rehabilitating the property —although it did not have to be so applied, that was the intention—should be instantly taken away in tax. I think that Parliament did not intend that result.

On the whole, although I think the case is a very difficult one, I have come to the conclusion that this is not a trading receipt. It was a contribution made and a payment received by the taxpayers, not as a part of their trading operations at all, but because they were compelled under the war damage scheme to make payments with the corresponding right of getting the benefit in their capacity, not as traders, but as owners of the land. The scheme was brought into existence to enable owners of property to resort to a common purse to re-build war-damaged property for their benefit and the benefit of the country as a whole. I do not think it is proper to regard the receipt of this payment as a trading profit.

Accordingly, I must allow the appeals and the matter must be sent back to the commissioners to adjust the figure. The taxpayers must have the costs of the appeal, and of the cross-appeals. I allow the taxpayers' appeals, and I dismiss the Crown's appeals with costs.

Taxpayers' appeals allowed. Crown's cross-appeals dismissed.

Solicitors: *R. C. Bartlett & Co.* (for the taxpayers); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

SLATER *v.* CLAY CROSS CO., LTD.

[COURT OF APPEAL (Denning, Birkett and Parker, L.JJ.), May 16, 17, 1956.]

Licensee—Negligence—Licensor's duty of care—Whether any distinction between duty to licensee and duty to invitee.

Negligence—Defence—Volenti non fit injuria—Knowledge of danger—Licensee walking on railway track—Injury owing to train driver's negligence.

The defendants owned and operated a narrow gauge railway some 2½ miles long which passed through a tunnel sixty-six yards in length. For many years local residents had habitually used the railway track as a pathway providing a short cut to a village, and the practice had been acquiesced in by the defendants. While walking through the tunnel the plaintiff was struck by a train and injured and she claimed damages. The court found that the plaintiff was a licensee on the track and that the driver employed by the defendants was negligent, but that the plaintiff was guilty of contributory negligence. On appeal,

Held: the plaintiff was entitled to damages because—

(i) the defendants (whether they were invitors or licensors) were under a duty, in carrying out their operations, to take reasonable care not to injure anybody lawfully walking on the railway, and they had failed in that duty, and

(ii) the defence of volenti non fit injuria was not available since, although the plaintiff in walking through the tunnel voluntarily took the risk of danger from the running of the railway in the usual way, she did not take the risk of negligence by the driver; but her knowledge of the danger was a factor in considering the plaintiff's contributory negligence.

Hawkins v. *Coulsdon & Purley Urban District Council* ([1954] 1 All E.R. 97) and *Dunster* v. *Abbott* ([1953] 2 All E.R. 1572) applied.

Dann v. *Hamilton* ([1939] 1 All E.R. 59) approved.

Appeal dismissed.

[**Editorial Note.** The third report of the Law Reform Committee, which was published as Cmd. 9305, made recommendations, to which DENNING, L.J., refers, concerning the abolition of the distinction between the duties owed by licensors and invitors respectively. The Occupiers' Liability Bill was introduced by the LORD CHANCELLOR on May 31, 1956, to give effect to recommendations of the Committee.

As to the duty of care owed to invitees and licensees, see 23 HALSBURY'S LAWS (2nd Edn.) 604, para. 853, and 610, para. 860; and for cases on the subject, see 36 DIGEST (Repl.) 54-56, *291-305*, 65-68, *352-371*.

As to the defence of volenti non fit injuria, see 23 HALSBURY'S LAWS (2nd Edn.) 715-718, paras. 1006, 1007; and for cases on the subject, see 36 DIGEST (Repl.) 150-152, *781-797*.]

Cases referred to:

(1) *Hawkins* v. *Coulsdon & Purley Urban District Council*, [1954] 1 All E.R. 97; [1954] 1 Q.B. 319; 118 J.P. 101; 3rd Digest Supp.

(2) *Dunster* v. *Abbott*, [1953] 2 All E.R. 1572; 3rd Digest Supp.

(3) *Slade* v. *Battersea & Putney Group Hospital Management Committee*, [1955] 1 All E.R. 429; 119 J.P. 212.

(4) *Dann* v. *Hamilton*, [1939] 1 All E. R. 59; [1939] 1 K.B. 509; 108 L.J.K.B. 255; 160 L.T. 433; Digest Supp.

(5) *London Graving Dock Co., Ltd.* v. *Horton*, [1951] 2 All E.R. 1; [1951] A.C. 737; 2nd Digest Supp.

(6) *Greene* v. *Chelsea Borough Council*, [1954] 2 All E.R. 318; [1954] 2 Q.B. 127; 118 J.P. 346; 3rd Digest Supp.

(7) *Cuthbert* v. *Mason*, (Jan. 19, 1956), unreported.

Appeal.

This was an appeal by the defendants, the Clay Cross Co., Ltd., from an order of Ashworth, J., at Nottingham dated Feb. 24, 1956. Responsibility for the plaintiff's injury suffered on the defendants' railway track was apportioned by the court as to sixty per cent. to the defendants by reason of their negligence, and as to the remainder to the plaintiff in view of her contributory negligence, and the plaintiff was awarded damages accordingly. The facts appear in the judgment of Denning, L.J.

Richard Elwes, Q.C., and *Bernard Caulfield* for the defendants.
H. G. Talbot for the plaintiff.

DENNING, L.J.: In Derbyshire there has been for well over a hundred years a railway line owned by the defendants. We were told that George Stephenson himself made it. The defendants use it so as to carry limestone from their quarries at Crich down to Ambergate. It is a small gauge line, only three feet, three inches wide, and is 2½ miles long. On that small line there are two tunnels. One of them, with which we are concerned, is only about eight feet or nine feet high, and it is just sixty-six yards long. On Feb. 12, 1953, the plaintiff was walking through the tunnel when she suddenly realised that a train was coming up behind her. She got down on to the ground to seek what safety she could, but unfortunately the train ran over one of her legs and cut it off. She now claims damages against the defendants saying that it was their fault.

If she were a trespasser on this railway, she would, of course, have no cause of action; but she says that the defendants had acquiesced for years in the villagers of Crich walking along this railway down to Ambergate and back. It was a short cut for them. The defendants had done nothing at all to show that they resented the villagers using it, and the villagers had in fact used it for years. The judge has found, and I think there can be no doubt, that she was what we call in law a licensee—not a trespasser who was unlawfully there, but a person who was permitted and allowed by the owners to be there—not for any matter in which they had an interest, but only for her own purposes.

It has been urged before us that, as she was a licensee and not an invitee, the duty of the defendants and their servants is greatly affected: and that it is much less on that account. The judge did not take that view; he held that there was a duty on the defendants' servants to take reasonable care in their operations, and he held that they had not taken that care. He found that instructions had been given to the drivers that on entering the tunnel they were to keep their heads down, they were to blow the whistle, and they were to slow down. On this particular occasion those instructions were not observed. It was in the winter. They had not been able to quarry fresh limestone up at Crich; they were using the existing stock; and, indeed, instead of having the train pulled by one little steam engine, they had a diesel engine on too. On coming up from Ambergate, the steam engine was in front and the diesel engine pushing behind. In the ordinary way, if the steam engine had been on its own, being the only engine pulling, the driver would have stopped before he entered the tunnel, and he would have whistled. On this occasion, the driver of the steam engine did not keep it pulling because he wanted to save up the steam for the gradient beyond but the diesel engine went on pushing behind. So the train did not stop at the entrance to the tunnel, the steam engine did not whistle at the entrance to the tunnel, and it did not slow down to a walking pace or stop. It went on at a pace which the judge put at eight miles an hour through the tunnel He found that in the circumstances it was going too fast, and that it failed to whistle; and that was negligence on the part of the driver for which the defendants were responsible. It seems to me that the judge's finding on that point cannot be disturbed.

Counsel for the defendants stressed the fact that the plaintiff was only a licensee and urged that this was of special significance. I do not think so. The

A Law Reform Committee* has recently recommended that the distinction between invitee and licensee should be abolished, but this result has already been virtually attained by the decisions of the courts. The classic distinction was that the invitor was liable for unusual dangers of which he knew or ought to know, whereas the licensor was only liable for concealed dangers of which he actually knew. This distinction has now been reduced to vanishing point. The decision of this court B in *Hawkins* v. *Coulsdon & Purley Urban District Council* (1) ([1954] 1 All E.R. 97) shows that a licensor too, as well as an invitor, is liable for unusual dangers of which he knew or ought to have known. The broken step in that case was not a concealed danger, but it was an unusual danger. The local authority did not know that it was a danger, but they ought to have known it, and they were held liable. The duty of the occupier is nowadays simply to take reasonable care C to see that the premises are reasonably safe for people lawfully coming on to them: and it makes no difference whether they are invitees or licensees. At any rate, the distinction has no relevance to cases such as the present where current operations are being carried out on the land. If a landowner is driving his car down his private drive and meets some one lawfully walking on it, then he is under a duty to take reasonable care so as not to injure the walker; and his duty D is the same no matter whether it is his gardener coming up with plants, a tradesman delivering goods, a friend coming to tea, or a flag seller seeking a charitable gift. That is made clear by the decision of this court in *Dunster* v. *Abbott* (2) ([1953] 2 All E.R. 1572), which was applied by FINNEMORE, J., very recently in *Slade* v. *Battersea & Putney Group Hospital Management Committee* (3) ([1955] 1 All E.R. 429). So here it seems to me that the defendants, in carrying on E their operations, were under a duty to take reasonable care not to injure anybody lawfully walking on the railway, and they failed in that duty. As the learned judge said:

> " I, therefore, hold that the defendants' servants were guilty of negligence in exposing the plaintiff to a risk which the defendants, their servants and F agents were well aware of, putting her in a position of great danger and failing to take the necessary reasonable precautions to prevent such danger arising."

Counsel for the defendants next relied on the maxim volenti non fit injuria. He said that the plaintiff must have known that it was dangerous to walk along this little tunnel and she must be taken voluntarily to have incurred the risk of danger from trains. He also said that that danger was an obvious one, and a G licensee could not complain of dangers which were obvious or known to him or her. On this matter counsel very properly drew our attention to the decision of ASQUITH, J., in *Dann* v. *Hamilton* (4) ([1939] 1 All E.R. 59), where a passenger took a lift with the driver of a car who was obviously under the influence of drink. There was an accident due to the negligence of the driver, and it was said that the passenger had no cause of action against the driver because she had volun- H tarily incurred the risk. ASQUITH, J., held that the maxim volenti non fit injuria had no application to the case; and he gave judgment in favour of the injured passenger. I must say that I agree with him. I know that the decision has in some quarters been criticised, but I would point out that LORD ASQUITH himself wrote a note in the LAW QUARTERLY REVIEW for July, 1953, vol. 69, at p. 317, which explains what he decided. He wrote:

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> " The criticisms . . . were to the effect that even if the volenti doctrine did not apply, there was here a cast iron defence on the ground of contributory negligence. I have since had the pleadings and my notes exhumed, and they very clearly confirm my recollection that contributory negligence was not pleaded. Not merely so, but my notes show that I encouraged counsel for the defence to ask for leave to amend by adding this plea, but he would not

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* See Editorial Note, p. 625, ante.

> be drawn: why, I have no idea. As the case has been a good deal canvassed on the opposite assumption, I hope you will not grudge the space for this not unimportant corrigendum."

In so far as he decided that the doctrine of volenti did not apply, I think the decision was quite correct. In so far as he suggested that the plea of contributory negligence might have been available, I agree with him.

Applying that decision to this case, it seems to me that, when the plaintiff walked in the tunnel, although it may be said that she voluntarily took the risk of danger from the running of the railway in the ordinary and accustomed way, nevertheless she did not take the risk of negligence by the driver. Her knowledge of the danger is a factor in contributory negligence, but is not a bar to the action.

Even in cases which concern the condition of premises, like *London Graving Dock Co., Ltd.* v. *Horton* (5) ([1951] 2 All E.R. 1), which was mentioned to us, knowledge of the danger is only a bar where the party is free to act on it, so that his injury can be said to be due solely to his own fault. I tried to explain as much in *Greene* v. *Chelsea Borough Council* (6) ([1954] 2 All E.R. 318), and *Cuthbert* v. *Mason* (7) (Jan. 19, 1956, unreported). Where knowledge of the danger is not such as to render the accident solely the fault of the injured party, then it is not a bar to the action but only a ground for reducing the damages. So here the knowledge of the plaintiff of danger is not a complete bar. It is a factor in contributory negligence. The judge pointed out that, if she had been paying attention, she should have heard the train approaching, especially the diesel engine, which made a loud noise, and if she had looked back she ought to have seen or realised that the train was coming. He found that she was guilty of contributory negligence because anyone having due regard for his or her own safety on entering a tunnel would have paused and thought whether a train was coming.

So she was at fault; and the consequence of that is that, whereas in the old days she would have failed altogether, now it is a matter for reducing the damages to which she would otherwise be entitled. The judge put her responsibility at forty per cent. and the defendants' at sixty per cent. Counsel for the defendants has urged strongly before us that those proportions do not represent the right shares of responsibility; but we in this court always pay the greatest attention to the view of the judge who tried the case, heard the witnesses and had all the circumstances before him. On the whole, this is not, I think, one of those cases where we can interfere with the proportions.

In the result, I think the judge was right on all points in his decision, and I would dismiss the appeal.

BIRKETT, L.J.: I am entirely of the same opinion and have nothing to add.

PARKER, L.J.: I also agree and would only add a few words in deference to the argument of counsel for the defendants. The only point on which the learned judge has held the defendants liable in this case is that their driver, the driver of the train, was negligent in two respects, in that he did not whistle before entering the tunnel, and, in effect, that he was going too fast. On that issue it seems to me that the question of the relationship between the parties, licensor and licensee, is wholly immaterial except in this respect, to show that the plaintiff herself was lawfully on the land; and once the learned judge has found, as he did, that the driver well knew that people such as the plaintiff were used to going through this tunnel, it seems to me that he owed a duty to such a person to take reasonable precautions before entering the tunnel; and indeed his employers felt the same, because the instructions to the men were to blow a whistle and to slow down, and when one realises that the maximum speed of the train was ten miles an hour, slowing down there is clearly slowing down to walking pace.

In those circumstances counsel for the defendants is forced to attack the findings of the learned judge, and he points out, quite rightly, that in regard to the whistle there were only three persons who gave evidence. One was the plaintiff, who said she heard no whistle, and, as she did not even hear the train, not very much weight can be attached to that evidence. Then there was a man called Bradley, who was the driver of the diesel engine pushing the train. He was called by the plaintiff, and he said that he never heard a whistle. Counsel has quite rightly pointed out that he was far from satisfactory as a witness. The only other witness was Mr. Davenport, the driver of the steam train, who quite clearly was a very poor witness, to say the least, who alleged that he did sound the whistle. In those circumstances, the learned judge said that on the whole he accepted Mr. Bradley and not Mr. Davenport, and it seems to me that is clearly in accordance with the probabilities of the case, because on the return journey from Ambergate to Crich the ordinary practice was for the train to stop and the whistle would only be sounded when the train went on again. On this occasion, although Mr. Davenport intended to stop, and so signalled to Mr. Bradley, Mr. Bradley from the rear of the train signalled him on and the train never stopped at all. It seems to me wholly in accordance with the probabilities that Mr. Davenport never sounded his whistle.

Finally, as regards the speed of the train, it is true that all the witnesses spoke of the train going slightly faster than a normal walking speed or walking pace, or, at the most, six miles an hour; but the learned judge, it seems to me, wholly refused to accept that evidence. Again he looked to the probabilities of the case and found, as it seems to me, rightly, that at any rate the train was going faster than the plaintiff, because it caught her up in the tunnel itself. He took the view—and I see no reason to disagree with him—that the train throughout must have been going at a considerable speed, be it six or eight miles an hour—considerable, of course, in relation to the maximum speed of the train. I see no way in which those findings can be successfully challenged and I think the learned judge came to a right conclusion. On all other points I agree entirely with what my Lord has said.

Appeal dismissed.

Solicitors: *J. F. Coules & Co.* (for the defendants); *Sharpe, Pritchard & Co.*, agents for *Bertram Mather & Co.*, Chesterfield (for the plaintiff).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

A

BEIGAN *v.* BEIGAN.

[COURT OF APPEAL (Denning, Birkett and Parker, L.JJ.), May 29, 30, 1956.]

Divorce—Desertion—Act of desertion—Determination of deserted spouse not to take back deserting spouse—Effect.

The parties were married in 1931 and in 1945 the husband committed B adultery which was condoned by the wife. On several occasions thereafter the husband threatened to leave. One night in October, 1951, the husband told his wife that he was leaving and the wife said "If you go now, you do not come back again". Despite that warning he left during the night. The wife in his absence caused the lock on the front door to be changed. Within a day or two the husband returned and having entered the house told the C wife that he wished to remain. His wife told him that he could not stay and he left the house. The wife had petitioned for a decree nisi of divorce on the ground of her husband's adultery and desertion.

Held: the words spoken by the wife did not prevent the husband's act of leaving the house from being an act of desertion, and that desertion revived the condoned adultery; accordingly, since the husband was thus guilty of D adultery when he returned to the wife, she was not bound to have him back, and her petition would be granted on the ground of the husband's adultery.

Barnett v. *Barnett* ([1954] 3 All E.R. 689) and *Fishburn* v. *Fishburn* ([1955] 1 All E.R. 230) considered and criticised (see p. 631, letter G, to p. 632, letter I, post).

Appeal dismissed. E

[As to the effect of rejection of an offer of reconciliation after desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 244, para. 456, text and note (o); and for cases on the subject, see 27 DIGEST (Repl.) 347-350, *2877-2896*.

As to the revival of a condoned adultery, see 12 HALSBURY'S LAWS (3rd Edn.) 306, para. 608; and for cases on the subject, see 27 DIGEST (Repl.) 410, 411, F *3390-3393*.]

Cases referred to:

(1) *Beard* v. *Beard*, [1945] 2 All E.R. 306; [1946] P. 8; 114 L.J.P. 33; 174 L.T. 65; 27 Digest (Repl.) 408, *3369*.

(2) *Barnett* v. *Barnett*, [1954] 3 All E.R. 689; [1955] P. 21.

(3) *Fishburn* v. *Fishburn*, [1955] 1 All E.R. 230; [1955] P. 29. G

(4) *Bevan* v. *Bevan*, [1955] 3 All E.R. 332.

(5) *Sifton* v. *Sifton*, [1939] 1 All E.R. 109; [1939] P. 221; 108 L.J.P. 131; 27 Digest (Repl.) 324, *2697*.

(6) *Church* v. *Church*, [1952] 2 All E.R. 441; [1952] P. 313; 3rd Digest Supp.

(7) *Hosegood* v. *Hosegood*, (1950), 66 (pt. 1) T.L.R. 735; 27 Digest (Repl.) 336, *2798*. H

(8) *Pearson* v. *Pearson*, [1948] L.J.R. 1435; [1948] W.N. 225; 27 Digest (Repl.) 703, *6721*.

(9) *Lloyd* v. *Lloyd & Hill*, [1947] 1 All E.R. 383; [1947] P. 89; [1948] L.J.R. 85; 27 Digest (Repl.) 406, *3352*.

Appeal. I

The husband appealed from an order of His Honour JUDGE REWCASTLE at Liverpool Assizes dated Jan. 13, 1956, whereby he granted the wife a decree nisi of divorce on the ground of the husband's adultery, which though condoned had been revived, and on the ground of his desertion.

The facts appear in the judgment of DENNING, L.J.

R. G. Clover for the husband.

D. B. McNeill for the wife.

DENNING, L.J.: In this case the parties married in 1931, and there are three children of the marriage. The difficulties in the married life started with the husband's own adultery. In 1945 he committed adultery with a married woman, as a result of which a child was born to that woman. His wife condoned that adultery. He on one occasion at least asked his wife to take charge of that child, and she, naturally enough, refused. The marriage continued in being, but not very happily. The husband on occasions threatened to leave and packed his bags, but he did not actually leave until a day in October, 1951, when he did leave the house for a time and went elsewhere. The first question is whether that was an act of desertion by him which revived the condoned adultery. What happened on that day was this: The husband was suspicious that the wife was going out with another man. She told him she was going to see a woman friend. He thought that was untrue and caused his son to telephone the woman friend in order to see if his wife was there. As it turned out, she was there, but that did not allay his suspicions. When she came back that night, he said that she ought to have been home earlier. When they went to bed, they were having high words in the bedroom. He felt his temper rising, and he decided then and there to leave, and told his wife that he would leave. She asked him whether he really intended going this time, and he said " Yes ". Thereupon she said to him: " If you go now, you do not come back again ". She made her position quite clear, and warned him that if he went she would in no circumstances take him back. In the middle of that night, in spite of that warning, he went. He went out, and having telephoned a friend at the Beehive Inn he stayed the night at that inn. The wife, firm in her intention, caused the lock on the front door to be changed. The husband on the next day or a day or two later returned, in some way entered the house, and wanted to stay. The wife made it plain to him that he could not stay and when the children came home, they persuaded the father to go, and he went. The two parties have not lived together since. The wife in her petition complains of adultery by the husband, and she says he is also guilty of desertion. The husband in his answer says that the wife deserted him.

On the facts that I have stated it is quite plain that the husband was guilty of adultery. It is equally plain that the wife condoned it, but it is settled law that a subsequent desertion by the husband, even if it is only for a short time such as a few hours or less than a day, can revive the condoned adultery. That was decided in *Beard* v. *Beard* (1) ([1945] 2 All E.R. 306). The first question to decide, therefore, is whether the husband did desert the wife on this night when he left the house. It has been argued before us by counsel for the husband that there was no desertion by the husband because the wife said: " If you go now, you do not come back again. I will not have you back ". Counsel supported his argument by reference to *Barnett* v. *Barnett* (2) ([1954] 3 All E.R. 689) and *Fishburn* v. *Fishburn* (3) ([1955] 1 All E.R. 230). He said that, according to those decisions, if a wife locks the door against her husband, and makes it clear to him that she will not have him back, that terminates any desertion by him if it has once commenced; and he says that in this case the words of the wife just before the husband went prevented any desertion from starting. I cannot agree with that argument. The husband plainly deserted his wife and must take the consequences.

I must say a word, however, about *Barnett* v. *Barnett* (2) and *Fishburn* v. *Fishburn* (3). In both those cases the husband and wife had for years lived a " cat and dog " life, and the tension between them eventually reached such a pitch that each of them, at about the same time, determined not to have anything more to do with the other and evinced that determination in a clear and unequivocal way. In *Barnett* v. *Barnett* (2) the husband left the matrimonial home because he had had enough of it, whereupon the wife promptly changed the lock so as to prevent his coming back. In *Fishburn* v. *Fishburn* (3) the parties continued to live in the same house, but the husband locked the wife out of his room, whereupon she fitted a Yale lock on her door so as to keep him out of hers. In each case the judge held that the husband was originally in desertion, but that his desertion automatically came to an end when the wife, by locking him out, evinced to her husband a firm and decisive determination that he should not return to her, even though her action had no effect at all on him. It was abundantly clear that neither party at any time within the three years before suit ever had the slightest desire or intention of resuming cohabitation with the other, yet the court refused any relief to either of them. Neither party was given a remedy. I have considerable doubt whether those cases were rightly decided. There has since been a decision of the Divisional Court in *Bevan* v. *Bevan* (4) ([1955] 3 All E.R. 332) in which it was held that, even though a wife says in terms that she does not want to see her husband again, she does not thereby automatically terminate his desertion. The Divisional Court applied the reasoning of Henn Collins, J., in *Sifton* v. *Sifton* (5) ([1939] 1 All E.R. 109) and of Willmer, J., in *Church* v. *Church* (6) ([1952] 2 All E.R. 441). I, too, agree with that reasoning, and I see no distinction in principle between a wife's words and her actions. I should have thought that, if a wife locks the door against her husband, it does not automatically terminate his desertion any more than her own adultery would do. It all depends on whether it has any effect on the husband by preventing him from seeking a reconciliation. If he would never have returned in any case, then he remains in desertion, notwithstanding the locking of the door. I know that in Scotland it is necessary for the petitioner to prove that she was throughout the three-year period " willing to adhere " to her husband, but this has never been part of English law and I do not think it should now be introduced.

I can well understand that in *Barnett* v. *Barnett* (2) and *Fishburn* v. *Fishburn* (3) the courts were reluctant to grant the wife a divorce for desertion when she was just as much at fault in locking him out as he was in leaving her. However, the fact that both are equally at fault does not mean that neither of them is. Rather than refuse relief to either of them, I think a preferable solution would be to hold that each party deserted the other, and to grant a divorce to each without drawing any distinction between them. After all, desertion is the deliberate withdrawal from life together without consent, and, if each party at the same time withdraws from the married life because it has become intolerable, each is guilty of desertion. A simple illustration is the case where a husband goes off to work in the morning, and neither party has then decided to leave the other; but during the day the husband decides never to return, and the wife packs her bag and leaves. There is no separation by agreement. Neither party has consented to the other going, but I should have thought there was, in the circumstances, desertion by each, and that after three years a decree could be granted without drawing any distinction between them. In many of these cases both parties are equally to blame for the breakdown of the marriage, and the only just solution is a decree of divorce on the ground of desertion by each without drawing any distinction between them. I said as much in *Hosegood* v. *Hosegood* (7) ((1950), 66 (pt. 1) T.L.R. at p. 740) and I adhere to that view. It is not necessary, however, to pronounce any final opinion on *Barnett* v. *Barnett* (2) and *Fishburn* v. *Fishburn* (3) because they are very different from this case. In this instance we have the simple words of the wife: " If you go now, you do not come back again ". In my judgment that does not prevent the husband's act from being an act of desertion. He deserted his wife when he left the house that night. His desertion revived the condoned adultery: that adultery is revived for all purposes, and therefore from that moment onwards he was a husband guilty of adultery. As such, when he came back the next day or a day or two later, the wife was not bound to take him back any more than a wife is bound, when she first finds out about her husband's adultery, to take him back. Counsel for the wife referred us to *Pearson* v. *Pearson* (8) ([1948] W.N. 225) and *Lloyd* v. *Lloyd & Hill* (9) ([1947] 1 All E.R. 383) which warrant that proposition.

A further point was raised by counsel for the husband. He said that when the husband wanted to come back, and the wife would not have him in the house, the wife was then deserting the husband and that he is entitled to a decree on his answer. The learned commissioner found, however, that the return of the husband was not such that the wife could reasonably be expected to accept him. He was in the circumstances a husband guilty of adultery and the wife was not bound to take him back.

There is, however, one variation which I would suggest in the order. We should grant the petition of the wife only on the ground of adultery, and not on the ground of desertion. The husband's adultery, condoned but revived, is the real basis of the decree. I would vary the order of the commissioner to that extent.

BIRKETT, L.J.: I am entirely of the same opinion. It is true that the learned commissioner laid the greater stress on what my Lord has suggested was the real ground of his decision, namely, the adultery committed by the husband in 1945 which had been subsequently condoned, and subsequently revived. Although I agree that the adultery is the main matter, I think the commissioner's decision to grant a decree on both grounds should be supported if need be.

This marriage had been in existence for about twenty-five years at the time of this hearing, and up to 1945 had been a reasonably happy marriage. Then there occurred the admitted adultery of the husband with Mrs. Hall in the most painful and humiliating circumstances for the wife. There is no question that that was the matter which first disturbed the harmony of the married life, and it was admittedly the husband's fault. Although it is said that that was forgiven by the wife, it is very difficult for a wife to put a matter of that kind entirely out of her mind; particularly when subsequent events in the married life tend to revive those old memories. In this case there were two such events: First, a child was born to Mrs. Hall of which the husband was the father; secondly, the husband had tried to induce his wife to take that child into their home. Then occurred another event which must have revived the memory of the adultery in the wife's mind. In October, 1951, which was the month in which the husband went away, the husband was suspicious because he thought that his wife was conducting an adulterous association with another man. There was no ground for that suspicion, but I mention it merely for this reason, that when a wife is accused of adultery of which she is quite innocent by the man who has disturbed the harmony of the married life by his own adultery, it is extremely difficult for a wife to forget those past incidents. Another factor in the background of the married life is that when the husband did go away in October, 1951, it was only the culminating point of many threats to the wife that that was what he would do. On the night when he did in fact leave, the wife had been out. The husband had had a telephone call put through, believing that she was really not where she said she was going; all this came to the ears of the wife, and when she came back that night the husband was in a state of some indignation. He said to her that he was going to leave, and as the son and daughter were present she said: " Do not talk like that here. Let us go upstairs." They went upstairs and he said: " Well, I will come tonight, but I am definitely leaving tomorrow ". During the night he got up, packed some clothes and went downstairs. The wife went down the stairs after him and said: " Do you really intend to go this time? " and he said: " Yes ". She said " If you go now, you do not come back again ". One other point to be mentioned is, that before he went away that night he said that he would send someone to take away all the furniture, and that was the reason that the wife had the locks changed.

The learned commissioner found (and I think he was perfectly entitled to find) that there had been desertion by the husband that night. It is not contested that if that be right then the adultery in 1945 is revived. The wife was, therefore, entitled to ask the court for a decree of divorce on the ground of her husband's adultery. On that ground the learned commissioner granted her a decree.

We have had cited to us *Barnett* v. *Barnett* (2) ([1954] 3 All E.R. 689), a decision of SACHS, J., and *Fishburn* v. *Fishburn* (3) ([1955] 1 All E.R. 230), a decision of WILLMER, J., and it was argued by counsel for the husband on the strength of those cases first, that there had in fact been no desertion because when the wife said " If you go now, you do not come back again ", that had the effect of allowing the husband to go and that the act was really the wife's act. Secondly that, if there was desertion, it ended when the husband made his offer to return. I think those two cases will need careful consideration because I observe that in *Bevan* v. *Bevan* (4) ([1955] 3 All E.R. 332) in the Divisional Court composed of LORD MERRIMAN, P., and COLLINGWOOD, J., those two decisions were discussed. The language of COLLINGWOOD, J. (with which the learned President agreed) is somewhat significant. He said (ibid., at p. 336):

> ". . . it is suggested that the present case is really in the same class as *Barnett* v. *Barnett* (2), a decision of SACHS, J., and *Fishburn* v. *Fishburn* (3). In my opinion, those cases are in a different category from the present. They were not cases merely of words indicating that the wife had no desire to see her husband again. In both those cases the deserted spouse effectively prevented the other spouse from approaching her by bolting the door against any advances towards reconciliation, not merely metaphorically, but actually and physically. Those cases go a long way further than anything that can be found in the evidence in the present case, which really amounts to this, that the wife, suffering, and not unjustly, from a deep sense of grievance, says to a husband who apparently is showing no contrition for, and almost no recognition of, what he has done: ' I do not want to see you any more '. In my opinion, that cannot exonerate him from the necessity of doing something to bring an end to the state of desertion which he started. It requires something far more than that to relieve him of the necessity of doing something to bring the state of desertion to an end."

In *Bevan* v. *Bevan* (4) the wife had said shortly after the separation that she did not want to see her husband again, and she wanted a divorce. I think that the learned commissioner in this case, having the background of the married life which I have sketched briefly, a background in which the wife so far as I can see was in no way to blame for anything that occurred, came to the conclusion that the blame was entirely on the husband. The learned commissioner said on this very important point:

> " It is said, and it has been argued before me, that because [the husband] was only away for a very short time, and then came back and said that he wished to resume cohabitation that there was a genuine offer which the wife was not entitled to refuse, and that it terminated the desertion. I do not accept that view. Primarily I do not accept it because, the adultery having been revived, the situation was exactly the same. It has never been condoned, and as I understand it in law, adulterous husbands, merely by coming back and offering to renew cohabitation, cannot terminate a desertion. If he could it would be some sort of compulsory condonation which is unknown to the law. Apart altogether from the adultery I should have been prepared to find—and I mention this in case this matter goes to appeal, and anyone may think differently about the first part of my judgment—that there never was, in this case, an offer by the husband which it was incumbent on the wife to accept."

Later in his judgment he said:

> " There is no evidence before me that he came back and said: ' Well, I accused you of adultery. I am sorry, I was wrong. I put all that suspicion right behind me. There will be no more of that. There will be no more of my ordering you to be in at nine-thirty. There will be no more of my threatening to leave you if our sexual desires do not happen to coincide '. Nothing of that kind, and I should have been quite prepared to hold that there never was an offer here which she was bound to accept ".

It is not necessary to discuss that part of the case further because in my opinion the learned commissioner was perfectly entitled to say as he did in this case: " I am ready to grant this wife a decree of divorce on the ground of adultery and admitted adultery of the husband, admittedly condoned, and which I hold to be revived by the act of desertion in October, 1951 ". I agree with the judgment which my Lord has expressed, and the alteration in the order to which he referred.

PARKER, L.J.: I have come to the same conclusion, and base my decision on the short ground that when the husband left the matrimonial home that night or early in the morning in October, 1951, he was guilty of an act of desertion which revived the previous adultery which had been condoned. Counsel has argued strenuously that the fact that the wife on that occasion said " If you go now, you do not come back again " meant that he never deserted her at all. Apart from authority, that seems to me an astonishing proposition. It is agreed that if the wife had said nothing, and he had left that night, he would be in desertion. How can it make any difference that the wife, in a last effort to make him stay, points out the consequences, namely: " If you go now, you do not come back again " ? It seems to me wholly artificial to say that because she used those words, the husband was not in desertion at all. It is, however, said that that is the logical result of the decisions in the two cases referred to, *Barnett* v. *Barnett* (2) ([1954] 3 All E.R. 689) and *Fishburn* v. *Fishburn* (3) ([1955] 1 All E.R. 230). I think that those are completely different cases dealing with a possible situation once desertion has actually occurred. It may be, however, that hereafter this court will have to consider those cases carefully if they go the length of suggesting that words used as they were in this case either prevented desertion taking place, or of themselves terminated desertion which had taken place. Once the act of desertion is proved, it seems clear that the adultery previously condoned is revived, and is revived for all purposes; and accordingly, when the husband did come back a day or two or three days later to the matrimonial home, I think that the wife was perfectly entitled to refuse to negotiate with him, or to have him back, just as she would have been immediately after the original adultery. Accordingly I agree with the order proposed.

Appeal dismissed.

Solicitors: *John Hands & Son*, agents for *K. Maxwell Brown*, Liverpool (for the husband); *Mawby, Barrie & Letts*, agents for *Silverman & Livermore*, Liverpool (for the wife).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

R. *v.* CABORN-WATERFIELD.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Streatfeild and Donovan, JJ.), June 5, 1956.]

Criminal Law—Appeal—Reference by Home Secretary—Appeal confined to grounds stated in reference—Criminal Appeal Act, 1907 (7 *Edw.* 7 *c.* 23), *s.* 19 (*a*)—*Criminal Appeal Rules,* 1908 (*S.R. & O.* 1908 *No.* 227), *r.* 48.

The appellant was convicted of shopbreaking and larceny and was serving his sentence. He had applied for and had been refused leave to appeal against conviction. F. who was convicted on the same indictment subsequently, while serving his sentence, made a petition to the Home Secretary in which he stated that the appellant was innocent of the offence. F. had not given evidence at the appellant's trial. The Home Secretary referred the appellant's case to the court under s. 19 (a) of the Criminal Appeal Act, 1907, enclosing F.'s petition. At the hearing of the appeal constituted by the reference counsel for the appellant sought to raise matters not referred to in F.'s petition.

Held: on the hearing of a reference under s. 19 (a) the court would go through the grounds on which the Home Secretary had referred the case but would confine itself to those grounds, and as the court could not rely on F.'s evidence the appeal would be dismissed.

[As to references to the court by the Secretary of State, see 10 HALSBURY'S LAWS (3rd Edn.) 523, para. 962.

For the Criminal Appeal Act, 1907, r. 19 (a), see 5 HALSBURY'S STATUTES (2nd Edn.) 938.

For the Criminal Appeal Rules, 1908, r. 48, see 6 HALSBURY'S STATUTORY INSTRUMENTS 63.]

Reference.

This was a reference by the Home Secretary to the Court of Criminal Appeal under s. 19 (a) of the Criminal Appeal Act, 1907* and the Criminal Appeal Rules, 1908 (S.R. & O. 1908 No. 227), r. 48†. The appellant had been indicted together with two other men, Arthur Anthony Rogers and John Timbrell Fricker at Lewes Assizes in March, 1954, for shopbreaking and larceny, it being alleged that on the night of May 21/22, 1953, they had broken into a jeweller's shop and had stolen jewellery. Rogers pleaded guilty. Fricker pleaded not guilty but was convicted. The jury disagreed in the case of the appellant. He came up for a second trial. At both trials the principal witness for the prosecution was a girl, Anne Wood, who said that on the day in question she had gone on a trip by car to Eastbourne with the three accused and another girl, Patricia Darling, and that in the evening the three men had left the car and after a long absence had returned and said they had done a robbery; and that the party returned to London to Patricia Darling's flat where the three men produced a considerable amount of jewellery. At the appellant's second trial evidence for the defence was given by Rogers who said that the trip described by Anne Wood took place the day before and that he had done the robbery with a man whom he called Cockamooski. Neither Fricker nor Patricia Darling were called. The appellant was convicted. He applied to the Court of Criminal Appeal for leave to appeal against conviction and the application was refused. He was serving his sentence at the time of this reference and was due to be released on June 16, 1956. The circumstances in which the case came to be referred by the Home Secretary to the Court of Criminal Appeal are stated in the judgment.

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* Section 19, so far as is relevant, provides: "Nothing in this Act shall affect the prerogative of mercy, but the Secretary of State on the consideration of any petition for the exercise of His Majesty's mercy, having reference to the conviction of a person on indictment or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit, at any time either—(a) refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted . . ."

† The Criminal Appeal Rules, 1908, r. 48, provides: "When the Secretary of State exercises his powers under s. 19 (a) of the [Criminal Appeal Act, 1907,] and refers the whole case to the Court of Criminal Appeal, the petitioner whose case is so dealt with shall be deemed to be for all the purposes of the Act or these rules a person who has obtained from the [Court of Criminal Appeal] leave to appeal, and the [Court of Criminal Appeal] may proceed to deal with his case accordingly."

Eric Myers for the appellant.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*) and *J. C. Phipps* for the Crown.

LORD GODDARD, C.J., gave the judgment of the court: This is a reference by the Home Secretary under s. 19 (a) of the Criminal Appeal Act, 1907, with regard to the conviction of the appellant, John Caborn-Waterfield, who was convicted at the East Sussex Quarter Sessions on May 6, 1954, of shopbreaking and larceny and sentenced to three years' imprisonment. He was indicted along with two other men, one called Rogers, and the other called Fricker. The jury disagreed at the first trial. The prosecution's case at the second trial depended entirely on the evidence of a young woman named Anne Wood, who said from the first and whose evidence has been consistent on this point throughout, that the appellant was a member of the party which went down to Eastbourne on the day in question when the shopbreaking was effected. Rogers and Fricker, the other two men, were convicted. Rogers pleaded guilty, Fricker pleaded not guilty. Rogers said at the trial that Fricker was not present. Fricker now admits that he was present, although he denied it on oath at the trial, and he has said that the appellant was not present, whereas Anne Wood has all along said that the appellant was one of the party. There was another young woman in this party called Patricia Darling. The first account she gave to the police plainly implicated the appellant as a member of the party that went down on this day. Subsequently she withdrew that account by making an affidavit in which she said that he was not. Therefore, you have all these witnesses saying one thing at one time and another thing at another time. It is only right to say that the appellant always denied that he was there, but the jury having heard the case convicted him. The sentence has very nearly been served—he is due to be released in about a fortnight's time—but meanwhile Fricker has put forward a petition* to the Home Secretary in which he has said that the appellant was not one of the party, and the Home Secretary has seen fit in the circumstances to refer the case to this court.

Counsel for the appellant realises that he cannot ask this court to rely on Fricker's evidence or on Patricia Darling's evidence, and he says that he has the express instructions of his client not to ask leave to call Patricia Darling, and he realises it would be no use to call Fricker. Therefore, there is little left of this reference but for counsel to go behind the reference and submit that as this matter has been referred, any point is open to him and that he wants now to challenge the summing-up of the learned chairman and to ask that the question whether certain evidence was properly admitted in the court below should be considered. After the appellant's conviction he applied to this court for leave to appeal and set out a variety of grounds. The court had before it on the hearing of the application, the summing-up, and if the court could have found any reason for thinking that the summing-up was in any way defective, the court would have given leave to appeal. The court did not give leave to appeal, but dismissed the application. A

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* Fricker stated in his petition that his sole reason for putting it forward was for the purpose of giving information, i.e., the information that the appellant was not present on the occasion of the shopbreaking, and that he had not done so previously because he had only recently realised that he could petition for that purpose.

It is quite impossible for this court to hold that on a reference by the Home Secretary on the ground that certain further facts have been submitted to him which he thinks the court ought to consider in determining whether the verdict was right, that is to say whether the verdict on the facts was right, this court can then increase the ambit of the reference by going again into the whole of the facts B of the trial and considering points of law which the Home Secretary has not referred to this court at all. This court desires to say quite definitely that on a reference by the Home Secretary under s. 19 (a) the court will go through the grounds on which the Home Secretary has referred the case and will confine itself to those grounds. The court cannot go into all sorts of different grounds, otherwise if it did, there might be no end to the matter. Supposing the case C had never been before the Court of Criminal Appeal at all either by means of an application or on appeal, the Home Secretary might refer the whole case because he might think that there was possibly some defect in law at the trial, which had been brought to his attention, and also some question of fact. The court could then, of course, go into the questions of law and fact and give its decision. If, the court having once given its decision on the questions, some further evidence D were to be put before the Home Secretary which he thought might have had a bearing on the verdict, he could then refer that evidence to the court to consider whether or not it was a ground for quashing the conviction. Then, according to the argument which has been put to the court, it would be open to the court or to counsel to challenge once again the whole legal position at the trial, the summing-up and the reception of evidence which had been put before the court. E The court thinks that when a matter of this sort is referred by the Home Secretary, the court sees the ground on which the Home Secretary has referred the case and must confine itself to that ground. As in this case the court is not asked to hear any further evidence, it follows that the appeal, because the reference is now treated as an appeal*, is dismissed.

Appeal constituted by the reference dismissed. F

Solicitors: *Cohen & Cohen* (for the appellant); *Director of Public Prosecutions.*

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

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* See footnotes, p. 636, ante.

R. *v.* INGRAM.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Streatfeild and Donovan, JJ.), June 4, 8, 1956.]

Criminal Law—Obtaining credit by fraud—Advance payments for services to be rendered—Whether obtaining credit—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 13 (1).

The appellant was an electrician. He obtained contracts from shopkeepers to erect or renovate electric signs at an agreed price and obtained payment of part of that price in advance. Apart from insignificant matters none of the work was carried out. None of the advance payments was returned. He was convicted on charges under s. 13 (1) of the Debtors Act, 1869, that in incurring a debt or liability he had obtained credit by fraud. By virtue of s. 3 of the Act of 1869 and s. 150 (2) and s. 30 (8) of the Bankruptcy Act, 1914*, "liability" in s. 13 (1) of the Act of 1869 includes an obligation to pay money or money's worth. The appellant contended that he had not obtained credit, since his obligation, in return for the part payments, was not to pay money in the future but to do work.

Held: since by obtaining money in advance in return for a promise to give money's worth, viz., to render services, the appellant had obtained credit within s. 13 (1) of the Debtors Act, 1869, viz., credit for the rendering of the services, and since he had obtained that credit by fraud, he was rightly convicted.

Per CURIAM: the present case was a clear case of fraud, but mere delay in paying a debt or doing work is not fraud (see p. 641, letter F, post).

Appeal dismissed.

[**Editorial Note.** The definition of "liability" for the purposes of s. 13 (1) of the Debtors Act, 1869, is now, by virtue of s. 3 of that Act and s. 150 (2) of the Bankruptcy Act, 1914, found in s. 30 (8) of the latter Act. A recent example of a case where there was not an obtaining of credit within s. 13 (1) of the Debtors Act, 1869, was *R.* v. *Mitchell* ([1955] 3 All E.R. 263).

As to the misdemeanour of obtaining credit by fraud, see 2 HALSBURY'S LAWS (3rd Edn.) 632, para. 1254; and for cases on the subject, see 5 DIGEST 1050-1052, *8558-8584.*

For the Debtors Act, 1869, s. 13 (1), see 2 HALSBURY'S STATUTES (2nd Edn.) 298.

For the Bankruptcy Act, 1914, s. 30 (8) and s. 150 (2), see 2 HALSBURY'S STATUTES (2nd Edn.) 365, 433.]

Case referred to:

(1) *R.* v. *Jones*, [1898] 1 Q.B. 119; 67 L.J.Q.B. 41; 77 L.T. 503; 5 Digest 1051, *8571.*

Appeal.

The appellant was convicted at Middlesex Quarter Sessions on Apr. 10, 1956, on an indictment containing six counts of obtaining credit by fraud contrary to s. 13 (1) of the Debtors Act, 1869, and was sentenced to nine months' imprisonment. He appealed against conviction.

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* Section 30 (8) of the Bankruptcy Act, 1914, so far as relevant provides:

"'Liability' shall . . . include . . . (b) any obligation or possibility of an obligation to pay money or money's worth on the breach of any . . . contract, agreement, or undertaking . . . (c) generally, any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of, money or money's worth . . ."

C. W. R. Pickthorn for the appellant.
J. H. Buzzard for the Crown.

Cur. adv. vult.

June 8. **DONOVAN, J.**, read the judgment of the court: The appellant was convicted at Middlesex Quarter Sessions on Apr. 10, 1956, on six charges of obtaining credit by fraud contrary to s. 13 (1) of the Debtors Act, 1869, and sentenced to nine months' imprisonment. He appealed to this court, pursuant to a certificate granted to him by the deputy chairman, and contended that the facts proved at the trial disclosed no obtaining of credit on his part, and that, accordingly, his conviction was bad in law. At the conclusion of the hearing on June 4 the court dismissed the appeal, and now gives its reasons for so doing.

The appellant is an electrician, and the fraud alleged against him was this: that he obtained contracts from a number of shopkeepers to erect or renovate electric neon signs at an agreed price. He obtained payment of part of that price in advance, but did not do the work save for insignificant matters of a preparatory nature. He was in financial difficulties, and none of the advance payments was returned.

The jury were properly directed that they could not convict the appellant unless they were satisfied, inter alia, that in obtaining these advance payments and then failing to do the work he was acting fraudulently, that is to say, that he never had any intention to do the stipulated work at the time when he received payments in advance. The jury, influenced no doubt by what appeared to be a systematic course of conduct on the appellant's part, convicted him, and it must accordingly be taken that they found that when he received part payments at the outset he had no intention to do the work he had undertaken to do. On any view, therefore, his conduct was fraudulent, but he argues that it involved no obtaining of credit and thus no offence under s. 13 (1) of the Debtors Act, 1869.

The requisites for an offence under that section are these: First, that the accused person obtained credit. Secondly, that he obtained it under false pretences or by means of any other fraud. Thirdly, that he obtained it in incurring any debt or liability. The appellant admits that he incurred a liability in these transactions, namely, a liability to do the work. He argues, however, that when he received the various payments in advance he obtained no credit, for what he had to do in return was not to pay money in the future, but to do work. In other words, there can be no obtaining of credit, he says, unless the obligation towards the person who had given credit is to pay him money in the future. It is not sufficient if the obligation is to pay him money's worth only, either in the shape of goods or services.

Considerable light is thrown on the problem by the statutory definition of the word " liability " in s. 13 (1). That definition comes in the first place from s. 3 of the same Act, where it is provided that

> " Words and expressions defined . . . in the Bankruptcy Act, 1869, shall have the same meaning in this Act."

By s. 31 of the Bankruptcy Act, 1869, the word " liability " was defined, so as to include any compensation for work or labour done and any obligation or possibility of obligation to pay " money or money's worth " on a breach of contract: and, generally,

> " . . . any express or implied engagement, agreement or undertaking to pay, or capable of resulting in the payment of money or money's worth whether such payment be as respects amount fixed or unliquidated; as respects time present or future, certain, or dependent on any one contingency, or on two or more contingencies . . . "

The Bankruptcy Act, 1869, was repealed by the Bankruptcy Act, 1883, which in turn was repealed by the Bankruptcy Act, 1914, with certain immaterial exceptions; but the definition of " liability " for the purpose of the Debtors Act, 1869, has been preserved, first by s. 149 (2) and s. 37 (8) of the Bankruptcy Act, 1883, and now by s. 150 (2) and s. 30 (8) of the Bankruptcy Act, 1914, which was a consolidating measure.

It therefore follows that, when s. 13 (1) of the Debtors Act, 1869, speaks of credit obtained in incurring any debt or liability, it covers the case where credit is obtained in incurring any liability to pay, not only money, but money's worth. Money's worth may consist of commodities or services, and, accordingly, if credit is obtained in incurring a liability to pay in money's worth, the case is within the express provisions of s. 13 having regard to the statutory definition above set out. It is, therefore, erroneous to argue that credit can be obtained within the meaning of the section only if the debt or liability incurred is to pay money and money alone. The one answer suggested on behalf of the appellant is that the word " liability " in s. 13 (1) refers to a debt payable in money in the future. Apart from any other defects which it may have, this argument entirely ignores the expression " money's worth " in the statutory definition of the word " liability ".

In the present case the appellant received cash in advance. The liability he incurred was to render money's worth, that is, services in the near future to the customer who paid him the cash. In the meantime the customer trusted him to do the work. On these facts it is clear that he received credit, and did so in incurring a liability within the meaning which the court has to give to that word. He obtained such credit by fraud, and thus the offence under s. 13 is complete.

A number of authorities were referred to in the argument, but none of them was concerned with the same point, namely, whether credit can be obtained within the meaning of s. 13 (1) when the correlative obligation is to pay in money's worth. It is not necessary, therefore, to discuss them, though it may be observed in passing that *R.* v. *Jones* (1) ([1898] 1 Q.B. 119), where the accused obtained a meal in a restaurant with no means to pay for it, is, in many respects, the converse of the present case.

One final observation of a general character may be added. The present case was, on the evidence, a clear case of fraud. Mere delay in paying a debt or doing work, however, is not a criminal offence, and courts who try these cases will, no doubt, be on their guard against any attempt to abuse the section by bringing proceedings under it where there is no real evidence of fraud, but merely of procrastination. The court's power to award costs against a prosecutor may usefully be borne in mind in this connection.

Appeal dismissed.

Solicitors: *Registrar of Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* A. P. Pringle, Esq., *Barrister-at-Law.*]

SUN LIFE ASSURANCE SOCIETY *v.* DAVIDSON (INSPECTOR OF TAXES).
PHOENIX ASSURANCE CO., LTD. *v.* LOGAN (INSPECTOR OF TAXES).

[Court of Appeal (Singleton, Morris and Romer, L.JJ.), April 30, May 1, 2, 3, 17, 1956.]

Income Tax—Repayment—Management expenses—Life assurance companies—Expenses of changing investments—Brokerage and stamp duties—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5 *c.* 40), *s.* 33 (1).

Two life assurance companies were charged to income tax on their investment income and not on their profits. An essential part of their day-to-day business was investing their premium income and changing the investments of their life funds, and they claimed relief under s. 33 (1)* of the Income Tax Act, 1918, in respect of sums expended for brokerage and stamp duty in buying and selling investments, contending that these sums were " sums disbursed as expenses of management (including commissions) " within the section.

Held: the companies were not entitled to the relief claimed, since payments of brokerage and stamp duty made by a life assurance company in buying and selling investments in the ordinary course of its life assurance business were not sums disbursed as " expenses of management (including commissions) " within s. 33 (1) of the Act of 1918.

Capital & National Trust, Ltd. v. *Golder* ([1949] 2 All E.R. 956) followed.

Decision of Harman, J. ([1955] 3 All E.R. 552), affirmed.

[As to the Crown's right of election to assess an assurance company on its investment income, see 17 Halsbury's Laws (2nd Edn.) 132, para. 255; and as to relief for expenses of management of a life assurance company, see 17 Halsbury's Laws (2nd Edn.) 135, 136, paras. 267, 268; pp. 335-337, paras. 676-678. For a case on the subject, see 28 Digest 55, *283*.

For the Income Tax Act, 1918, s. 33 (1), see 12 Halsbury's Statutes (2nd Edn.) 27; and for the replacing provision in s. 425 (1) of the Income Tax Act, 1952, see 31 Halsbury's Statutes (2nd Edn.) 406, 407.]

Cases referred to:

(1) *Simpson* v. *Grange Trust, Ltd.*, [1935] A.C. 422; 104 L.J.K.B. 276; 152 L.T. 517; 19 Tax Cas. 231; Digest Supp.

(2) *Capital & National Trust, Ltd.* v. *Golder*, [1949] 2 All E.R. 132; *affd.* C.A., [1949] 2 All E.R. 956; 31 Tax Cas. 265; 2nd Digest Supp.

(3) *Liverpool & London & Globe Insurance Co.* v. *Bennett*, [1913] A.C. 610; 82 L.J.K.B. 1221; 109 L.T. 483; 6 Tax Cas. 327; 28 Digest 60, *304*.

(4) *Rosyth Building & Estates Co., Ltd.* v. *Rogers*, (1921), 8 Tax Cas. 11.

(5) *Southern* v. *Aldwych Property Trust, Ltd.*, [1940] 2 K.B. 266; 109 L.J.K.B. 719; 163 L.T. 364; 23 Tax Cas. 707; 2nd Digest Supp.

(6) *North British & Mercantile Insurance Co.* v. *Easson*, (1919), 7 Tax Cas. 463; 28 Digest 55, *r*.

(7) *London County Freehold & Leasehold Properties, Ltd.* v. *Sweet*, [1942] 2 All E.R. 212; 167 L.T. 175; 24 Tax Cas. 412; 2nd Digest Supp.

Appeal.

The appellant assurance companies claimed repayment of income tax paid by them for the year of assessment equal to the amount of tax on sums disbursed as expenses of management for the year ended Dec. 31, 1949, under s. 33 (1) of the Income Tax Act, 1918. The Crown objected to the claims to the extent and on the ground that the expenses included sums disbursed by the companies by way of brokerage and stamp duties. It therefore fell to the Special Commissioners to determine whether such sums were expenses of management reclaimable under s. 33 (1). In the case of the Sun Life Assurance Society the sum was £40,773, and in the case of the Phoenix Assurance Co., Ltd., it was £62,806, less consequential reduction of foreign life fund restriction £3,623, leaving £59,183 net. The Sun Life Assurance Society contended that purchases and sales of stocks and shares giving rise to payment of the commissions and stamp duties were part of the company's ordinary day-to-day activities, and the stocks and shares purchased were part of its ordinary trading assets, and on that ground it sought to distinguish *Capital & National Trust, Ltd.* v. *Golder* (2) in which the stocks and shares purchased and sold were part of the capital assets of the company. The Phoenix Assurance Co., Ltd., sought to distinguish the case on the ground that its investments, representing its life funds, constituted circulating capital of its trade, and it said alternatively that the case cited was wrongly decided. Both companies contended that the expenses were "sums disbursed as expenses of management (including commissions)" within the meaning of s. 33 (1). The Crown contended that the sums were not expenses of management allowable under s. 33 (1) on the authority of *Capital & National Trust, Ltd.* v. *Golder* (2) since (in the Phoenix Assurance Co., Ltd.'s case) they were directly referable to each several purchase and sale of a holding of investments and were to be treated as part of the cost, or as a deduction from the receipts of sale. The commissioners found that, in the case of each company, it was necessary for the company in carrying on its business to purchase investments out of its premium income and from time to time to sell or change investments as part of its ordinary day-to-day business activities. They held, however, that the expenses were so specifically referable to the transactions involved that they constituted part of the expenses of purchase or sale and were not expenses of management, and they therefore disallowed the claims. On Nov. 2, 1955, HARMAN, J. ([1955] 3 All E.R. 552) dismissed the companies' appeal against that decision, holding himself bound by the decision in *Capital & National Trust, Ltd.* v. *Golder* (2). The companies appealed to the Court of Appeal.

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* The terms of the sub-section are printed at p. 643, letter I, to p. 644, letter A, post.

Sir James Millard Tucker, Q.C., *L. C. Graham-Dixon, Q.C.*, and *J. L. Creese* for the Sun Life Assurance Society.

F. Heyworth Talbot, Q.C., and *S. M. Young* for the Phoenix Assurance Co., Ltd.

The Solicitor-General (*Sir Harry Hylton-Foster, Q.C.*), *Roy Borneman, Q.C.*, and *Sir Reginald Hills* for the Crown.

Cur. adv. vult.

May 17. The following judgments were read.

SINGLETON, L.J.: These two appeals raise the same points, and were heard together at the request of counsel, or, perhaps I should say, that after we had heard argument on one, counsel in the other adopted the argument on that appeal and added some submissions on his case which, though short, were useful. Both appeals are from judgments of HARMAN, J., dismissing appeals from decisions of the Special Commissioners of Income Tax. I propose to deal generally with the appeal of the Sun Life Assurance Society (whom I shall call "the society").

The appeal arises from, or under, s. 33 (1) of the Income Tax Act, 1918, which provided:

> "Where an assurance company carrying on life assurance business, or any company whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom, or any savings bank or other bank for savings, claims and proves to the satisfaction of the Special Commissioners that, for any year of assessment, it has been charged to tax by deduction or otherwise, and has not been charged in respect of its profits in accordance with the Rules applicable to Case I of Sch. D, the

> company or bank shall be entitled to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year: Provided that—(a) relief shall not be given under this section so as to make the tax paid by the company or bank less than the tax which would have been paid if the profits had been charged in accordance with the said rules."

The question for decision is whether certain payments made by the society fall within the words "any sums disbursed as expenses of management (including commissions)". This section took the place of a like provision in the Finance Act, 1915.

The reason for, and the object of, the section is clearly stated in the judgment of Romer, L.J., in *Simpson* v. *Grange Trust, Ltd.* (1) ((1934), 19 Tax Cas. 231 at p. 246):

> "The object, or the general object, of the section cannot be in doubt. There are many companies the principal part of whose income is derived from investments, and in respect of those investments the companies have been taxed by deduction at the source or by direct assessment, but they never had an opportunity of bringing in against their profits—that is to say, deducting from their profits for the purposes of taxation—their management expenses, either because they were not trading companies at all, or because, being trading companies, the Crown had elected to tax them on the income of their investments rather than under Sch. D. It was that injustice—anything can be called an 'injustice' under the Income Tax Acts—that the section was intended to remove";

and in the speech of Lord Wright (ibid., at p. 250):

> "The section reproduced s. 14 (1) of the Finance Act, 1915, which first gave relief in such cases. An ordinary trading company assessed on the balance of its profits and gains for the year under Sch. D, Case I, is entitled, in order to arrive at the balance, to an allowance for outlays incurred for the purpose of earning its profits: the companies or concerns enumerated in s. 33 (1) whose income is in the main taxed by deduction, would be placed at a disadvantage if no allowance was made to them for management expenses."

The Crown elected to tax both the appellant companies—and, I believe, all other British insurance companies—on the income from their investments rather than under Sch. D. Consequently, since the year 1915, companies so taxed have been entitled to the relief which is now given by s. 33 of the Income Tax Act, 1918. Whether sums disbursed are disbursed as expenses of management seems, at first sight, to be a question of fact, but it is not quite so simple as that, as the findings of the Special Commissioners show.

The history of the society is set out in para. 4 of the Case and the nature of its business in para. 5. I must read paras. 6, 7, 8 and 9 of the Case:

> "6. The annual premiums payable on the policies issued by the society are fixed at the date of issue of the policies and are unalterable throughout the life of the policies. The premiums are calculated on the basis that the society will invest them at interest and continue to invest its income from investments. In fixing the premiums payable on its policies the society assumes a net rate of interest or dividend after deduction of income tax and takes into account other factors such as mortality rates and the proportion of the expenses of management of its business which will have to be borne out of the premiums, less the income tax recoverable under s. 33 in respect of these expenses. The business of life assurance is highly competitive. It is therefore essential that, in order to keep its premiums as low as possible, the society should invest its premiums to the best advantage and, as necessary, change the investments from time to time. Moreover, it is

> necessary that the premiums should be invested to earn a rate of interest sufficient to meet the society's obligations under its policies as well as to provide profits for the benefit of participating policyholders and of shareholders. A constant watch must also be kept on the society's investments to avoid excessive depreciation which might jeopardise the security of the life assurance fund. Thus in the ordinary course of carrying on its business it is necessary for the society to purchase investments and from time to time to sell or change such investments. The investments made by the society are part of its circulating capital and do not constitute part of its fixed capital assets.
>
> " 7. In order to carry out the day-to-day work in respect of the investment and reinvestment of its moneys in the life assurance fund the society has a special staff of employees in the investment department. This department is concerned with buying investments quoted on the Stock Exchange and also with investing the society's money privately, that is, not through the agency of members of the Stock Exchange. In addition, the society makes investments by advancing moneys at interest to policyholders on the security of their policies.
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> " 8. The amount of the salaries paid for the year ended Dec. 31, 1949, to all employees of the society including the staff of the investment department and those dealing with advances to policyholders was included as part of the expenses of management in the society's claim under s. 33 for the year of assessment 1949-50. No objection to any part of the amount so included was made by the respondent. In addition to salaries of staff which amounted to £513,678, no objection was raised by the respondent to the inclusion among management expenses of the following amounts disbursed by the society in the year ended Dec. 31, 1949, which management expenses were the subject of the claim under s. 33 for the year of assessment 1949-50."

These items, as we see, in the figures included:

> " Travelling allowances: staff catering: rents, rates and taxes: Inland Revenue stamps on policies: law charges for investigation of title to property mortgaged to the society under a scheme for the purchase of houses by policyholders: printing and stationery.
>
> " 9. The respondent did, however, object to the inclusion in the claim under s. 33 of the sum of £40,773 being the amount included therein in respect of commission to stockbrokers and stamp duties disbursed by the society in connection with the purchases and sales of investments, such as are referred to in para. 6 above. Moreover, the society had each year since the passing of the Finance Act, 1915, up to and including the year of assessment 1948-49, claimed and been allowed relief under s. 33 in respect of expenses which included similar amounts disbursed by way of brokerage and stamp duties, the respondent not having objected to their inclusion as part of the expenses of management for such years."

The objection to the items included in the figure of £40,773 was based on a decision of this court in *Capital & National Trust, Ltd.* v. *Golder* (2) ([1949] 2 All E.R. 956). On behalf of the society it was claimed that sums paid for brokerage charges (or commissions) and stamp duties were disbursements necessarily made by it in the ordinary day-to-day trading activities of the society and that they were " sums disbursed as expenses of management (including commissions) " within the meaning of those words in s. 33.

On behalf of the Crown, it was contended that the case was governed by the decision in *Golder's* case (2), in which it was held that disbursements of a similar kind made by an investment trust company were not on the facts there found sums disbursed as expenses of management. The Special Commissioners held that the claim of the society in regard to items comprised in the figure of £40,773 failed. Harman, J., dismissed the appeal of the society from that decision, adding ([1955] 3 All E.R. at p. 558):

> " I do not conceal the fact that I should not have reached this conclusion unaided, but the authority standing where it does binds me and is to my mind indistinguishable and I must follow it."

On the appeal of the society to this court, counsel for the society submitted that this case can be distinguished from *Golder's* case (2) and, while recognising that the judgment in that case is binding on us, argued that in the case of an insurance company carrying on a trade or business which embraced day-to-day purchases and sales of stocks, the disbursements to which objection was taken should be held to fall within the relief given by the section.

In *Liverpool & London & Globe Insurance Co.* v. *Bennett* (3) ((1911), 6 Tax Cas. 327), Hamilton, J., used words which seem to me to be helpful in considering the activities of insurance companies generally (ibid., at p. 357):

> " There is another point with regard to the insurance company. It embarks its funds in its business simply by having money ready to pay its debts with. We are not here concerned with manufactories or the maintenance of a stock which is to be sold. The business of insurance consists in making promises to pay, by way of indemnity, in futuro and contingent sums in consideration of present payments of money, and the whole business therefore, apart from the wisdom and prudence with which it is conducted, consists in being ready to meet the liabilities if they accrue, and to the extent to which they accrue, out of one class of funds or another. Consequently the money is embarked in the business as soon as it is money which belongs to and is available to the insurance company. If they have paid it away in the shape of dividends, it is no longer available, but all their assets substantially are only possessed for the purpose of meeting the contingencies of losses on the policies if they should fall in. I am speaking of fire insurance only as an illustration, but I do not think that either indemnity business or, for this purpose, life business differs, although of course the calculation of risks and the mode of carrying out the transaction are enormously different.
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> " Now, the practice of English insurance companies, which is found to be the practice of the companies in question here, has, as far as I know, always been to start from the very first accumulating large accessible funds for the purpose of meeting losses. The advantages are numerous. It renders the calling up of unpaid capital an extremely improbable event; it presents to the insuring world an enormous reserve of security; it assures within the company a uniform dividend and a uniform state of solvency apart from the changes and chances of a business which is essentially a business of hazards, and consequently it is the very pivot of the conduct of a fire insurance business to build up with prudence, by not distributing surpluses of premiums as and when they are received, large reserve funds, and to invest them, of course, so that they may not be fruitless while they are held in hand. That is the policy that is pursued here under class C, and thanks to it and thanks to the usual policy of not putting all the eggs in one basket, either with regard to the risks or the investments, the companies have under all imaginable contingencies large available funds in different parts of the world readily realisable in case of need. As it appears from *Liverpool & London & Globe Insurance Co.* v. *Bennett* (3), that emergency practically does not arise. But the funds received from the investments are just as much part of the receipts of the business, and the making of the investments is just as much part of the mode of conducting the business, as the taking of the risks, and except to the extent to which the current account at the bank, fed by premiums on the one side and depleted by losses paid on the other, is

> A sufficient to carry on the business, all these funds in their several degrees may have to be called upon at some time or in some way or other."

It is found in the Case that it is necessary for the society in the ordinary course of carrying on its business to purchase investments and from time to time to sell or change such investments and that that is part of the day-to-day work of the society. B What, then, is the meaning of the expression "any sums disbursed as expenses of management"? If it be contended that the words are limited to the head management, I would draw attention to *Rosyth Building & Estates Co., Ltd.* v. *Rogers* (4) ((1921), 8 Tax Cas. 11), in which the Lord President (when dealing with a claim under s. 14 of the Finance Act, 1915 (ibid., at p. 16)) treated the expression as meaning "the expenses of managing its business" C incurred in the year in which it has been so charged; and LAWRENCE, J., in *Southern* v. *Aldwych Property Trust, Ltd.* (5) ((1940), 23 Tax Cas. 707 at p. 711), said that the question was whether the costs of advertising were expenses of the management of the company's business.

The expression "expenses of management" is, I think, taken from the statutory forms in Sch. 1 to the Assurance Companies Act, 1909, which are D required under s. 4 of the Act and which have to be deposited with the Board of Trade (s. 7). I draw attention to the expression "expenses of management" in the revenue account which is form (A) in Sch. 1 to the Assurance Companies Act, 1909*. There was a similar provision in s. 5 of the Life Assurance Companies Act, 1870, and the statutory forms for revenue accounts in the different schedules contain the same words "expenses of management". The making of invest- E ments is, to use the words of HAMILTON, J., "part of the mode of conducting the business" of the society. Apart from the decision in *Capital & National Trust, Ltd.* v. *Golder* (2), I should have thought that the words "expenses of management" meant expenses properly incurred in the course of managing or conducting the business or, to put it in another way, the expenses of running the business.

The Special Commissioners in their findings set out in para. 15 recognise the F fact that, in the ordinary course of carrying on its business, it is necessary for the society to purchase investments out of its premium income and from time to time to change such investments. They say in para. 15 (5) that there is a fundamental difference between the business carried on by the society and the business of an investment company such as was considered in *Golder's* case (2) but they hold in para. 15 (6) that brokerage and stamp duties

> G "being not general expenses of conducting the society's business but expenses specifically referable to and only incurred by reason of the purchase, are expenses of the purchase and not expenses of management."

On this ground they held that the claim of the society failed. It is necessary to ask oneself why, if it is part of the day-to-day business of the society to purchase investments, the costs of carrying through the transaction is not part H of the expenses of managing or conducting the business.

Now, whenever the society purchases stocks or shares, it is of necessity bound to pay stamp duty and brokerage. The former is an obligation by statute, and the latter is a well-recognised charge under the rules of the Stock Exchange, a charge which includes, not only payment for the carrying through of the transaction, but also remuneration to the broker for his advice for which he is not I paid unless a transaction of buying or selling follows. If the purchase is part of the ordinary day-to-day business of the society it is difficult at first sight to see why something which the society has to pay in order to carry out the purchase is not an expense of the ordinary running of the society's business. It is argued that the expenses of management end when a decision is made to buy, and thus that the cost of stamp or brokerage which takes place later is not an expense of management. That cannot be right, for someone on behalf of the society has to receive and to check the securities and the broker is under the duty of seeing to the transfers and forwarding the securities. That is a part of his work in return for the remuneration he receives by way of brokerage or commission. It seems to me to be impossible to split up the transaction in this way: to do so is to depart from common sense.

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* See 3 **HALSBURY'S STATUTES** (2nd Edn.) 395.

If there had not been any authority on this question, I am inclined to the view that I should have said that the expenses here in question were expenses of management, but I find myself faced with two difficulties. The first is that which faced HARMAN, J., viz., the decision of this court in *Capital & National Trust, Ltd.* v. *Golder* (2) to which I was a party; and the second is that counsel for the Crown did not submit any argument on whether that case was rightly decided or not, but rested his submission on the decision, which he submitted was conclusive of the appeal so far as this court is concerned. In those circumstances, it would not be right for this court, in the absence of argument on one side, to express any opinion on the decision. We are bound by it if it covers this appeal. HARMAN, J., was unable to distinguish this case from *Golder's* case (2).

It was said, on behalf of the society, that the decision in *Golder's* case (2) was not conclusive on this appeal. Support for this can be found from para. 15 (5) of the Stated Case. It was pointed out that the society is a trading concern and carries on different branches of business, and that its investment business is related to its circulating capital, whereas in *Golder's* case (2) the purchases and change of stocks were in relation to that which I may describe as the capital of the company. In a case such as *Golder's* case (2), the cost of changing from one form of security to another—be it from real property to stocks and shares, or from one stock to another—might well be a charge against capital. and not an expense of management, even though the management of the company had devoted time to the consideration of it. This, however, was not the basis of the judgment in *Golder's* case (2), as appears from the judgment of TUCKER, L.J. ([1949] 2 All E.R. at p. 958):

> "I would only add that the argument of counsel for the company, as it seems to me, is really that these expenses were 'expenses of management', because they were expenses incurred by the management in carrying out the business of the company. That seems to me a totally different thing. What we are concerned with here is the expenses *of* management, not expenses incurred *by* the management in carrying out the proper business of the company."

I think it right to say that the admirable argument which we had on the activities of insurance companies cast new light on the position so far as I was concerned. It would have been of great advantage if this case had been heard before *Golder's* case (2) came before the court. The Crown now seeks to extend the decision in that case to insurance companies. At the moment only some of the expenses claimed by the society are attacked by the Crown, after many years' acceptance of them as legitimate, but from answers given during the argument, it appears that other objections may follow and that much of that which has been regarded as within the relief given to insurance companies may disappear if the contention of the Crown is upheld.

I feel that it is the duty of this court to say that, on the authority of the decision of this court in *Capital & National Trust, Ltd.* v. *Golder* (2), the appeal should be dismissed.

In the appeal of the Phoenix Assurance Co., Ltd., counsel for the company submitted that the character of the purchases of stocks and shares was different from that in *Golder's* case (2). In the latter, the purchaser was buying to hold, whereas an insurance company bought for the purposes of its trade or business. He summed up the case in this way: "If you cannot carry on a part of your trade without paying stamp duties, the payment is a necessary expense of your trade or business." There is no material difference between the two appeals

A before the court, and the appeal of the Phoenix Assurance Co., Ltd. should be dismissed.

MORRIS, L.J. (read by SINGLETON, L.J.): Each of the appellant companies is, in the wording of s. 33 (1) of the Income Tax Act, 1918, " an assurance company carrying on life assurance business ". In the case of each

B > " it has been charged to tax by deduction or otherwise, and has not been charged in respect of its profits in accordance with the Rules applicable to Case I of Sch. D . . ."

It follows, therefore, that, in reference to its life assurance business, in respect of which there is the separation enjoined by s. 3 of the Assurance Companies Act, 1909, each is

C > " entitled to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) . . ."

Each company made claims for repayment and the only items in issue are sums paid in respect of brokerage and stamp duties in connection with the purchases D and sales of investments.

It is not in contest that amounts paid by the companies in respect of brokerage and stamp duties are " sums disbursed ". Nor do I understand that it is disputed that they are " sums disbursed as expenses ". The sole dispute is whether they are sums disbursed as expenses " of management ".

The companies, citing the decision in the Court of Session in *North British &* E *Mercantile Insurance Co.* v. *Easson* (6) ((1919), 7 Tax Cas. 463 at p. 473), submit that the words of s. 33 are expressed in ordinary and popular language on which no special and technical meaning can be placed. The companies point to certain judicial phrases which have been employed and which it is submitted are helpful indications as to the ordinary meaning of the words. Thus in *Rosyth Building & Estates Co., Ltd.* v. *Rogers* (4) ((1921), 8 Tax Cas. 11 at p. 16), the Lord President F spoke of " the expenses of managing its business ". So in *Southern* v. *Aldwych Property Trust, Ltd.* (5) ((1940), 23 Tax Cas. 707 at p. 711) LAWRENCE, J., spoke of " expenses of the management of the respondent company's business ". *London County Freehold & Leasehold Properties, Ltd.* v. *Sweet* (7) ([1942] 2 All E.R. 212) proceeded on an acceptance of such an interpretation of the words. MACNAGHTEN, J., said (ibid., at p. 213):

G > " It was said by counsel on behalf of the appellants that the words ' expenses of management ' in s. 33 must mean the expenses of the management of the business of the company, and that view of the meaning of those words is not disputed by the Crown."

The findings in the present case show: (a) that it is essential for the companies H to purchase investments, to keep a constant watch on these investments and, as and when necessary, to sell or to change their investments; (b) that purchases and sales of investments form an inherent part of the ordinary day-to-day business activities of the companies; (c) that amounts expended on brokerage and stamp duties are necessarily paid in the course of the transactions of purchase and sale.

I The companies submit that, as the " sums disbursed as expenses " (for instance the brokerage and stamp duties) are necessarily disbursed in the course of transactions which are necessary and which are inherent in the ordinary day-to-day business activities, they are sums disbursed as expenses " of management ". The Crown submit that in this court the matter is concluded by the decision in *Capital & National Trust, Ltd.* v. *Golder* (2) ([1949] 2 All E.R. 956). Counsel for the Crown submitted that that case was not distinguishable. He submitted that no occasion arose for him to rebut such contentions of the companies as involved criticism of it.

When considering these appeals it seems to me that attention must be focused on an analysis of the transactions which are in question, so that it can be decided whether sums disbursed as expenses are or are not expenses " of management ". The way in which entries are made in books cannot therefore be decisive. Nor is a decision advanced by considering what attitude the Crown have at any time adopted in regard to the items under immediate review or in regard to other items. Thus items of the kind now being considered were for many years accepted by the Revenue as qualifying for entitlement for repayment of tax. So also other items which possess features of similarity (such as law charges for investigation of title to property mortgaged under a house purchase scheme or Inland Revenue stamps on policies) have been accepted. These facts and circumstances do not advance the solution of the problem. Nor does it assist to have in mind that a private individual who buys shares may so closely associate what he pays for brokerage and stamps with what he pays for the shares that he may loosely refer to his total outlay as being what the shares have cost him.

When the appellant companies purchase shares, they have to pay the price of the shares, and they have to expend sums in the course of the transaction of purchase. It is not suggested that the price paid for the shares could be regarded as being money disbursed " as expenses of management ". In *Golder's* case (2), one point adverted to was whether sums which must necessarily be disbursed in the process of buying shares should be regarded as partaking of a capital nature and of being, for that reason, outside the ambit of the words " expenses of management ". This point, however, was not decided but was left open by Croom-Johnson, J., and by the Court of Appeal.

When it is said that sums paid in respect of brokerage and stamp duty are part of the cost of acquiring an investment or are part of the cost of the investment, a new word, the word " cost ", is introduced which in turn calls for analysis. The " cost " will include price. The price paid for shares will be within the words " sums disbursed ", but not within the words " as expenses of management ". In regard to the sums disbursed for brokerage and stamp duty, the question seems to be whether these sums are expenses which are merely the result of, or consequent on, decisions made or actions taken in the managing of insurance business, so that these expenses are not part of the expenses " of management " or, inasmuch as they are necessary expenses in the carrying out of a necessary function in the managing of insurance business, whether they are expenses " of management ".

In approaching this question, it seems to me that counsel for the Crown is correct in submitting that it is essential to decide whether *Golder's* case (2), which is binding on us, is distinguishable. It must be recognised that the functions of management may vary as between different concerns. It is to be noted also that, in *Golder's* case (2), no actual claim was made for sums representing brokerage and stamp duties relating to investments by way of capital expansions, though there was no admission that such a claim could not lawfully be made. The claim was advanced in regard to sums representing brokerage and stamp duties in connection with changes of investments. It was held that such sums were not " expenses of management ".

It is said that assurance companies carry on a trade, whereas investment companies do not. It is said that the investments of assurance companies constitute circulating capital, whereas the investments of investment companies are their fixed capital. While these are differences, in my judgment, they do not form any basis for distinguishing the decision in *Golder's* case (2) as being inapplicable to the present case. It is said that, in the case of assurance companies, investments are an inevitable inherent necessity of their trade and that the changing of investments is essential, whereas such changing is not essential in the case of investment companies. Stated otherwise, it was said that, from the point of view of an investment company, investments were rather of static nature whereas investing and the changing of investments was for an assurance company a dynamic activity. I doubt the significance of these contrasts: both investment companies and assurance companies must constantly be concerned in buying and selling investments: the extent and degree of their activities may vary. I can see no reason why the decision in *Golder's* case (2) does not govern the present cases.

The question how the issue which is raised might have been decided in the absence of authority does not arise, therefore, and as we have not heard full argument on the question I express no opinion. I would dismiss the appeals.

ROMER, L.J.: Notwithstanding the attractive provocation of the submissions of counsel for the Sun Life Assurance Society in opening his appeal, counsel for the Crown declined to allow himself to be drawn into a discussion as to the merits of *Capital & National Trust, Ltd.* v. *Golder* (2) ([1949] 2 All E.R. 956). The logic of his attitude in this respect is unassailable. If the decision in that case, *Capital & National Trust, Ltd.* v. *Golder* (2) is applicable to the cases now before us, then we must apply it, whether the decision was right or wrong, whilst, if it is inapplicable, the soundness or otherwise of the decision becomes irrelevant; on either view, therefore, says counsel for the Crown, this is neither the time nor the place to put *Golder's* case (2) on its trial. Realising, as I do, the force of this, and having heard arguments on one side but not on the other, I express no opinion as to the validity of counsel's impeachment of the decision.

The ratio decidendi of *Golder's* case (2) as it seems to me, was that the phrase " expenses of management ", as used in s. 33 (1) of the Income Tax Act, 1918, means, in effect, the expenses of the managers of a company (who would normally be the board of directors) and not the expenses incurred by the company in the general management of its business; in other words, the phrase is directed to the expenses involved in shaping policy, and in other matters of managerial decision, and does not extend to expenses subsequently and consequently incurred at lower levels of the company's executive structure.

If this be so, I am unable to see any relevant distinction between the disbursements which were disallowed in *Golder's* case (2) and those which are in issue on the present appeals. It is just as much a part of the day-to-day business of an investment trust as it is of that of an assurance company to purchase and change the investments which represent its capital; and it appears to me that the question whether that capital is fixed or circulating is as immaterial to the present issue as is the difference in purpose which each type of company may have in mind when investing or reinvesting in stocks and shares. I therefore think that the principle of *Golder's* case (2) governs the cases which are now before us and that the appeals must accordingly be dismissed.

I would only add one further observation. The " expenses of management " which the Crown are challenging in these cases are only of a limited character. If, however, the challenge is well founded, as we must hold it to be, so many other expenses, hitherto undisputed but indistinguishable in quality, would appear to fall within its scope as to defeat in great measure the object of s. 33 (1) as expounded by the late LORD ROMER in *Simpson* v. *Grange Trust, Ltd.* (1) ((1935), 19 Tax Cas. 231). This in itself, and apart from sundry other considerations, casts grave doubt, as it seems to me, on the validity of the construction of the section for which the Crown contend and lends corresponding force to the submissions of the appellant companies.

Appeals dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Hair & Co.* (for the Sun Life Assurance Society); *Slaughter & May,* (for the Phoenix Assurance Co., Ltd.); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

BEACH *v.* REED CORRUGATED CASES, LTD.

[QUEEN'S BENCH DIVISION (Pilcher, J.), May 7, 8, 9, 10, 11, 18, 1956.]

Damages—Measure of damages—Loss of earnings—Incidence of income tax—Relevance of plaintiff's intentions as to disposition of his private income.

Company—Director—Managing director—Wrongful dismissal—Measure of damages—Managing director of company—Relevance of certain factors in assessing damages—Income tax—Directors' fees—Prospective benefit under retirement pension scheme.

The plaintiff's service agreement as managing director and general manager of the defendants was terminated in circumstances which amounted to his wrongful dismissal and he sued the defendants for damages. The defendants admitted liability but contested the amount of the damages. The plaintiff was fifty-four years old and in good health. His service agreement had been for fifteen years from Dec. 21, 1950, at a salary of £5,000 per annum, and in the event of his being prevented by ill health from performing his duties as managing director and general manager he was entitled under the agreement to serve the defendants as technical adviser at two-thirds of his salary as managing director. The plaintiff had been receiving director's fees of £578 per annum, but his service agreement gave him no contractual right to these. He was also a member of the defendants' retirement scheme, and, on his dismissal, had elected to have a life annuity thereunder. Although he conceded that the provision of this scheme regarding termination of employment applied in the circumstances, yet he contended that he had lost the amount which he would have to pay to insure such further benefits as he would have had if his service had continued, since all contributions to the insurers under the scheme were paid by the defendants. The plaintiff possessed investments having a value of £500,000 or more and had a gross income from investments of over £20,000 per annum. For many years he had been in the habit of covenanting to pay substantial portions of his gross income to relatives, thereby legitimately diminishing his taxable income. At the date of the hearing these covenants were for an aggregate of £4,900 per annum, but he intended to increase their amounts. The plaintiff also intended in the future to hand over substantial sums of capital to his children and it was possible that by investing in non-income producing property he could dispose of further parts of his investments in such manner that liability to income tax would not be attracted. The plaintiff had also a prospective earned income of £1,000 per annum derived from two businesses in which, since his dismissal, he had invested money. The plaintiff's gross loss from Apr. 5, 1956, after giving credit for £1,000 per annum earned income, amounted to £48,000 or, if director's fees from the defendants were excluded, £43,000, in which estimate no deduction was made for the possibility of ill health compelling the plaintiff to act only as technical adviser at the lower salary. If income tax (including surtax) were deducted, and assuming that the incidence of tax due to unearned income were not taken into account and that covenanted annual payments were discharged out of unearned income, this loss would be, it was estimated, £22,000. If the plaintiff's unearned income were taken into account, the plaintiff's loss, as computed by the defendants and having regard to liability to income tax and surtax on the whole of his income and prospective reduction of covenanted payments (thus increasing his liability to tax), would be about £4,650.

Held: (i) in determining by what amount the gross damages should be reduced in view of the incidence of income tax (including surtax) at a rate appropriate not merely to the plaintiff's earned income but to the aggregate of his earned and investment income, regard would be had to the fact that the plaintiff was able and intended to dispose of his capital and income therefrom in such manner that his liability to income tax would be diminished.

Observations of LORD GODDARD in *British Transport Commission* v. *Gourley* ([1955] 3 All E.R. at p. 806) applied.

(ii) as the defendants were under no contractual obligation to the plaintiff by virtue of his service agreement to pay to him director's fees, the amount of prospective director's fees from Apr. 6, 1956, onwards would not be taken into account in assessing the damages.

(iii) no sum would be included in relation to any alleged loss of prospective benefit under the retirement scheme.

(iv) in all the circumstances the amount of the general damages should be £18,000.

[As to collateral liabilities and benefits in assessing the measure of damages, see 11 HALSBURY'S LAWS (3rd Edn.) 240, para. 408; and for cases on the subject, see 17 DIGEST (Repl.) 80, 81, *27-38*.]

Cases referred to:

(1) *British Transport Commission* v. *Gourley*, [1955] 3 All E.R. 796.

(2) *Chaplin* v. *Hicks*, [1911] 2 K.B. 786; 80 L.J.K.B. 1292; 105 L.T. 285; 17 Digest (Repl.) 89, *96*.

(3) *Abrahams* v. *Reiach (Herbert), Ltd.*, [1922] 1 K.B. 477; 91 L.J.K.B. 404; 126 L.T. 546; 17 Digest (Repl.) 98, *146*.

(4) *Deverill* v. *Burnell*, (1873), L.R. 8 C.P. 475; 42 L.J.C.P. 214 ; 28 L.T. 874; 17 Digest (Repl.) 95, *119*.

Action for wrongful dismissal.

The plaintiff, Kenneth Newton Beach, claimed damages against Thompson & Norris Manufacturing Co., Ltd., in respect of the termination of his contract of service on Aug. 26, 1954. He claimed that the termination was a breach by the defendants of that contract. The name of Thompson & Norris Manufacturing Co., Ltd. was changed on Apr. 1, 1956, to Reed Corrugated Cases Co., Ltd., and leave was given at the trial to amend the name of the company on the writ and in all subsequent proceedings. The plaintiff had joined the defendants in 1924 and had been managing director since 1940. On Dec. 21, 1950, he entered into a service agreement with the defendants whereby he was appointed managing director and general manager of Thompson & Norris Manufacturing Co., Ltd. for a period of fifteen years. The agreement provided:

> "(a) That the plaintiff would hold the said offices of managing director and general manager (subject as provided in the agreement) for a term of fifteen years from Dec. 21, 1950, provided that if he should at any time cease to be a director of the defendants he should ipso facto cease to be a managing director thereof but should continue as general manager of the defendant company's group. (b) That the plaintiff on his attaining the age of fifty-five years or at any time thereafter might on giving three months' written notice to the defendants resign from his offices of managing director and general manager (or if he should at such date be no longer the managing director from his office as general manager) and thereupon the defendants would appoint him and he would act as technical adviser to the defendants and the defendants would pay him therefore during the period which but for his resignation the agreement would have remained in force remuneration at the rate of £2,500 per annum. (c) That the defendants would pay to the plaintiff as remuneration for his services as general manager a salary which should be deemed to accrue from day to day at the rate of £5,000 per annum. (d) That in the event of the plaintiff becoming owing to ill health prevented from performing his duties under the agreement, he should be entitled to be appointed and to serve the defendants as technical adviser under the provisions set out in sub-para. (b) hereof whether or not he should have attained the age of fifty-five years."

By a supplemental agreement made on Aug. 17, 1951, between the plaintiff and the defendants and expressed to be supplemental to the agreement of Dec. 21, 1950, it was provided as follows:

> " (a) That in the event of the plaintiff becoming entitled under the agreement to be appointed technical adviser to the defendants, the defendants would appoint him and he would serve the defendants as a director of and as technical adviser to the defendants until he should attain the age of sixty-five years. (b) That as remuneration for his services under the supplemental agreement the defendants would pay him a yearly salary equivalent to two-thirds of the salary received by him under the agreement immediately before his appointment as technical adviser."

In addition to his salary as general manager and managing director the plaintiff was entitled to receive such director's fees in respect of his directorship of the defendants and their subsidiary companies as were from time to time determined by appropriate resolution. In all the material years the director's fees received by the plaintiff amounted to £578 per annum. As a director of the defendants the plaintiff was also entitled to substantial benefit under a retirement scheme.

In the years 1951-52 the defendants' prosperity suffered a set back, largely as result of the market for the defendants' products changing from a seller's to a buyer's market, and the shareholders were advised to accept an offer by the firm of A. E. Reed & Co., Ltd. to purchase the majority or the whole of the defendants' shares. This " take over " offer was accepted and had been put into effect by August, 1954. The plaintiff was not offered any position in the reorganised group of companies although he had always contemplated that he would be offered a suitable post so that he could continue his business career until the time came for him to retire. At the time of the take over the plaintiff had been joint managing director of the defendants under the terms of the service agreement but on Aug. 26, 1954, he received a letter from the defendants' solicitors terminating, as from that day, his contract of service. The defendants at first contended that the plaintiff had orally agreed to the cancellation of his service agreement as one of the conditions of the take over but this contention was not persisted in and the trial proceeded on the basis that liability for the breach of the service agreement was admitted by the defendants and the judgment, as reported, deals only with the amount of damages. In addition to his income as described above the plaintiff possessed a private fortune amounting to upwards of half a million pounds and he had a gross income from invested funds of something over £20,000 per annum. For many years he had been in the habit of covenanting a substantial portion of his gross income to relatives and old friends and in this way he had perfectly legitimately diminished his taxable income. The damages claimed by the plaintiff fell under three heads: (1) damages from the date of the breach of the agreements, namely, Aug. 26, 1954, to Apr. 5, 1956, which for the sake of convenience, being the end of the fiscal year, was taken as the date of the trial: (2) damages from Apr. 6, 1956, until the plaintiff reached the age of sixty-five on Dec. 9, 1966: and (3) loss of benefit under the defendants' retirement benefit scheme for directors. The figure for damages under (1) was agreed at £1,375 which was his net loss after payment of income tax and surtax on his earned and unearned income for the period in question.

Gilbert Paull, Q.C., and *H. P. J. Milmo* for the plaintiff.
John Megaw, Q.C., and *L. G. Scarman* for the defendants.

Cur. adv. vult.

May 18. **PILCHER, J.**, having referred to the agreements and stated the facts as set out above, continued, reading his judgment: The plaintiff's claim under (2) is by no means easy to assess. It is clear that for many years the plaintiff had been in the habit of covenanting by deed very large sums to a number of relatives and friends. By his first marriage, which was dissolved

A in 1938, his ex-wife being now forty-five years of age, he has two sons aged twenty-six and twenty-two respectively; the elder of these sons has recently married. Apparently no order for alimony or maintenance has been obtained by his ex-wife but the plaintiff has bound himself by deed to pay her a sum amounting to £900 per annum net for her life. He has moreover supplemented this sum substantially from time to time under deed of covenant. The plaintiff informed B me, and I accept his evidence, that he intends further to increase this sum covenanted to his ex-wife if necessary, his intention being that this lady shall enjoy in the future the same standard of comfort to which she has been used in the past. In the year ending April, 1953, the plaintiff was paying under covenants made on different dates a total gross sum of over £12,000 per annum. In the year ending April, 1954, this sum had been reduced to £9,600, in the year C ending April, 1955, to about £6,000 and in the year ending April, 1956, to about £4,900.

The plaintiff said in evidence, and again I accept his statement, that he intends in the near future to hand over substantial sums of capital to each of his sons by his first marriage. The plaintiff has married again and has two adopted daughters aged ten and six years. He told me that it was also his intention to hand over D capital to each of these children. To what extent by so doing he will be able to escape tax liability for the income on the capital so transferred to these children during their minority may be an interesting question. The plaintiff is no doubt an astute business man. He told me that when he judges it prudent he keeps substantial sums of money either on deposit or on his current account at the bank. His present gross income from investments is upwards of £20,000 E per annum. His obligations under deeds of covenant have, as I have pointed out, been reduced from over £12,000 per annum for the year ended April, 1953, to about £4,900 in the year ending April, 1956. This, he says, reflects the difficult period through which the defendants passed in 1951-53. The plaintiff, however, said that he intends in the future to increase his covenanted payments now that these difficulties have been surmounted.

F Since the plaintiff ceased to have any connection with Thompson & Norris Manufacturing Co. he has invested money in two other businesses which are at present in low water but which he hopes to work up into profitable concerns. It is not, I think, in dispute that he now draws from these two businesses about £1,000 per annum gross. The plaintiff says, and again I accept his evidence, that he does not intend to draw more than approximately the sum of £1,000 G per annum from these two businesses for a number of years, preferring to plough back profits until the businesses are firmly established.

The general conclusion to be drawn from the foregoing summary is that the plaintiff from April, 1956, to December, 1965, would, had he lived and remained in good health, have received from the defendants by way of salary a yearly sum of £5,000 gross under the service agreement. There was a provision in H the agreement that his salary might be increased but I do not propose to take any account of that fact in arriving at my assessment of damages. If the plaintiff had suffered from ill health or tendered his resignation as general manager and managing director of Thompson & Norris Manufacturing Co. during the currency of his service agreement he would have been entitled to receive two-thirds of his salary, namely, £3,333 as technical adviser to the company until he I reached the age of sixty-five. As from the year ending Apr. 5, 1958, he anticipates earning a gross sum of £1,000 per annum from the two new businesses in which he has interested himself. On the basis that he would have received his salary of £5,000 per annum and director's fees of £578 per annum during the remaining currency of the agreement of Dec. 21, 1950, and thereafter two-thirds of his salary until he attained his sixty-fifth birthday, he would, after giving credit for the £1,000 per annum earned as from April, 1958, have suffered a gross loss of over £48 000. If tax is deducted from the annual sums which make up this gross loss of £48,000 on the assmption that these sums alone would be subject to tax (that is, ignoring any additional tax liability arising from any unearned income of the plaintiff and assuming that any sums payable under covenants will be covered by such unearned income), the plaintiff's loss arrived at for the same period and on the same basis would have been over £22,000. The plaintiff is said to be in good health and in neither of these computations is any allowance made for the fact that he might die before attaining his sixty-fifth birthday, or be compelled to accept this lower salary of £3,333 owing to ill health.

The defendants have also prepared an elaborate schedule which is agreed not to be completely accurate in certain small matters of detail which I propose to ignore. It is based on the assumption that the plaintiff's gross unearned income would remain at just over £18,000 per annum until he reached the age of sixty-five. It also assumes that the sums at present made under covenant would diminish through the years, thus increasing the plaintiff's liability to surtax. It also assumes that the plaintiff does not make any capital gifts to his wife, children or adopted children. On this basis the defendants calculate that having regard to the incidence of income tax and surtax, the plaintiff would have lost between April, 1956, and his sixty-fifth birthday a net sum of about £4,650.

The problem with which I am faced is to assess the general damages to which the plaintiff is entitled in the light of the principles laid down in *British Transport Commission* v. *Gourley* (1) ([1955] 3 All E.R. 796), the top limit being something of the order of £48,000 if it is proper to take the gross loss and to include director's fees, and £4,650 if the defendants' calculation based on deduction of income tax and surtax and the reduction of payments under covenant is accepted.

I say at once that it was not seriously contended by counsel for the plaintiff that the plaintiff was entitled to recover his gross loss in full. I should also add that I do not think in all the circumstances that it is proper to include as a constituent of the gross figure the yearly loss of £578 from director's fees. The amount of such fees would, no doubt, be voted yearly by appropriate resolution and might be substantially reduced if business were bad or increased if it were good. It is not impossible that the directors might, in certain circumstances, have decided to forgo all their directors' fees. The plaintiff's service agreement does not provide for the payment of director's fees of any stated amount. Whilst the inclusion or exclusion of director's fees for the contractual period from the plaintiff's gross claim involves a substantial gross figure, this figure was not included as an item of loss in the original or amended claim. Whilst the plaintiff would no doubt have received a substantial figure from the director's fees during the remainder of the period covered by his agreement, there was no contractual obligation on the defendants to pay him such fees or any fees, and I therefore propose to ignore them.

In *British Transport Commission* v. *Gourley* (1) the learned trial judge awarded the plaintiff the sum of £10,000 for pain and suffering, loss of amenities, and expenses actually incurred. No dispute arose about this sum in the appellate courts. In addition, he awarded the plaintiff the sum of £37,720 by way of general damages. After a careful analysis of all the evidence and the figures put before him, he indicated that if it should ultimately be decided that incidence of income tax and surtax ought to be taken into account, he would have awarded the plaintiff £6,695 as general damages in respect of diminution in his future earning capacity resulting from the disability which he suffered following the accident for which the defendants were responsible.

I would like, first of all, to cite a passage from the speech of EARL JOWITT. He is there dealing with the duty which will lie on the court in assessing damages in cases such as *British Transport Commission* v. *Gourley* (1) and, possibly, also cases such as this case ([1955] 3 All E.R. at p. 803):

> " It will, no doubt, become necessary for the tribunal assessing damages to form an estimate of what the tax would have been if the money had been

> A earned, but such an estimate will be none the worse if it is formed on broad lines, even though it may be described as rough and ready. It is impossible to assess with mathematical accuracy what reduction should be made by reason of the tax position, just as it is impossible to assess with mathematical accuracy the amount of damages which should be awarded for the injury itself and for the pain and suffering endured."

B It should be borne in mind that in *British Transport Commission* v. *Gourley* (1) the plaintiff's earned income was so large that no account seems to have been taken of his unearned income from investments and the learned trial judge's assessment of damages on the lower basis (which was accepted as a figure by both parties in the appellate courts) was arrived at solely on a consideration of diminution of earned income after deduction of tax and surtax at the appropriate
C rate. In dealing with special damage, that is to say, loss actually incurred up to the date of trial, LORD GODDARD, with whose speech LORD RADCLIFFE and LORD SOMERVELL expressly agreed, said ([1955] 3 All E.R. at p. 805):

> " But, in considering special damage in these cases, the rate of tax to be taken must, as it seems to me, be the effective rate of income tax and, if
> D necessary, surtax, which would have been applicable to the sums in question if they had been earned. That rate depends on the combination of a number of factors that may vary with each case—allowances, reduced rates, surtax rates, other income of the claimant or his wife, charges or reliefs. The task of determining it may not always be an easy one, but, in complicated cases, it is to be hoped that the parties, with the help of accountants, will be able to
> E agree figures. If not, the court must do its best to arrive at a reasonable figure, even though it cannot be said to be an exact one."

Dealing with general damages, he says (ibid., at p. 806):

> " In cases where surtax is payable, and the rate has been affected by private income, the nature of that private income will be relevant. If it is a life annuity under a will or settlement, it may well be expected to continue.
> F If it is disposable investments, which might be sold at any time or transferred to a child, less, perhaps little, regard should be had to it."

In the case with which I have to deal, the plaintiff has a large private fortune and an income of, as I have said, over £20,000 derived from private investments. He also has, for my purpose, an earned income of £1,000 per annum. Out of this
G income he has at present engaged himself to pay a gross yearly sum of about £2,600 to his ex-wife for her life. In addition, he has entered into seven-yearly covenants to pay to other relatives and friends the gross yearly sum of about £2,300. The total gross yearly sum which he pays under covenant has, as I have said, diminished since 1953 from about £12,000 to about £4,900, but I accept the plaintiff's evidence that he intends, in the immediate future, substantially to
H increase the amounts paid under covenant. I also accept his statement that he intends shortly to make substantial capital provision for his wife, his two sons, and his adopted daughters. What the amount of this capital provision will be, I do not know; nor do I know what uninvested sum the plaintiff may now have in his deposit or current accounts at the bank.

I mention these matters because of the concluding sentence from the speech
I of LORD GODDARD which I have already quoted. The case now before me would seem to be essentially the type of case envisaged by LORD GODDARD when he says that the nature of private income will be relevant. The plaintiff has a large sum of, to use LORD GODDARD's words, " disposable investments, which might be sold at any time or transferred to a child ". In such a case, LORD GODDARD's view was that " less, perhaps little, regard should be had to it ", namely, private income, when arriving at the amount by which gross damages should be diminished owing to tax considerations. I appreciate that the passage from LORD GODDARD's speech, to which I am referring, was not necessary for the decision

in *British Transport Commission* v. *Gourley* (1). This passage was, however, rightly stressed by counsel for the plaintiff. I respectfully agree with the view expressed by the noble Lord in the passage which I have quoted and even if I had not done so, I should have hesitated long before venturing to express a contrary view. It is common knowledge that, with the present high incidence of taxation on income, those who are fortunate enough to enjoy a large income which is primarily unearned can legitimately and do, in fact, reduce their taxable income substantially by covenanting, sometimes for life, and sometimes for a period in excess of six years, large yearly sums to relatives and sometimes to old friends. They are thus legitimately generous at the expense of the Exchequer. Similarly it is common knowledge that men of the plaintiff's age with large disposable investments are more prone, owing to high death duties, to transfer during their life capital sums to their children or dependants which, in the past, they would have disposed of by will.

It would not perhaps be too much to say that the plaintiff seems to have acted in the past and intends to act in the future in the fashion which might be expected of a prudent man of affairs of his age possessed of his fortune. He is ordering, and I am satisfied intends to order, his affairs along the lines which he indicated.

To what, then, is he entitled by way of general damages ? If I disregard, as I do, the fact that he has lost his director's fees, the gross sum of £48,000, to which I have already referred, is diminished by some £5,000 to about £43,000. I make allowance for the fact that the plaintiff might have died during the currency of his service agreement and also for the fact that he might, owing to ill health during the same period, have been compelled to accept the lesser salary of £3,333 as technical adviser. I also make allowance for the fact that he will receive now whatever sum is awarded as general damages instead of receiving his salary over the next nine years. Whilst I think that it is in the highest degree improbable that such a thing would have occurred, I do not forget that his agreement might have been properly terminated for fraud or misconduct. He might have held his job as technical adviser after he reached the age of sixty-five and it is just possible, I suppose, that his salary might have been increased. Counsel suggested that I should allow these two matters to weigh in favour of the plaintiff, but in a case which is founded on breach of contract I do not feel I ought to do so.

It was submitted on behalf of the defendants that the sum of £1,000 per annum which the plaintiff will draw from the two businesses in which he has bought an interest was too little. The plaintiff made it clear that he intended to devote his energies and attention to these two businesses and hoped to make a success of them. I accept his statement that it is not easy for a redundant chairman of fifty-four to obtain a salaried post unless he is prepared to put up money. I am satisfied that the plaintiff has done his best to mitigate his loss and I doubt whether he would have succeeded in mitigating it to the extent to which he has if he had not been in a position to put up capital.

With regard to the passage in LORD GODDARD's speech to which I have referred, it was contended on behalf of the defendants that it was only proper to pay regard to disposable investments to the extent that they were likely to be disposed of and that on the plaintiff's own evidence he might be able to make all, or a substantial proportion of, his proposed capital gifts out of money in the bank and that the bulk of his free investments would remain undisturbed. If this were the case, the bulk of his present shareholdings, which are worth some £500,000, would still remain disposable and the income tax from them uncharged except in so far as it was required to pay sums due under covenants. So far as I am aware, there is nothing to prevent the plaintiff, after making his proposed capital gift, from setting aside sufficient income-producing investments to pay the sums due under the covenants from time to time and from investing the remainder of his capital in some non-income bearing investment which

A possesses the prospects of capital appreciation, provided he keeps in the bank a sum of ready money sufficient to provide for his immediate requirements or, alternatively, to buy himself a substantial annuity. In such a case the view of LORD GODDARD and the two noble Lords who agreed with his speech was that less, or little, regard should be paid to the incidence of tax. The majority of the House of Lords in *British Transport Commission* v. *Gourley* (1) were also of the B opinion that no difference in principle existed between the damages to be awarded in a case of personal injury founded on tort and in an action for wrongful dismissal founded on breach of contract.

Bearing in mind the considerations which I have endeavoured to set out and mindful of the fact that I have not even the material on which to arrive at an arithmetically calculable sum to which I should pay less, or little, regard, I must C do my best to arrive at what I consider a reasonable sum to award the plaintiff as general damages. The sum at which I arrive is £18,000.

[HIS LORDSHIP then dealt with the third head under which the plaintiff claimed damages, namely, his alleged loss of benefits under the retirement scheme for directors. He referred to the rules of the scheme which was a non-contributory scheme, viz., the defendants paid the contributions to the insurers for the benefits D which they provided. Rule 12 of the scheme which was headed " Leaving the employment " provided by sub-r. (i) that in the event of the employment being terminated by the employer before the normal pension date for any reason, other than those mentioned in a sub-r. (ii), the member should be entitled to the benefit of the assurance and should have certain options. The plaintiff had exercised one of the options and it was conceded that his employment had been terminated E within r. 12 (i) and that he had no further claim against the defendants under the scheme itself, that is to say, the plaintiff did not contend that the words " being terminated " meant " being rightfully terminated." Under these rules the plaintiff had become entitled to a life annuity purchasable by the sum of £10,647. If he had continued to serve the defendants until his sixty-fifth birthday, or had died before that date, he or his estate would have been entitled to receive F the sum of £27,379. The difference between these sums was £16,732. The plaintiff contended that owing to the wrongful termination of his contract of service he had lost the sum of £13,462 which was the sum he would have had to have paid to give him the extra £16,732 on reaching the age of sixty-five or on earlier death. It was not disputed that under the rules the plaintiff's rights under the retirement scheme were exhausted when he had claimed the sum of G £10,647 to which he was entitled and that he had no further claim against the defendants under the scheme itself, but it was contended that by their wrongful determination of his contract of service the defendants had in fact deprived the plaintiff of the opportunity of receiving the larger sum of £27,379. After referring to *Chaplin* v. *Hicks* (2) ([1911] 2 K.B. 786) HIS LORDSHIP continued:]

Chaplin v. *Hicks* (2) decided that where a defendant by his breach of contract H deprived the plaintiff of a chance of obtaining another beneficial contract, the plaintiff was entitled to damages for the loss of that chance. The difficulty in *Chaplin* v. *Hicks* (2) was to measure the plaintiff's damage. In the present case it is conceded that the plaintiff's rights under the retirement benefit scheme as such are exhausted. The defendants had a perfect right under the scheme and trust deed to discontinue the whole scheme or, alternatively, to discontinue any I participant's assurance under the scheme at any time. They discontinued the plaintiff's assurance and paid him out under the rules of the scheme. The plaintiff's claim is for breach of contract and it is axiomatic that no man can be held liable in contract for failing to do what he is not obliged to do under the contract. If this proposition required authority to support it (which I doubt) I need only quote a passage from the judgment of SCRUTTON, L.J., in *Abrahams* v. *Herbert Reiach, Ltd.* (3) ([1922] 1 K.B. 477 at p. 482). That was a case which concerned the measure of damages payable to two young athletes who had entered into a contract with a firm of publishers to publish certain articles in a magazine and thereafter to publish them in book form, the publishers paying them a sum for each copy sold. It was disputed to what damages, if any, the plaintiffs were entitled, and SCRUTTON, L.J., in his judgment, said this:

> "I am not inclined to be strict in limiting the damages recoverable against wrongdoers, but if their obligation is left so much to their discretion that there are several ways of performing it, I have always understood that the court assesses damages on the basis that 'if the contract could have been performed by the performance of the alternative least beneficial to the plaintiff, the measure of damages would be regulated by the loss occasioned by non-performance of that alternative': *Deverill* v. *Burnell* (4) ((1873), L.R. 8 C.P. 475, per BOVILL, C.J., at p. 481). The simple reason for this is that a defendant is not liable in damages for not doing that which he is not bound to do."

Participation or continued participation in the retirement benefit scheme was no doubt one of the attractive terms of the plaintiff's service agreement, but, once it is conceded that the plaintiff's deprivation of a chance of obtaining enhanced benefits under the scheme does not sound in damages because the defendants have fulfilled their obligations under the scheme, I find it quite impossible to see how the plaintiff can be entitled to swell the amount of damages to which he is entitled owing to the defendants' wrongful repudiation of his service agreement by including in his claim an item in respect of which no damage is recoverable.

I accordingly award the plaintiff the agreed sum of £1,375 for what may be called the agreed special damage and £18,000 by way of general damages, making a total of £19,375.

Judgment for the plaintiff.

Solicitors: *Herbert Smith & Co.* (for the plaintiff); *Slaughter & May* (for the defendants).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

POLAK AND ANOTHER *v.* WINCHESTER (MARCHIONESS).

[COURT OF APPEAL (Jenkins and Hodson, L.JJ.), June 1, 1956.]

Costs—Taxation—Withdrawal and re-delivery of bill—Solicitor and client taxation—Jurisdiction of court to permit—Counsel's fees not paid before delivery of bill—Unpaid fees shown as paid—Bona fide mistake.

A firm of solicitors delivered a bill of costs to their client, who obtained an order for taxation of it. When the matter came before the taxing master it was discovered that items of disbursements appearing in the bill in respect of counsel's fees amounting to some £300 had not in fact been paid. The solicitors asked for the taxation to be adjourned so that they could apply to the judge to substitute a new bill prior to which counsel's fees would be paid but which would be in other respects identical with the existing bill. An adjournment was granted and the solicitors paid counsel's fees. They then applied to the court by summons for liberty to withdraw the bill and to deliver a new bill. Evidence was given by affidavit that the failure to pay counsel's fees had been due to some confusion in the solicitors' office. The deponent was cross-examined. The judge was satisfied that the omission was due to a bona fide mistake and inadvertence, and that the solicitors had no dishonest intention, and he made the order sought. On appeal the client contended that the court had no jurisdiction to give leave for the substitution of a new bill of costs so as to include therein as disbursements fees which could have been but had not been paid at the date when the original bill was delivered.

Held: the court had inherent jurisdiction to allow the withdrawal of the bill and its re-delivery after payment of counsel's fees, the court being satisfied that the solicitors acted honestly and merited assistance (see p. 666, letter D, post); and, although the jurisdiction should be exercised only in exceptional cases where there were special circumstances of genuine mistake or inadvertence (see p. 668, letter A, post), yet the judge was justified in the present case in exercising his discretion in favour of the solicitors and the Court of Appeal would not interfere with his decision.

Thomas v. *Smith* (May 2, 1932, unreported) followed.

Dictum of SIR GEORGE JESSEL, M.R., in *Re Holroyde & Smith* ((1881), 43 L.T. at p. 722), applied.

Re Taxation of Costs, Re Solicitor ([1943] 1 All E.R. 157) approved.

Appeal dismissed.

[**Editorial Note.** A solicitor's bill of costs to his client may include disbursements payable in discharge of a liability, being a liability properly incurred by a solicitor on behalf of the client, although the disbursements have not been paid when the bill is delivered to the client. The disbursements must be described in the bill as not having been paid. As from Nov. 1, 1956, when the Solicitors (Amendment) Act, 1956, s. 13 (1) comes into force, there will be jurisdiction to allow such disbursements if paid before the taxation is completed. R.S.C., Ord. 65, r. 27 (29A), under which they were allowable if made before the proceedings in which the taxation took place, will be revoked by s. 13 (1).

As to the withdrawal of a bill of costs delivered by a solicitor to his client and the substitution of a new bill, see 31 HALSBURY'S LAWS (2nd Edn.) 179, para. 212; and for cases on the subject, see 42 DIGEST 157-159, *1570-1595*.]

Cases referred to:

(1) *Sadd* v. *Griffin*, [1908] 2 K.B. 510; 77 L.J.K.B. 775; 99 L.T. 502; 42 Digest 156, *1558*.

(2) *Davis* v. *Dysart* (*Earl*), (1855), 21 Beav. 124; 25 L.J.Ch. 122; 26 L.T.O.S. 84; 52 E.R. 805; *on appeal*, (1856), 8 De G.M. & G. 33; 44 E.R. 301; 42 Digest 158, *1581*.

(3) *Re Solicitor*, (1883), 27 Sol. Jo. 683; 42 Digest 399, *4503*.

(4) *Re Thompson*, (1885), 30 Ch.D. 441; 55 L.J.Ch. 138; 53 L.T. 479; 42 Digest 159, *1594*.

(5) *Re Holroyde & Smith*, (1881), 43 L.T. 722; 45 J.P. 437; 42 Digest 158, *1586*.

(6) *Re Heather*, (1870), 5 Ch. App. 694; 39 L.J.Ch. 781; 42 Digest 158, *1588*.

(7) *Re Chambers*, (1865), 34 Beav. 177; 34 L.J.Ch. 292; 11 L.T. 726; 55 E.R. 602; 42 Digest 159, *1591*.

(8) *Re Taxation of Costs, Re Solicitor*, [1936] 1 All E.R. 491; [1936] 1 K.B. 523; 105 L.J.K.B. 376; 154 L.T. 621; Digest Supp.

(9) *Re A Solicitor*, [1951] 1 All E.R. 592; 2nd Digest Supp.

(10) *Re Hildesheim*, [1914] 3 K.B. 841; 84 L.J.K.B. 1; 111 L.T. 749; 42 Digest 156, *1559*.

(11) *Re Taxation of Costs, Re Solicitor*, [1943] 1 All E.R. 157; [1943] Ch. 48; 112 L.J.Ch. 73; 168 L.T. 127; 2nd Digest Supp.

(12) *Thomas* v. *Smith* (May 2, 1932) unreported.

Interlocutory Appeal.

This was an appeal by leave of the court by the respondent, the former client of solicitors who were the applicants, from an order of PEARSON, J., dated Apr. 11, 1956, ordering that the applicants be at liberty to withdraw their bill of costs delivered on Dec. 7, 1955, and deliver a new bill in substitution therefor, subject to the payment by them of the respondent's costs (incurred under an order for taxation of a bill of costs) within fourteen days after they had been taxed as between solicitor and client.

P. C. M. Curtis-Bennett for the respondent, the former client.

J. Lloyd-Eley for the applicants, the solicitors.

JENKINS, L.J.: In this case the Marchioness of Winchester, who may conveniently be referred to as the client, employed in certain litigation as her solicitors the firm of Henry S. L. Polak & Co., who may conveniently be referred to as the solicitors. After a period the client decided on a change of solicitors. She withdrew her instructions from the solicitors, who on Dec. 7, 1955, delivered a bill of costs. On Jan. 11, 1956, the client obtained an order for taxation of that bill. The matter came before the taxing master on Mar. 16, 1956. It was then discovered that items of disbursements in respect of counsel's fees amounting to a substantial figure, of the order of £300, had not in fact been paid. This was pointed out so soon as the matter came before the taxing master, and thereupon the solicitors asked for the taxation to be adjourned so that they could apply to the judge for rectification of the bill by substituting a new bill, prior to delivery of which counsel's fees would in fact have been paid. An adjournment was granted and the solicitors did in fact pay counsel's fees. Having done that, the solicitors applied to the court by a summons, on which the relief sought was briefly that the solicitors should pay the whole of the costs of the client incurred in respect of the taxation to date, such costs to be taxed as between solicitor and client, and an order that, subject to those costs being paid within fourteen days after completion of their taxation, the solicitors should be at liberty to withdraw their bill of costs delivered on Dec. 7, 1955, and to deliver a new bill of costs in substitution therefor, with a proviso to the effect that the substituted bill of costs should, to put it shortly, be identical with the bill previously delivered save that proper entries could be made in respect of counsel's fees. Counsel's fees, of course, could by that time properly be included in a bill as disbursements because they had in fact been paid.

On Apr. 11, 1956, the matter came before PEARSON, J. The application was supported by an affidavit of Mr. Maurice Hendrik Leon Polak, one of the partners in the solicitors' firm, which showed that the failure to pay counsel's fees before the bill was delivered had taken place through some confusion in the solicitors' office. Apparently the matter was attended to by the litigation managing clerk to the firm, who was then very busy. As this taxation was regarded as a matter of urgency, it was not referred to the costs draftsman who usually dealt with such matters. The litigation clerk, so it was said, was at this period in poor health and in a somewhat overwrought nervous condition. Owing to these various causes, and apparently also to a mistaken assumption by the deponent that his father had attended to the matter of the payment of these fees, and to a notion erroneously entertained by the litigation clerk that it was not necessary actually to pay the fees before taxation, the matter was overlooked.

One cannot regard these errors and assumptions on the question of the payment of these fees as reflecting any great credit on the efficiency of the solicitors' office organisation at that time; but the learned judge was perfectly satisfied that the omission to pay these fees was due to bona fide mistake and inadvertence, and that there was no intention whatever on the part of the solicitors to do anything dishonest in the matter, or to overreach the client in any way. The judge came to that conclusion after he had seen and heard the deponent being cross-examined on his affidavit. In these circumstances the learned judge made the order sought, and the view of the law on which he made the order was that the court has jurisdiction to allow a bill to be withdrawn and a new bill to be substituted for the purpose of making a correction such as the correction here sought in the matter of counsel's fees, but that the court should take a strict view to maintain the necessary safeguards, that is to say, the court should be perfectly satisfied that the error in the bill as originally delivered was due to a bona fide mistake.

The main argument put forward by counsel for the client before us—though not, I think, the main argument, or indeed an argument put forward at all before the learned judge—was to the effect that there was no jurisdiction in the court to make an order of the kind made by the learned judge. Counsel referred us to certain sections of the Solicitors Act, 1932. He cited the provision in s. 65 (1), that

> "Subject to the provisions of this Act, no action shall be brought to recover any costs due to a solicitor until one month after a bill thereof has been delivered in accordance with the requirements of this section"

—that provision being read in conjunction with the definition of "costs" in s. 81 (1):

> "'Costs' includes fees, charges, disbursements, expenses and remuneration."

He also referred to s. 66 (1), as to taxation:

> "On the application, made within one month of the delivery of a solicitor's bill, of the party chargeable therewith, the High Court shall, without requiring any sum to be paid into court, order that the bill shall be taxed and that no action shall be commenced thereon until the taxation is completed."

Lastly he referred to this provision in s. 68 (3):

> "The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as they think fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs."

The general rule in cases of this kind is well settled, and counsel for the client referred us for it to *Sadd* v. *Griffin* (1) ([1908] 2 K.B. 510). The headnote in that case is:

> "For the purpose of taxation of a solicitor's bill under the Solicitors Act, 1843, 'disbursements' means actual payments before delivery of the bill, and any sums claimed in the bill as disbursements, e.g., fees to counsel, which have not been paid before its delivery, must be disallowed."

Farwell, L.J., reading the judgment of himself and Fletcher Moulton, L.J., used these words (ibid., at p. 511):

> "This is a taxation under the Solicitors Act, and to such a taxation considerations different from those applicable to a party and party taxation apply. As the Master of the Rolls in *Davis* v. *Earl of Dysart* (2) ((1855), 21 Beav. 124 at p. 132), said: 'The bill of costs, as between party and party, is always susceptible of being added to or varied, after it has been brought into the office. In this respect, it is quite different from a bill of costs taxed under the statute, where an alteration cannot be made as against the client, except with his consent, after the bill has been brought in for taxation. In cases of taxation of costs as between party and party, the bill of costs is analogous to a mere state of facts, and is a claim by one party against another party to a suit, and it may be amended, in any way and at any time, before the taxation is concluded'."

Farwell, L.J., said ([1908] 2 K.B. at p. 512):

> "It is equally clear that a solicitor cannot properly accept payment of the bill unless he has paid the alleged disbursements, and, if he did so, he would run considerable risk of being struck off the rolls: see *Re Solicitor* (3) ((1883), 27 Sol. Jo. 683); and it is settled beyond controversy that the solicitor is, for the purposes of taxation, bound by the bill that he has delivered and cannot alter it without the leave of the court or the consent of the party. See *Re Thompson* (4) where Cotton, L.J., says ((1885), 30 Ch.D. 441 at p.

> 448): 'It has been well established that, when a solicitor sends in his bill, he gives the client to whom he sends it in a right to have that bill taxed. That rule was laid down to prevent any attempt being made by solicitors to impose on clients, who did not know what the proper charges were, by sending in a bill which would not stand taxation, and then, when taxation was insisted on or threatened, sending in another bill which they knew could stand taxation. The rule has been carried so far that even where objections have been made to particular items of a bill delivered, and the solicitors have, with the assent of the client, taken back the bill for the purpose of reconsideration and have struck out certain items, the court has held that the bill to be taxed must be the bill as it was originally sent in and not the bill as amended'. The solicitor has claimed in the bill in this case £54 odd for fees to counsel which, by delivering his bill, he alleges to have been paid, and he is bound by that statement. When it is shown to be incorrect, the items cannot be allowed, for such allowance would enable him to turn an amount which when the bill was delivered was a liability not enforceable at law into an actual payment."

It is to be observed that in saying that the solicitor is for the purposes of taxation bound by the bill which he has delivered, FARWELL, L.J., went on to say "and cannot alter it without the leave of the court or the consent of the party". That reference to the leave of the court recognises the existence of an inherent jurisdiction in the court to control these matters of taxation. Counsel for the client does not dispute the existence of an inherent jurisdiction of that kind, but he contends that it is not wide enough to justify the court in doing, or to empower the court to do, that which was here done by the learned judge.

SIR GEORGE JESSEL, M.R., in *Re Holroyde & Smith* (5) ((1881), 43 L.T. 722) made some observations on this question. He began his judgment in these words (ibid.):

> "As regards the law on this question, I will take it from a decision in the Appeal Court in *Re Heather* (6) ((1870), 5 Ch. App. 694), the headnote to which is as follows: 'A solicitor who has delivered his bill to the person chargeable therewith cannot afterwards avoid the taxation of the bill by withdrawing it and delivering an amended bill even though the person chargeable sent back the original bill with suggested alterations which were partially acquiesced in'. . . The reporter's marginal note to *Re Chambers* (7) ((1865), 34 Beav. 177) is certainly not reconcilable with the decision in *Re Heather* (6). The marginal note in the former case is: 'A solicitor after delivering his bill of costs may before being served with an order for taxation withdraw it and substitute another bill of a reduced amount.' I think the reporter made a mistake, for what LORD ROMILLY seems to have actually decided was that there must be special circumstances to entitle a solicitor to withdraw one bill and substitute another. In my opinion under special circumstances, this might be so, that is to say, on the ordinary equitable grounds of fraud, accident, or mistake—such as, for instance, when the solicitor has been entrapped into making charges by the misrepresentations of his client or in the case of accident, where a charge or a wrong page had been inserted by mistake; but special circumstances there must be. LORD ROMILLY says, in *Re Chambers* (7): 'LORD LANGDALE held, and I have also held, that a solicitor cannot substitute as a matter of course a second bill for the first, but I have not held that you can never do it'."

SIR GEORGE JESSEL, M.R., in that case undoubtedly recognised the existence of a jurisdiction in special circumstances to allow one bill of costs to be withdrawn and another to be substituted for it. Counsel for the client says that the position between a client and his solicitor as regards costs is crystallised once and for all when the bill, for better or worse, is delivered. He says that the rights and liabilities of the parties must be determined once and for all by reference to the position as it stood at the date of the delivery of the original bill. He says that the mistakes which it is permissible for the court to rectify or amend are merely mistakes by reason of which the bill as originally delivered failed properly or truly to show the amount rightly due to the solicitor at that date; and that that is as far as the inherent jurisdiction goes. He says that it does not extend to the substitution of a new bill which includes not merely matters which were proper to be included at the date of the bill originally delivered, but also matters which can only be claimed by the solicitor by virtue of something which has happened since the date of delivery of the original bill, such as in the present case the payment of counsel's fees, which, until they had actually been paid, retained their character of mere honoraria for the recovery of which by counsel no legal proceedings could be taken. Thus, says counsel, the court cannot substitute a new bill introducing counsel's fees as disbursements which had in fact been made, a character which they did not and could not bear at the date of the original bill. So the only course which would fall within the inherent jurisdiction of the court would be for the court to allow an amendment of the existing bill so as to make it comply with R.S.C., Ord. 65, r. 27, reg. 29A, which provides as follows:

> "In taxations under or pursuant to the Solicitors Act, 1932, of a solicitor's fees, charges and disbursements, no such disbursements shall be allowed which have not been actually made before the delivery of the bill of costs, unless the bill shall expressly state that they have not then been made, and shall set out such unpaid items of disbursements under a separate heading in the bill, in which case they may be allowed by the taxing master if they are actually made before the commencement of the proceedings in which the taxation takes place, and are made in discharge of an antecedent liability of the solicitor (including counsel's fees) properly incurred on behalf of the client. For the purposes of computation of one-sixth thereof such bill shall be deemed to include such unpaid items as part of the bill. Provided also that if the proceedings for taxation shall have been commenced by the client or a third party, payments made by the solicitor pending such proceedings in discharge of any such antecedent liability so set out in the bill (including counsel's fees) may be allowed by the taxing master if actually made before the commencement of the taxation, if it appears to him that such payments have been properly made and that no injustice is done thereby."

Counsel for the client says that the utmost the court could allow would be the amendment of the bill by extracting from it the items of counsel's fees shown as disbursements in the ordinary way and setting them out instead as unpaid items of disbursement under a separate heading in the bill; and that if this had been done, then the bill would have been brought within the requirements of reg. 29A. This concession by counsel was somewhat in the nature of a Greek gift, for he adds that this will not avail the solicitors because reg. 29A is in truth ultra vires, so that the solicitors would be no better off with their amended bill than they were with their bill as it stands at present. Counsel for the client founded this contention on some observations of Scott, L.J., in *Re Taxation of Costs, Re Solicitor* (8) ([1936] 1 All E.R. 491). It suffices if I refer to the following passage (ibid., at p. 494):

> "What, then, is the true position in regard to the argument that reg. 29A is ultra vires? Clearly its first four lines are just as consistent with the new Act as with the old; that part is not ultra vires. In regard to lines 4 to 11 of the regulation we need not consider the question of ultra vires for nothing in this appeal turns upon that part, but we must not be understood to express any affirmative view that that part of the regulation can have the effect of authorising the inclusion in the bill of costs of any

> disbursement which is not ' due ' as a legally enforceable debt from the client to the solicitor. In the case of counsel's fees there cannot be any debt until after actual payment by the solicitor to counsel. To enter unpaid counsel's fees in the bill of costs under the permissive words of the regulation would be a direct violation of the prohibition of the statute. The wording of the regulation should be considered by the Rule Committee. On this first point the appeal must be dismissed."

Scott, L.J., thus was, to put it at its lowest, expressing grave doubts as to the validity of the regulation. As against that, it was pointed out by Harman, J., in *Re A Solicitor* (9) ([1951] 1 All E.R. 592 at p. 598) that Scott, L.J.'s view expressed in the passage I have just read was "in flat contradiction to the opinion of the court in *Re Hildesheim* (10) ([1914] 3 K.B. 841)" where the Court of Appeal appeared to take the view that reg. 29A was a perfectly valid regulation. I find it unnecessary to express any opinion on that question which may now be regarded as of transitory interest, in view of legislation which is shortly due to come into force*. I need express no opinion on it, for I do not agree that the inherent jurisdiction of the court is limited in the way propounded by counsel for the client. In my judgment, provided that the court is satisfied that the case is one in which the solicitor concerned has acted honestly and merits assistance in the matter, the inherent jurisdiction extends to the withdrawal of a bill already delivered containing, as in the present case, disbursements in respect of counsel's fees which had not then actually been paid; the jurisdiction extends to the withdrawal of such a bill and, after the fees have been paid, the substitution of a fresh bill showing them as paid, as they will have been by the time when the substituted bill is delivered. The language of Sir George Jessel, M.R., in *Re Holroyde & Smith* (5) is wide enough to include such a withdrawal and substitution, and as appears from *Re Taxation of Costs, Re Solicitor* (11) ([1943] 1 All E.R. 157), Uthwatt, J., had no doubt that this could be done. That was a case in which counsel's fees which had not been paid were shown as paid in the bill delivered, and, although the actual circumstances were different from those of the present case, it did in that respect resemble this case, so that the technical point involved was exactly the same; and the learned judge held that the court had jurisdiction to allow the bill to be withdrawn and a fresh bill delivered, and ought in the case then before him to exercise that jurisdiction, as otherwise the client would obtain the benefit of the payments which the solicitors had made and had failed to note properly in the bill. In reaching that conclusion, Uthwatt, J., referred to an unreported case in the Court of Appeal of *Thomas* v. *Smith* (12) (May 2, 1932) and after commenting on the merits of the case, he said ([1943] Ch. at p. 49; cf. [1943] 1 All E.R. at p. 158, quoted at p. 667, letter E, post):

> "However that may be, there is undoubtedly jurisdiction in the court to allow a solicitor to withdraw a bill and to deliver a fresh bill. There are old authorities to that effect, and recently the Court of Appeal, in *Thomas* v. *Smith* (12), exercised that power in circumstances which, so far as can be gathered from the only available material, were exceedingly like those of the present case. The question whether that power ought to be exercised in any particular case depends on all the circumstances of that case."

Finally, at the end of the judgment Uthwatt, J., set out the terms of the order he proposed to make, and they are in fact in substance reproduced in the order made by the learned judge in the present case.

Counsel for the client fastened on a reference in the report to the submission of Mr. Denning, K.C., where Mr. Denning is reported as having said ([1943] 1 Ch. 49):

> " the solicitor ought to be allowed to withdraw it [the bill] and to deliver

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* See s. 13 of the Solicitors (Amendment) Act, 1956 (4 & 5 Eliz. 2 c. 41), coming into force on Nov. 1, 1956.

> a fresh one showing the £298 as unpaid items of disbursements under a separate heading as otherwise he will be unable to recover what he has paid."

That, says counsel for the client, is an obvious reference to the type of amendment which would bring the case within reg. 29A. Indeed, Mr. Denning began his observations, as reported, by saying: "The bill does not comply with Ord. 65, r. 27, reg. 29A". That may be so, but I do not think that affords any ground for the view that that method of amendment is the only method open, and I think that the jurisdiction to allow the bill to be withdrawn and a fresh bill to be substituted extends to allowing the fresh bill to include items of disbursements in respect of counsel's fees which have in fact been paid before the date of the fresh bill and can truly be shown in that bill as disbursements paid.

Re A Solicitor (9) raised the same question of withdrawal of the bill and substitution of a fresh bill in a case involving counsel's fees, and HARMAN, J., followed UTHWATT, J., in applying *Thomas* v. *Smith* (12). It is unfortunate that *Thomas* v. *Smith* (12) appears to be unreported, but I think enough is known about it to make it reasonably clear that it was a case raising the same technical question as is raised in this case, and that the decision which reversed the decision of the judge below was to the same effect as UTHWATT, J.'s decision in *Re Taxation of Costs, Re Solicitor* (11). I should perhaps add with respect to *Thomas* v. *Smith* (12) that a slightly more ample reference to it is to be found in the report of UTHWATT, J.'s judgment in the same case in the ALL ENGLAND LAW REPORTS, where the learned judge is reported as having said ([1943] 1 All E.R. at p. 158):

> "However that may be, it is undoubted that there is a discretion in the court, and the court has power, to allow a solicitor to withdraw a bill and to deliver a fresh bill. There are, I think, old authorities to that effect, but there is a recent authority in an unreported case, *Thomas* v. *Smith* (12), where the Court of Appeal, reversing the decision of DU PARCQ, J., exercised that power and exercised it in circumstances which, as far as one could gather from the only available material—a note of the decision in the taxing master's office—were exceedingly like the present case. As far as I am concerned, that case is only authority for the proposition that there is jurisdiction in the court to allow a bill to be withdrawn and a new bill to be delivered."

The learned judge, having said that that case is only authority for the proposition that there is jurisdiction, went on to examine the question whether on the merits the jurisdiction ought to be exercised.

In my view, this court should follow the decision in *Thomas* v. *Smith* (12) and hold that the learned judge in the court below had jurisdiction to make the order sought. On the question whether this case is one in which the jurisdiction should be exercised in favour of the solicitors, I have made a brief reference to the circumstances in which it came about that these disbursements for counsel's fees were not in fact paid before the bill was delivered. The story is something of a chapter of accidents, of pressure in the office, of somebody who had already had a lot of work to do having this task thrust on him, of a departure from what was apparently the usual routine of going to a costs specialist to have the bill drafted, of a misapprehension by the particular clerk who was charged with the duty of looking after this particular matter of costs as to the time at which counsel's fees ought to be paid in relation to the delivery of a bill, and of a mistaken assumption by a member of the solicitors' firm that the fees had in fact been paid. A combination of these matters resulted in this unfortunate oversight.

I entirely agree with the learned judge when he said that one has to take a strict view to maintain the necessary safeguards, and nothing that I say is to be regarded as suggesting to solicitors that they can be careless or unbusinesslike in a matter such as this, and then, as of course, apply for and receive the assistance of the court. It is only in exceptional cases, cases of special circumstances, of genuine mistake or inadvertence, that assistance ought to be given. I agree with the learned judge that this is a case which is very near the borderline; but he has found it one in which he came to the conclusion that the discretion could properly be exercised in favour of the solicitors. In my view he was justified in coming to that conclusion and it would not be right for this court to interfere with his exercise of that discretion. I think, moreover, that, while the case is near the line, it is a case where I myself, if I were dealing with the matter at first instance, would have been likely to have come to the same conclusion as the learned judge. The loss of this substantial sum which the solicitors have paid out for counsel's fees would, as it seems to me, be a wholly excessive penalty for the carelessness of which they have been guilty in this matter. Be that as it may, the learned judge seems, from the short note of the judgment, to have directed himself correctly in determining this question of discretion and seems to me to have come to a conclusion which this court certainly should not disturb. For these reasons I would dismiss this appeal.

HODSON, L.J.: I entirely agree with the judgment which my Lord has delivered. When this matter came before the learned judge it was simply on the footing that the question was, aye or no, whether he should exercise his discretion in the matter. It was a case in which an entry had been made in the bill of costs which was not true: money was said to have been paid which had not been paid, and, therefore, it was a matter which gave him anxious consideration. He came to the conclusion that the error arose, as it was said to have arisen, by a slip, and not with any intention of trying to obtain payment of money which might otherwise not so readily be paid. He saw the witness who had sworn the affidavit and heard him cross-examined, and came to the conclusion that there was no dishonesty. In those circumstances, he having exercised his discretion, it would not be right for this court to take a different view, in my opinion. Moreover, I agree with my Lord that on the facts disclosed it seems to me that this is a case in which any judge would be likely to arrive at the same conclusion, if it were open to him. In this court counsel for the client argued further that there is no discretion in a case like this where a bill has been delivered: the position is crystallised and no alteration can be made—at any rate, no alteration of such a kind as would alter the position to the prejudice of the client. In making that submission he realised that he was faced with the decision of Uthwatt, J., in *Re Taxation of Costs, Re Solicitor* (11) ([1943] 1 All E.R. 157), which must therefore be wrongly decided. In my view that submission is not well founded. That case was like this case, in that fees were stated to have been paid whereas they had not been paid; they were subsequently paid, and an attempt was made by the solicitors to amend the bill; an order was made not that the bill should be amended, but that a fresh bill should be delivered not distinguished from the previous bill in any material particular save that proper entries might be made in respect of counsel's fees. The fees having been paid in that case as in this case, the only proper entry could be an entry showing the payment of those fees when they were truly paid. Uthwatt, J.'s decision was in my opinion perfectly correct and I agree with him that it was supported by the authority of this court, namely, the authority of *Thomas* v. *Smith* (12). It is quite true that it seems to have been a settled practice before *Thomas* v. *Smith* (12) was decided on May 2, 1932, following *Sadd* v. *Griffin* (1) ([1908] 2 K.B. 510) and what was said in that case, to prevent solicitors recovering items unpaid at the time when the bill was delivered and not set out in the bill under a separate head. That course of disallowance was, however, taken by the judge of first instance in *Thomas* v. *Smith* (12), and his decision was reversed by this court. The circumstances in which that reversal took place seem to be the same circumstances, so far as our information goes, as those which exist in this case. There appears to me to be no doubt but that UTHWATT, J., was acting in accordance with authority when he made the decision which he did; and moreover I agree with my Lord that he was acting in accordance with the principle as set out in the earlier decisions to which our attention has been drawn. I agree, therefore, that the appeal should be dismissed. *Appeal dismissed.*

Solicitors: *Theodore Goddard & Co.* (for the respondent); *B. C. Somper* (for the applicants). [*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

EAST RIDING COUNTY COUNCIL *v.* PARK ESTATE (BRIDLINGTON), LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Radcliffe, Lord Cohen and Lord Evershed), April 10, 11, June 8, 1956.]

Town and Country Planning—Enforcement notice—Development prior to July 1, 1948—*Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6 *c.* 51), *s.* 23 (1), (2), (4), *s.* 75 (1).

In 1951 the local planning authority served on the owners of land, on which a holiday camp had been carried on since 1934, an enforcement notice stating that the development of the land appeared " to be in contravention of planning control " and requiring the use of the land for residential purposes to be discontinued, the temporary buildings to be removed, and every use of the land except for the purposes of agriculture to be discontinued. Notes on the back of the notice, to which the owners' attention was drawn in the notice, referred to the Town and Country Planning Act, 1947, s. 23*, relating to development after July 1, 1948, when the Act came into operation, but not to s. 75*, relating to development before that date. The owners having sought that the enforcement notice should be quashed pursuant to s. 23 (4) (a) of the Act,

Held: (i) (per VISCOUNT SIMONDS, LORD COHEN and LORD EVERSHED) there was jurisdiction under s. 23 (4) (a) of the Town and Country Planning Act, 1947, to quash the enforcement notice, and it was rightly quashed because the notice on its true construction alleged contravention of planning control under the Act of 1947 by development after July 1, 1948, without permission but in fact the development had taken place before July, 1948, and planning permission under the Act of 1947 had not been required, and

(ii) (per VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD RADCLIFFE and LORD EVERSHED) apart from the question whether the enforcement notice should have been quashed, it was invalid because it did not allege that the development contravened previous planning control, viz., control prior to July, 1948, and because the notice failed to specify the nature of the alleged contravention.

Decision of COURT OF APPEAL (sub nom. *Park Estate* (*Bridlington*), *Ltd.* v. *East Riding County Council,* [1955] 2 All E.R. 269) affirmed.

[For the Town and Country Planning Act, 1947, s. 23 and s. 75, see 25 HALSBURY'S STATUTES (2nd Edn.) 524, 583.]

Cases referred to:

(1) *Lincoln County Council* (*Parts of Lindsey*) v. *Henshall,* [1953] 1 All E.R. 1143; [1953] 2 Q.B. 178; 117 J.P. 321; 3rd Digest Supp.

(2) *Mead* v. *Plumtree,* [1952] 2 All E.R. 723; [1953] 1 Q.B. 32; 116 J.P. 589; 3rd Digest Supp.

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* The relevant portions of s. 23 and s. 75 are set out at p. 677, letter I, and p. 678, letters D and I, post.

Appeal. A

Appeal by the local planning authority, the East Riding County Council, from an order of the Court of Appeal, dated Mar. 31, 1955, and reported sub nom. *Park Estate (Bridlington), Ltd.* v. *East Riding County Council*, [1955] 2 All E.R. 269, affirming an order of the Queen's Bench Divisional Court, dated Jan. 14, 1955, allowing an appeal by the respondents, the owners of land on which a holiday camp was carried on, by way of Case Stated against an adjudication of the B East Riding of Yorkshire justices sitting at Bridlington, dated May 24, 1954. The facts appear in the opinion of VISCOUNT SIMONDS.

Harold Williams, Q.C., and *W. L. Roots* for the appellants.
G. R. Hinchcliffe, Q.C., and *A. S. Orr* for the respondents.

The House took time for consideration. C

June 8. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal raises a question of exceptional difficulty. It arises on a so-called " enforcement notice " given by the appellant county council to the respondents under the Town and Country Planning Act, 1947, which the Court of Appeal, affirming the Divisional Court, D have directed to be quashed under s. 23 (4) of that Act.

The relevant facts can be briefly stated and I summarise them from the Case Stated by the justices for the East Riding of the County of York. An enforcement notice under the Act, dated Apr. 26, 1951, to which I will refer in detail, was duly served by the appellants in their capacity of local planning authority on the respondents relating to land in the said county referred to in the notice, E of which the respondents were at all material times the owners. The use of this land as a site for temporary dwellings or a holiday camp began in 1934, and all development on the land material to these proceedings was carried out before July 1, 1948, that being the appointed day for the purposes of the Act.

I now turn to the enforcement notice and must state it at length. It is headed " East Riding County Council, Town and Country Planning Act, 1947. Enforcement Notice." F It is addressed to the secretary of the respondents and to whom it may concern, and it gives notice in these terms:

> " that the development or other matter hereunder specified appears to them [i.e., the county council] to be in contravention of planning control, namely: the erection or placing and the use for residential and ancillary purposes of temporary dwellings and other erections on land known as G Limekiln Lane Camp, Bridlington, in the said county ":

the location is then described by reference to the ordnance map and an annexed plan, the temporary dwellings and other erections are enumerated and described, and the notice proceeds:

> " And they hereby require that the following steps shall be taken within H two years from the date on which this notice takes effect:—(i) The use of the said land for residential purposes shall be discontinued. (ii) The said temporary buildings and other erections shall be removed or demolished and the materials thereof removed from the said land. (iii) Any materials, sheds, huts or fences brought on to or erected on the said land in connection with the construction, use or demolition of the said temporary dwellings and other erections shall be removed. I (iv) Every use of the said land except the use thereof for the purposes of agriculture shall be discontinued. Subject to the provisions of the above-mentioned Act, this notice will take effect at the expiration of twenty-eight days after service thereof. Expressions used in this notice have the meanings assigned to them by the above-mentioned Act, except where the context otherwise requires."

Finally, there is on the face of the notice after the date and the signature of the clerk to the council a note in these terms " Your attention is drawn to the

A notes set out on the back of this notice." These notes (inter alia) refer with sufficient accuracy to the provisions of s. 23 and s. 24 of the Act in regard to making application for permission for the retention of buildings or works, or the continuation of a use, to which the notice relates and to the right of a person, if aggrieved, to appeal to the appropriate petty sessional court on one or other of the grounds therein stated. The notes also referred to the penal consequences B of non-compliance with the notice.

I have now stated the terms of the notice and call attention to two matters of importance. In the first place, there is no suggestion that the provisions of any other Act than the Town and Country Planning Act, 1947, had been infringed, and in the second place no mention direct or oblique is made of s. 75 of the Act which is, as will appear, the all-important section.

C Availing themselves of s. 23 of the Act of 1947, the respondents preferred a complaint by way of appeal to the justices whom I have already mentioned, whereby they sought to have the notice quashed. It is provided by s. 23 (4) (a) that the court, if satisfied that permission was granted under that Part (Part 3) of the Act of 1947 for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the D conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates; by s. 23 (4) (b) that the court, if not so satisfied, but satisfied that the requirements of the notice exceed what is necessary for restoring land to its condition before development took place, or for securing compliance with the conditions, as the case may be, shall vary the notice accordingly, and by s. 24 (4) (c) it is provided that, in any other E case, the court shall dismiss the appeal.

It is clear that the grounds on which the justices may quash an enforcement notice are strictly limited, and do not exhaust the possibilities of challenge. This is recognised in s. 24, which provides that the validity of such a notice shall not in any proceedings be disputed on a ground which might have been raised in an appeal under s. 23. Other grounds of defence—e.g., to take a conspicuous F example, that the notice was not bona fide—remain open to the person aggrieved. Secondly, it is clear that those grounds on which the justices may quash a notice relate precisely to the earlier sub-sections of s. 23. Sub-section (1) provides that, if it appears to the local planning authority that any development of land has been carried out after the appointed day (i.e., July 1, 1948) without the permission required in that behalf under that Part of the Act of 1947, or that any conditions G subject to which permission was granted in respect of any development have not been complied with, then (subject as therein mentioned), they may serve on the owner and occupier of the land an enforcement notice under the section. Sub-section (2) prescribes the requisites of such a notice and is important. It enacts that the notice shall specify the development which is alleged to have been carried out without the grant of such permission as aforesaid or, as the case H may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with, and may require such steps as may be specified in the notice to be taken within such period as may be so specified for restoring the land to its former condition, or for securing compliance with the conditions, as the case may be, and otherwise as therein mentioned. Sub-section (3) provided for the time within which an enforcement notice should take effect. I In the present case, nothing turns on this sub-section.

I pause, my Lords, to observe that s. 23 of the Town and Country Planning Act, 1947, to which section alone the enforcement notice in the present case refers, deals solely with development after the appointed day and with permission required to be given under the Act of 1947, but the development, to which the notice referred, had, in fact, all taken place at an earlier date, so that permission under that Act could not have been required for it. In these circumstances, it might well have appeared to the respondents that they had ample ground for asking the justices to quash the notice on the specific ground mentioned in s. 23 (4) (a) that no permission was required under the Act of 1947 in respect thereof. Their attention had not been called, nor have I yet called your Lordships' attention, to s. 75 of the Act of 1947, on which it appears that the appellants relied and rely. I will do so in due course.

The respondents, as I have said, preferred their complaint to the justices, and before them advanced a number of contentions in which the distinction between the grounds on which that court had statutory power to quash the notice and the grounds on which, in other proceedings, its validity might be challenged was not properly observed. From this, some confusion has arisen. It was in the first place contended that the Act of 1947 was highly technical and, as it encroached on private rights, the court must insist on strict and rigid adherence to formalities. This, as a general proposition, commands assent and not the less because disregard of an enforcement notice is an offence involving sufficiently serious penal consequences. Then it was contended that the notice was defective in substance and form and should be treated as a nullity, and the defects were enumerated. Here the confusion began. For the jurisdiction of the justices could not be founded on any ambiguity, lack of precision or even calculated vagueness in the notice, though such a defect might, in other proceedings, be a ground of challenge. Their jurisdiction, so far as quashing this notice is concerned, could only be invoked, if, on its true construction, it alleged that permission was required under the Act of 1947 for certain development and if that permission was not, in fact, required. It can, I think, be fairly said that this plea does emerge among the alleged defects, though it is somewhat obscure. Naturally enough the contentions of the appellants followed the same line and the justices followed suit. In the Case which they duly stated, they expressed the opinion (A) that the notes on the back of the enforcement notice did not form part of the notice inasmuch as the notice would have been complete without them, (B) that there is no requirement in s. 23 of the Act of 1947 or elsewhere that the section or sections of the Act of 1947 on which an enforcement notice is based shall be specified in the notice and that a case to which their attention had been called (*Lincoln County Council* (*Parts of Lindsey*) v. *Henshall* (1), [1953] 1 All E.R. 1143) was no authority for that proposition, (C) that the omission from the enforcement notice of reference to particular sections of the Act of 1947 was not misleading, (D) that the notice properly referred to the Act of 1947 as a whole, and (E) that the notice was not defective in substance and form. Accordingly they dismissed the appeal, and the question they stated for the opinion of the court was whether they came to a correct determination on the matters of law in issue before them.

My Lords, it appears to me that we have travelled far from the only matters on which the justices had jurisdiction to pronounce. This was not, however, quite the view of the Divisional Court; for, as with great respect I think, the same confusion recurred, so that LYNSKEY, J., delivering a judgment in which the other members of the court concurred, said:

> "This notice served on the appellants [the present respondents] in this case in terms refers them to s. 23 and anyone reading this notice, I should have thought, would read it as being a notice relating to development after the Act to which s. 23 applies. There is nothing in the notice at all to indicate in any way that it is dealing with pre-Act development or dealing in any way with development to which s. 75 applies. In those circumstances it seems to me that this notice is a bad notice. Although a notice is not required to be in any specified form, it is a notice which ought to give the person who receives it a clear indication as to what it is intended to apply and what development it is sought to remedy."

The appeal was, accordingly, allowed and the notice was directed to be quashed. I do not dissent from the conclusion to which the Divisional Court came, and I think that, in the earlier part of the passage that I have cited, the view is clearly expressed that, on its true construction, the notice purported to refer to development for which permission under the Act of 1947 was required, whereas, in fact, such permission was not required. That, not the lack of clear indication, gave jurisdiction to quash.

The appellants appealed to the Court of Appeal. That court took the same view of the construction of the notice. Thus, DENNING, L.J., said ([1955] 2 All E.R. at p. 271):

> "It seems to me that, on a fair reading of that enforcement notice, it complains only of breaches of the existing planning control since July 1, 1948, and not at all of breaches of previous planning control."

So also PARKER, L.J. (ibid., at p. 272):

> "Accordingly, the only point in this case is whether, on its true construction, on a fair reading of it, the enforcement notice deals with a breach of previous planning control or of current planning control"

and on that question the learned lord justice came to the same conclusion as DENNING, L.J. On such a question I should, in any case, hesitate to differ from such a consensus of opinion. But it appears to me to be clearly right. The notice is the plainest assertion that there has been development for which permission under the Town and Country Planning Act, 1947, ought to have been, but had not been, obtained. The assertion was wrong. No such permission was required and, on complaint, the justices were bound to quash the notice.

How, then, is it sought to sustain the notice? My Lords, I come to s. 75 of the Act of 1947. That section, which is in Part 8 of the Act of 1947, provides that where any works on land existing at the appointed day were carried out, or any use to which land is put on that day was begun, in contravention of previous planning control, then, subject to the provisions of that section, the provisions of Part 3 of the Act of 1947 with respect to enforcement notices should apply in relation thereto as they applied in relation to development carried on after the appointed day without the grant of permission in that behalf under the said Part 3. The same section contains numerous and elaborate sub-sections which would require careful consideration by any person who had carried out any works alleged to fall within its scope, but I need refer only to sub-s. (9), which provides that, for the purposes of the section, works on land shall be deemed to have been carried out, and uses of land to have been begun, in contravention of previous planning control (a) where at the material time the land was subject to a resolution to prepare a planning scheme, if carried out or begun otherwise than in accordance with permission granted in that behalf by or under the interim development order; (b) where at the material time the land was subject to a planning scheme, if carried out or begun otherwise than in conformity with the provisions of the scheme or of permission granted thereunder, and the same sub-section also dealt with the case in which permission for any works or use was granted subject to conditions as therein mentioned.

It is this section on which the appellants rely, claiming that the notice, on its true construction, alleges that the works specified therein have been carried out without the necessary permission "in contravention of previous planning control", and that it does so with all the clarity and precision which a valid notice postulates. My Lords, it appears to me that this notice does nothing of the kind. I have already stated what, in agreement with the courts below, I consider to be the true meaning of the notice, and that is sufficient to conclude this case. But suppose that I am wrong in this. It may be that then the justices cannot quash the notice. What then ensues? Assuredly not that it is a valid notice alleging that works were carried out or use of land begun in contravention of previous planning control. For that, clearly, it does not allege. It is at this point that some of the contentions, irrelevant, as I think, to the real issue before the justices, may come into play. For the line of argument vigorously pursued on behalf of the appellants was to the effect that the use of the general words "in contravention of planning control", without specifying what contravention or what control, was sufficient to inform the respondents of what was wrong and why it was wrong. It was, I think, admitted that the words "planning control", which deliberately avoid the technical expression "previous planning control", were chosen in order to cover compendiously any possible breach of any possible planning Act. This is not, in my opinion, a legitimate way of framing a notice, the disregard of which involves penal consequences, nor is it what s. 23 (2) of the Town and Country Planning Act, 1947, requires. Still less is it what is required when the co-operation of s. 75 with s. 23 is demanded. I do not suggest that the form of notice adopted by the appellants was intended to mislead. I am sure it was not, but what I can only call the marked avoidance of any reference to s. 75, and the deliberate use of words calculated to suggest a contravention of the Act of 1947, make it impossible for them to rely on the notice as a valid notice under that Act.

I am, therefore, of opinion that the notice, if it was not, as, in my opinion, it was, a notice which it was the duty of the justices to quash, was, in any case, not a notice on which the appellants can rely.

In the course of the argument before your Lordships and in the courts below, reference was made to *Lincoln County Council* (*Parts of Lindsey*) v. *Henshall* (1). In that case, too, the same confusion arose between the statutory grounds on which the justices could quash a notice, and other grounds on which such a notice might in other proceedings be challenged. I do not repeat what I have already said on this point. The decision in question was, no doubt, justified because, as LORD GODDARD, C.J., said ([1953] 1 All E.R. at p. 1145):

> "The justices had power to quash in the present case because no such permission was required in respect of work which was done before July 1, 1948."

He took, as I understand it, the same view of the construction of the notice there under consideration as I do of the notice in the present case.

LORD MORTON OF HENRYTON: My Lords, in my opinion the enforcement notice served by the appellants on the respondents on Apr. 26, 1951, was invalid because it did not fulfil the requirements of the Town and Country Planning Act, 1947. Enforcement notices can be served under s. 23 (1), or under s. 75 (1), of the Act of 1947. The circumstances in which a notice can be served under s. 23 (1) are:

> "If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, or that any conditions subject to which such permission was granted in respect of any development have not been complied with . . ."

The circumstances in which a notice can be served under s. 75 (1) of the Act of 1947 are:

> "Where any works on land existing at the appointed day were carried out, or any use to which land is put on that day was begun, in contravention of previous planning control . . ."

The "appointed day" was July 1, 1948, and it is to be observed that s. 23 (1) applies only to a development of land carried out after that date, while s. 75 (1) applies only to a case in which works on land were existing, or land was being used, on that date.

Section 23 (2) of the Act of 1947 provides that:

> "Any notice served under this section (hereinafter called an 'enforcement notice') shall specify the development which is alleged to have been carried

> out without the grant of such permission as aforesaid or, as the case may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with . . ."

My Lords, as I read these words, they require the planning authority not only to specify the development to which the notice relates, but also to state either (a) that this development appears to the authority to have been carried out after July 1, 1948, without the grant of permission required in that behalf under Part 3 of the Act, or (b) that it appears to the authority that the following conditions, subject to which such permission was granted, have not been complied with in respect of the following matters—setting out the conditions in question and the matters in respect whereof such conditions have not been complied with.

The notice of Apr. 26, 1951, refers to the "development or other matter hereunder specified". "Development", as defined by s. 12 (2) of the Act, includes the carrying out of building operations on land, and the making of any material change in the use of any buildings or other land. I do not think that the words "or other matter" are happily chosen, but the notice goes on to make it clear that the development or other matter to which the notice relates is "the erection or placing and the use for residential and ancillary purposes of temporary dwellings and other erections" on certain land which is clearly identified. The temporary dwellings and other erections are then identified by description and by reference to a plan attached to the notice.

My Lords, I think that the development to which the notice relates is thus sufficiently identified. The notice does not, however, allege either that the development has been carried out after July 1, 1948, without the grant of permission under Part 3 of the Act, or that such permission was granted subject to conditions which have not been complied with. The development is simply alleged to be "in contravention of planning control". The result is that, if the notice of Apr. 26, 1951, on its true construction, is a notice of an alleged contravention of the provisions of the Act of 1947 by a development carried out after July 1, 1948, it is, in my view, invalid, because it does not comply with the provisions of s. 23 (2) of the Act of 1947.

I now consider whether the notice can possibly be regarded as a valid notice relating to works carried out, or land used, in contravention of previous planning control within s. 75 of the Act of 1947. In my opinion, it cannot, for two reasons. First, because the notice gives no indication that it relates to a contravention, before July 1, 1948, of planning control existing before that date. On the contrary, there are indications that it relates to a development carried out after that date. For instance, the words "*to be* in contravention" apply more aptly to a contravention of existing planning control, and the only sections mentioned in the notes on the back of the notice (to which the reader's attention is drawn by a note at the end of the notice) are s. 23 and s. 24. Secondly, s. 75 (1) provides that, in the cases to which it applies,

> ". . . subject to the provisions of this section, the provisions of Part 3 of this Act with respect to enforcement notices shall apply in relation thereto as they apply in relation to development carried out after the appointed day without the grant of permission in that behalf under the said Part 3:"

I think it follows, from this incorporation of the provisions of s. 23 (2), that some indication must be given of the nature of the alleged contravention of previous planning control. I do not venture to suggest the form of such indication, as your Lordships were not referred to the terms of any earlier Act imposing planning control.

For these reasons, I am of opinion that the notice of Apr. 26, 1951, was wholly invalid.

Counsel for the appellants submitted that s. 23 (2) should not be construed as imposing on the planning authority the obligations which I have already set out.

He suggested that the owner of the land would know when the development of the land was carried out and whether permission had been granted and, if so, on what conditions, whereas the planning authority might not know the first of these matters. Thus, a notice couched in general terms, such as the present notice, involved no real hardship to the recipient, whereas a requirement of greater particularity in the notice might impose real hardship on the authority. My Lords, I cannot accept this submission. I think that the words of s. 23 (2), on their natural construction, do impose on the authority the obligations in question, and I see no reason for giving them any other construction. I agree that the owner of the land will probably know the relevant facts. This may not always be so, as he may have bought the land shortly before he receives the notice; but, whether or not he knows the facts, it is only right that he should know what the authority alleges against him. As to the position of the authority, I make two observations. First, the authority cannot serve a notice unless it " appears " to it that the state of facts described in s. 23 (1) or in s. 75 (1) exists; and it is to be assumed that no authority would serve a notice without making due inquiry as to any facts not already recorded in its books, and ascertaining whether the facts brought the case within s. 23 (1) or within s. 75 (1). Secondly, these two sections confer wide powers on the authority, and the exercise of these powers may involve very great loss to the recipient of the notice. It is not surprising if the legislature imposes on the authority the duty of telling the recipient plainly what is the case which he has to meet.

Before the justices, the present respondents contended that

> "the enforcement notice was defective in substance and form and the court should quash the notice and treat it as a nullity."

The justices held that the notice was not defective, and dismissed the appeal. The question which they stated for the opinion of the High Court was: " Whether we came to a correct determination on the matters of law in issue before us." My Lords, I would answer that question in the negative. I doubt whether the justices had power to quash the notice, as the jurisdiction to do so is conferred only by s. 23 (4) of the Act of 1947, and is strictly limited by the terms of that sub-section. I need not, however, pursue that matter further. The practical result is the same, apart from any question of costs, whether the justices ought to have treated the notice as a nullity ab initio, or ought to have quashed it. I understand that the majority of your Lordships take the latter view, and that no question arises as to the costs, the appellants having agreed to pay the respondents' costs in any event. In these circumstances, I do not desire to dissent from the motion proposed by my noble and learned friend on the Woolsack.

LORD RADCLIFFE: My Lords, I agree with the views that have been expressed by my noble and learned friend, LORD MORTON OF HENRYTON. In my opinion, the enforcement notice suffered from one radical defect: it did not contain such particulars of what was alleged against the offender as the Town and Country Planning Act, 1947, required. It is evident that those who framed it thought that it was a sufficient compliance with the Act of 1947 to inform the respondents that the development specified appeared to the county council to be " in contravention of planning control ". I have a good deal of sympathy with them in their problem of finding the right form of words that would do justice to the rather obscure prescriptions of the Act of 1947 on one side, and on the other would correspond with their own necessarily imperfect knowledge of the exact circumstances of which they wished to complain. They seem to have chosen the general phrase " in contravention of planning control " which, in my view, is, at any rate, wide enough to cover everything before or after 1948; for, in this field, planning control has been a continuous régime, involving, indeed, different rights and obligations and different remedies and consequences from time to time, but still a continuous system with the nature of which everyone concerned

A has had to be more or less familiar. But I think that such a general phrase is not enough, and that the Act of 1947 does entitle an alleged offender to receive a particular allegation, not merely of what he is said to have done that is wrong, but also of the respect in which what he has done is said to be a ground for the issue of an enforcement notice against him. Considering the serious consequences that may result either from complying with a notice or from failing to B comply with it, I do not think that any rule less strict than this can be upheld by the courts.

Taking this general view of what the notice sought to do and of what is amiss with it, I am afraid that I do not find myself persuaded by the other argument against its validity, that, on its true construction, it was a notice " under s. 23 " of the Act of 1947, whereas the development complained of took place before 1948. C All notices of this kind are " under s. 23 ", because s. 75 itself so provides. But, in my view, it would be going too far to pin this notice down to a positive allegation that what is complained of is some post-1948 development, or that the statutory powers invoked are confined to those given by s. 23. It is its vagueness, not its particularity, that is its vice. " Planning control " is, after all, the phrase which the Building Restrictions (War-Time Contraventions) Act, 1946, D had used in reference to the then existing system; " previous planning control " is a phrase evolved by s. 75 of the Town and Country Planning Act, 1947, and " current planning control " is not a phrase which that Act uses at all, but owes its existence to the nice clarity of the judicial mind. Read by an ordinary layman, the notice would not convey more to him than that the Town and Country Planning Act, 1947, and its powers were being invoked against him; E and, read by his legal advisers, they would have to know enough about that Act not to be misled by the notice's form before they would be able to appreciate the significance of those special words or phrases that do, indeed, point more appropriately to the enforcement powers of s. 23 than to the enforcement powers of s. 75.

I agree with my noble and learned friend, LORD MORTON OF HENRYTON, that, F strictly, this was not a case for quashing by justices. But I do not see any useful purpose served by upsetting the order of the Divisional Court, since, if the notice is, as I think, radically defective, it can have no substantive operation before any court of law.

LORD COHEN: My Lords, the Town and Country Planning Act, 1947, G repealed earlier legislation on the subject and, in Part 3, dealt with control of development of land after the appointed day (July 1, 1948). Section 12 (1) provides that permission shall be required in respect of any development of land carried out after the appointed day, and sub-s. (2) contains a definition of development which differs in some respects from the definition of development in the repealed Acts. Section 13 deals with the grant of permission for development H under Part 3, and provides that permission may be granted either unconditionally or subject to such conditions or limitations as may be specified. Section 23 deals (see the marginal note) with " enforcement of planning control ". Subsection (1) and sub-s. (2) of that section read as follows:

> " (1) If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of I permission required in that behalf under this Part of this Act, or that any conditions subject to which such permission was granted in respect of any development have not been complied with, then, subject to any directions given by the Minister, the local planning authority may within four years of such development being carried out, if they consider it expedient so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land a notice under this section.

> " (2) Any notice served under this section (hereinafter called an ' enforcement notice ') shall specify the development which is alleged to have been carried out without the grant of such permission as aforesaid or, as the case may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with, and may require such steps as may be specified in the notice to be taken within such period as may be so specified for restoring the land to its condition before the development took place, or for securing compliance with the conditions, as the case may be; and in particular any such notice may, for the purpose aforesaid, require the demolition or alteration of any buildings or works, the discontinuance of any use of land, or the carrying out on land of any building or other operations."

Sub-section (3) provides that an enforcement notice shall take effect at the expiration of such period (not being less than twenty-eight days after service thereof) as may be specified in the notice, unless within the period so specified an application is made for permission for the retention on the land of any buildings or works, or continuance of any use of the land to which the enforcement notice relates, or an appeal is made to the court in accordance with the provisions of the section. Sub-section (4) deals with appeals, and provides that the appeal shall be to the appropriate court of summary jurisdiction and that on any such appeal the court—

> " (a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates;
>
> " (b) if not so satisfied, but satisfied that the requirements of the notice exceed what is necessary for restoring land to its condition before the development took place, or for securing compliance with the conditions, as the case may be, shall vary the notice accordingly;
>
> " (c) in any other case shall dismiss the appeal."

I pause here to observe that it has been held, and I think rightly held, (i) that the court of summary jurisdiction can only quash the enforcement order on proof of one or other of the matters mentioned in sub-s. (4) (a); (ii) that, if the notice is defective in respects not there mentioned, the magistrate cannot quash the conviction but, on any proceedings to enforce an alleged breach of the planning control, the accused may plead that the notice was bad and will not be prejudiced by the fact that it had not been quashed: see *Mead* v. *Plumtree* (2) ([1952] 2 All E.R. 723).

Section 24 contains supplementary provisions as to enforcement of planning control, including (i) a power for the planning authority to enter on the land and take any steps required by the enforcement notice to be taken and not so taken; (ii) a power for the authority to recover any expenses incurred in exercising the first-mentioned power; (iii) a provision exposing any person who continues to use land in breach of an enforcement notice or in breach of conditions required to be complied with in respect of any use of such land to a penalty on conviction not exceeding £50 and, if the use is continued after conviction, to a further penalty not exceeding £20 for each day the conviction continues.

Part 8 of the Town and Country Planning Act, 1947, deals with its application to special cases. Section 75, the first section in Part 8, deals (see the marginal note) with " existing development contravening previous planning control ". Though the marginal note uses the word " development ", that word does not appear in the body of s. 75, possibly because the definition of development in the earlier Act of 1932 differs from that in s. 12 of the Act of 1947. Section 75 (1), so far as material, provides as follows:

> " Where any works on land existing at the appointed day were carried out,

> or any use to which land is put on that day was begun, in contravention of previous planning control, then, subject to the provisions of this section, the provisions of Part 3 of this Act with respect to enforcement notices shall apply in relation thereto as they apply in relation to development carried out after the appointed day without the grant of permission in that behalf under the said Part 3."

The effect of this is to incorporate s. 23 mutatis mutandis. It is obvious that s. 23 (4) (a) could not be applied since, in dealing with previous planning control, there could be no question of permission having been granted under the Act of 1947; hence, by s. 75 (5), a new para. (a) is substituted for that in s. 23 (4), where the enforcement notice is served by virtue of s. 75. It reads as follows:

> "(a) if satisfied that the works or use to which the notice relates are not works or a use to which s. 75 of this Act applies, shall quash the notice to which the appeal relates."

Sub-section (9) explains what is meant by contravention of previous planning control. So far as material, it provides:

> "For the purposes of this section, works on land shall be deemed to have been carried out, and uses of land to have been begun, in contravention of previous planning control—(a) where at the material time the land was subject to a resolution to prepare a planning scheme, if carried out or begun otherwise than in accordance with permission granted in that behalf by or under the interim development order."

I turn to the facts. It is common ground between the parties that the use of the land to which the appellants objected commenced in 1934, and that all the development referred to in the enforcement notice was carried out before the appointed day. If, therefore, the notice on which the appellants rely is valid, it must be because it was rightly served by virtue of s. 75 and complied with the requirements of s. 23 (2), modified so far as necessary having regard to the fact that the complaint was of contravention of "previous planning control." The notice is headed "Town and Country Planning Act, 1947. Enforcement Notice". By it, the appellants

> "give notice that the development or other matter hereunder specified appears to them to be in contravention of planning control."

The notice specifies the erection or placing and the use for residential and ancillary purposes of temporary buildings and other erections on land known as Limekiln Lane Camp, and identifies the dwellings and erections to which objection is taken. It then proceeds to specify the steps which the respondents are required to take, and states that, subject to the provisions of the Act, the notice will take effect at the expiration of twenty-eight days after service thereof. It concludes:

> "Expressions used in this notice have the meanings assigned to them by the above-mentioned Act, except where the context otherwise requires."

Some reliance was placed on those words, but I do not attach importance to them, since (i) even without them, I should have assumed that development meant development under the Act mentioned in the heading; and (ii) the Town and Country Planning Act, 1947, contains no definition of "planning control".

Below the signature of the clerk to the council appears the words "Your attention is drawn to the notes set out on the back of this notice". On the back appears a summary of the provisions of s. 23 (3) and s. 24 (1), but no reference to s. 75.

Was this a good notice, having regard to the facts found which make it clear that the only breach of planning control which could be established was contravention of "previous planning control"?

This question raises a matter of construction of s. 23 (2). As I read that section, while it prescribes no particular form, it does, by its terms, require that, in the case of development after the appointed day, the enforcement notice must bring home to the person on whom it is served first, whether the authority objects to development without permission or to failure to comply with conditions, and secondly, if the objection is to development, that the development is alleged to be without permission. No particular formula is prescribed, and the notice could satisfy this last condition either by an express statement to the effect that the development was without permission, or by a reference to s. 23 (2), which necessarily connotes an allegation that the development was without permission.

We are, however, not concerned with development since the appointed day. The notice, if valid, must be justified under s. 75. How must the authority adapt s. 23 to a case of development before the appointed day? In such a case, it seems to me that the notice must not only specify the works which are alleged to have been carried out, or the use to which land is alleged to have been put on the appointed day, it must make it clear that such works are alleged to have been carried out before the appointed day, or such use is alleged to have been on the appointed day " in contravention of previous planning control ". If that be the true view of the requirements of s. 23 (2), when made applicable by virtue of s. 75 (1), it necessarily follows that the notice in the present case failed to comply with the requirement since, as I read the notice, there is nothing in it to indicate to the recipient that the planning control alleged to have been contravened was " previous planning control ", and not planning control under the Town and Country Planning Act, 1947.

If the matter rested there, the magistrates might still have been right in refusing to quash the enforcement notice, since it could not, if regarded as a notice served by virtue of s. 75, be brought within the paragraph substituted by sub-s. (5) of that section for para. (a) of s. 23 (4). The principle of the decision in *Mead* v. *Plumtree* (2), with which I respectfully agree, would apply. The notice could not be quashed under s. 23 (4), but the respondents could raise the question of the validity of the notice in any proceedings against them for failing to comply with it.

But was the notice, on its construction, a notice under s. 23, as made applicable by s. 75, or was it a notice under s. 23 in respect of development alleged to have taken place after the appointed day? The Court of Appeal construed it in the latter sense, and I agree with them. I am content to adopt for the purposes of my judgment the observations of Denning, L.J., when he says ([1955] 2 All E.R. at p. 271):

> " It seems to me that, on a fair reading of that enforcement notice, it complains only of breaches of the existing planning control since July 1, 1948, and not at all of breaches of previous planning control. The notice starts off with a direct reference to the Act of 1947 and no earlier Act. It refers to ' development ', which is a term particularly defined by the Act of 1947 and has a much wider meaning in that Act than in other Acts; it refers simply to ' planning control ' and not to ' previous planning control '; and, finally, it refers on the back to s. 23 without a single reference to s. 75. These considerations lead me to the conclusion that this notice complains only of contraventions after July 1, 1948."

I would only add that I think the conclusion which the learned lord justice reached is reinforced by the fact that the development is stated in the notice to be, not to have been, in contravention of planning control.

Counsel for the appellants submitted that, even on this construction of the notice, the magistrates were right in refusing to quash the order, because the enforcement notice did not specify that the development was done without permission. Being a defective notice, he said that the principle of the decision in *Mead* v. *Plumtree* (2) was applicable, and the respondents must wait to raise the point until they are charged with breach of the enforcement notice. I cannot accept this argument. On the construction I have placed on the notice, it alleges

A that the respondents had developed the land since the appointed day without permission. It was proved before the magistrates that the development took place before the appointed day, and it was agreed that no obligation rested on the respondents to obtain permission under the law in force before the appointed day. It seems to me that, in these circumstances, the respondents proved that no such permission was required in respect thereof, i.e., in respect of " the development to B which the notice relates ". The magistrates, therefore, had jurisdiction to quash the enforcement order, and, in my opinion, they should have done so.

For these reasons, which are substantially the reasons given by the Court of Appeal for their decision in the present case, I would dismiss the appeal.

LORD EVERSHED: My Lords, I agree with the order proposed by the C noble and learned Lord on the Woolsack.

My Lords, the Town and Country Planning Act, 1947, introduced a system of control of all land use more strict and comprehensive than the control to which it had been subject under previous legislation, more particularly under the Town and Country Planning Act, 1932, and the Town and Country Planning (Interim Development) Act, 1943, both wholly repealed by the Act of 1947 from D the appointed day. The power to enforce this new control by way of enforcement notice is contained in s. 23 and s. 24 of the Act of 1947. According to s. 23 (1), the power arises in either one of two events; namely, (i) where " development " has been carried out since July 1, 1948, without the permission of the planning authority, and (ii) where there has been non-compliance with any condition on which the permission for development had been given by the planning authority.

E Although no form of enforcement notice is prescribed, the essential requirements of every such notice are found in s. 23 (2). Thus the notice

> " shall specify the development which is alleged to have been carried out without the grant of such permission as aforesaid or, as the case may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with . . . "

F It is, in my opinion, clear from the language which I have quoted that it is not sufficient for the planning authority in an enforcement notice merely to denote the buildings or other matters of which they complain, and then to require that such buildings be removed or that the matters complained of be remedied. The notice must also draw specific attention to the grounds of complaint; that is, it must allege as regards any buildings or other matters of complaint either that G they constitute development for which no permission has been granted, or (as the case may be) that they constitute, or have involved, non-compliance with conditions imposed when the permission was given. So much is, in my judgment, the inescapable effect of the language above cited from s. 23 (2) of the Act of 1947.

In the present case, it has been found, and is agreed, that none of the buildings or other matters complained of in the enforcement notice was carried out, or H done, after July 1, 1948. They are, therefore, prima facie, wholly outside the scope of the control contained in Part 3 of the Act. It is, however, alleged by the appellants that, at the time these buildings or other matters were carried out or done, the land in question was subject to a resolution to prepare a scheme and to an interim development order under the previous legislation of 1932 and 1943; and, by s. 75 (1) (in Part 8 of the Act of 1947 entitled " Application to I special cases "), it is provided that:

> " Where any works on land existing at the appointed day were carried out, or any use to which land is put on that day was begun, in contravention of previous planning control, then, subject to the provisions of this section, the provisions of Part 3 of this Act with respect to enforcement notices shall apply in relation thereto [i.e., in relation to the existing works or use] as they apply in relation to development carried out after the appointed day without the grant of permission in that behalf under the said Part 3."

Sub-section (9) of the same section declares that works on land shall be deemed to have been carried out, and use of land to have been begun, in contravention of previous planning control

> " (a) where at the material time the land was subject to a resolution to prepare a planning scheme, if carried out or begun otherwise than in accordance with permission granted in that behalf by or under the interim development order; (b) where at the material time the land was subject to a planning scheme, if carried out or begun otherwise than in conformity with the provisions of the scheme or of permission granted thereunder."

The sub-section goes on to provide for the case where permission had been granted subject to conditions restricting the period during which the works or use could be continued, so that, where such period had expired before the appointed day, s. 75 applies

> " as if the works or use had been carried out or begun in contravention of previous planning control."

It follows that the appellants were enabled by the terms of s. 75 of the Act to serve an enforcement notice related to the works and other matters here in question if such works or other matters were, in fact (as they allege), carried out, or done, in contravention of the 1932 and 1943 planning control. But, as I read s. 75 (1) and (9), in conjunction with s. 23 (2), it was incumbent on the appellants in any valid or effective enforcement notice so related to pre-1948 works and other matters to allege of them that they had been in contravention of previous planning control, as that phrase is used and defined in s. 75. In other words, though I agree with the learned counsel for the appellants that there is no necessity to refer in terms or by number to s. 75 of the Act, the joint effect of that section and s. 23 is, in the case of complaints based on alleged contravention of previous planning control, so to specify or allege, by way of necessary analogy to the obligation which, in my judgment, arises in the case of alleged contravention of the new Act of 1947 control. My view is reinforced by the further circumstance that the powers and duties of the justices under s. 23 (4) of the Act on an appeal against an enforcement notice are, by virtue of s. 75 (5), in terms different when such notice is " served by virtue of this section " (i.e., s. 75); a provision which, to my mind, at least requires that the notice, if intended to relate to alleged contravention of previous planning control, shall, in effect, so state on the face of it.

I turn to the enforcement notice in the present case, which I apprehend must be construed in the light of the statutory provisions, by virtue of which it purports to have been served. I do not repeat the grounds which have already been stated by your Lordships for rejecting the view, as a matter of construction, that such notice is apt to relate to works and other matters existing on July 1, 1948, and alleged to constitute contravention of the planning control contained in the Acts of 1932 and 1943.

But the question remains whether the notice not only on its face and according to its ordinary sense constitutes allegations of contravention of post-1948 control but suffers also from the vice of being, even in that respect, ambiguous and, therefore, wholly ineffective. I have already expressed my view that a notice related to alleged contravention of the Act of 1947 control must, in order to satisfy the requirements of form according to s. 23 (2), not only indicate the buildings or other matters complained of, but must also make it sufficiently clear on which of the two grounds indicated in sub-s. (1) they are objected to. In my judgment, on a fair reading of the present notice according to its terms, the complaint and the allegation are that the buildings and other matters complained of constitute development carried out after the appointed day without permission. There is, to my mind, nothing in the language used apt to cover or suggest an allegation that any of the matters complained of constitute breaches of conditions imposed

A on the grant of permission. It is to be observed that, under s. 23 (2), the antithesis is between " development " on the one hand and " matters in respect of which it is alleged that . . . conditions . . . have not been complied with " on the other. It is true that, at the beginning of the present notice, complaint is made of " development *or other matter* hereunder specified "; but, if the items thereunder specified are referred to and regard is had to the steps which are required to be B taken, there is nowhere to be found any suggestion that there had been conditions imposed, and that such conditions had been broken. I, therefore, do not read the enforcement notice as ambiguous or as failing, on the face of it, to satisfy the terms of s. 23 (2) by an omission to indicate whether the alleged contravention of control consists of development without permission or of breach of conditions imposed on the grant of permission. I read it as constituting an allegation C (imprecise, no doubt, but sufficiently clear to a recipient) that all the specific items set out in the notice constituted development of land which had been carried out after July 1, 1948, without the grant of permission. So much is, indeed, apart from the date, in exact accordance with what the appellants have at all times alleged and now allege; for it is their case that the works and use of which they complain were carried out, or begun, without permission granted D under the interim development order.

My Lords, if my view of the requirements of the Act and the construction of the notice is correct, then I would answer the question posed by the justices in the Case Stated in the negative. But there is still the question whether, in the circumstances, the justices should (having interpreted the notice as one alleging post-1948 development without permission) have quashed the notice. The powers E of the justices to quash are narrowly defined by s. 23 (4), as amended (where appropriate) by s. 75 (5); and it is expressly enjoined on the justices in all cases, other than those specified, that they shall dismiss the appeal. Thus, in a case of contravention of post-1948 control, the right and duty of the justices to quash a notice appears to be limited to the three cases where (contrary to the allegation of the authority) (i) permission had in fact been given, or (ii) permission was not F properly required, or (iii) the conditions to the grant of permission had, in fact, been complied with. In the present case, it is not in doubt that the power and duty to quash arose, if at all, under the second of the above heads, that is, on the ground that no permission was, in truth, required.

It cannot, I think, be doubted that the terms of s. 23 (4) (a) and the formulation of the three grounds on which a notice under the section may be quashed, assume G the premise on which the notice proceeds—viz., that the matters complained of have been done, or undertaken, since July 1, 1948. The relevant words " that no such permission was required in respect thereof ", according to their more natural meaning, refer to those cases in which, by virtue of s. 12 (5), the development is of the limited character for which permission is excused. On the face of it, the sub-section makes no provision for the case where the development H alleged has not occurred in fact at all. In this respect, there appears to me to be a distinction between the language of para. (a) of s. 23 (4) itself, and the para. (a) which, in appropriate cases (i.e., cases of alleged contravention of previous planning control), s. 75 (5) requires to be substituted; for the general terms of the substituted para. (a) would appear to cover the case where the works or use alleged to be within the scope of s. 75 turn out, in fact, to be outside that section, I as having been executed after and not before, and, therefore, not " existing at ", the appointed day.

In *Mead* v. *Plumtree* (2) ([1952] 2 All E.R. 723), it was held by the Divisional Court, having regard to the limitations of the language of s. 23 (4), that the justices' power to quash could not arise where the notice was, on the face of it, a nullity—in that case, by reason of its failure, in accordance with the requirement of s. 23 (3), to specify the period at the expiration of which the notice should have effect. But, my Lords, the present is not, in my view, a case in which the enforcement notice is a nullity on the face of it. On its face (as I construe it), the notice alleged, and alleged in due compliance with s. 23 (2), specific development carried out since July 1, 1948, and carried out without the permission required by the Act of 1947. The true facts being that none of the development was carried out after July 1, 1948 (as by the terms of the notice alleged), is it too great a stretch of the natural language of s. 23 (4) (a) to say that no permission under the Act of 1947 was required for such development, because the development was executed at a date which made any such permission inapposite and, indeed, impossible ?

In the present case, where the facts are undisputed, I do not doubt that the respondents would be fully protected by the expression of your Lordships' opinion that the appellants have failed effectively to exercise the power conferred on them by s. 75 of the Act to invoke the provisions of s. 23 in relation to the works and use complained of. The notice which the appellants have served would have no more vitality in it than if it had been quashed; and it is conceded that it is now too late for the appellants to retrace their steps and serve a fresh notice in proper and appropriate form.

But other cases may well arise in which serious questions of fact might be involved, questions whether, in truth, the development had been carried out before the appointed day, or whether the land had, in fact, ever been used as alleged. If in such cases it were beyond the jurisdiction of the justices on an appeal to determine such questions of fact, then the only course open to the owner would be to await the taking of further steps by the authority under s. 24 of the Act, and then to challenge the validity of the notice; a course which might well involve him in a long period of uncertainty, and would certainly be likely to expose him to serious expense. Equally might such a course of proceedings be an embarrassment to the authority who might find, when the facts had turned out ultimately against them, that it was then too late to exercise their statutory powers and duties at all.

The words in s. 23 (4), " no such permission was required in respect thereof ", are clearly capable of application to any case in which permission was not, in truth, required under the Act of 1947, whether because the development was of a kind which, by the terms of the Act, called for no permission, or because the development, by reason of the date when it was carried out, was outside the scope of the Act altogether. In the absence, therefore, of any provision for the case of a notice related to development alleged to have been carried out after July 1, 1948, but executed, in fact, prior to that date, and having regard to the incongruity which would otherwise appear to arise in the converse case of a notice related to development alleged to have been carried out before but, in fact, executed after the appointed day, I think the Court of Appeal and the Divisional Court were right in holding that, in the circumstances and on its true construction, the enforcement notice of Apr. 26, 1951, ought to have been quashed by the justices.

I would, accordingly, dismiss the appeal.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. A. Whitley*, Beverley (for the appellants); *Corbin, Greener & Cook*, agents for *Lambert & Parkinson*, Bridlington (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

POSTILL *v.* EAST RIDING COUNTY COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Streatfeild and Donovan, JJ.), June 5, 6, 1956.]

Town and Country Planning—Enforcement notice—Planning permission for use of field as site for travelling circus for period in 1952 *subject to discontinuance at end of period—Use without planning permission for periods in subsequent years—Whether use discontinued in* 1952*—Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6 *c.* 51), *s.* 23 (4) (*a*).

From 1947 onwards the appellant let a field of which he was the owner to travelling circuses for short periods during the summer. In 1952 he was granted planning permission to use the field as a temporary site for a travelling circus for the period July 20 to Sept. 7, subject to a condition that the use should be discontinued at the expiration of that period. The field ceased to be used as the site of a circus on Sept. 6, 1952. Planning permission was not obtained for the field to be used as a site for a circus in 1953, 1954 or 1955. In 1955, when a circus was on the field, the respondents served an enforcement notice on the appellant based on the ground that the condition subject to which the planning permission was granted in 1952 had not been complied with. The appellant sought to have the notice quashed.

Held: the notice must be quashed since the user of the field as a site for a circus was discontinued by Sept. 7, 1952, and, therefore, there was no breach of the condition imposed in the planning permission of that year.

Appeal allowed.

[For the Town and Country Planning Act, 1947, s. 23 (4), see 25 HALSBURY'S STATUTES (2nd Edn.) 525.]

Case Stated.

This was a Case Stated by justices for the East Riding of the County of York in respect of their adjudication as a magistrates' court sitting at Bridlington on Oct. 14, 1955. On Sept. 17, 1955, the appellant preferred a complaint against the respondents under the Town and Country Planning Act, 1947, s. 23 (4), thereby seeking, as a person aggrieved by an enforcement notice served on him by the respondents, to have the notice quashed by appeal to the justices. The following facts were found. On Sept. 7, 1955, an enforcement notice was served by the respondents, as local planning authority, on the appellant. The land referred to in the notice was acquired by the appellant in 1945, and he was thereafter, and at all material times, the owner of the land. Since 1945 the land had been used in connection with a riding school and for grazing. In the years 1947-55 inclusive, use had also been made of the land for the accommodation of circuses giving performances in the summer, the use varying between ten days in 1949 and over two months in 1955. Each of the circuses was a complete circus, bringing its own tentage and equipment. In 1952, in consequence of representations made to the appellant by the Bridlington Corporation, acting on behalf of the local planning authority, the appellant applied for, and obtained, planning permission, dated May 26, 1952, for the use of the land as a temporary site for a travelling circus for the period from July 20 until Sept. 7, 1952. This planning permission was made subject to a condition that the use thereby authorised should be discontinued, and any works necessary to reinstate the land carried out, at the expiration of the period ending Sept. 7, 1952. The circus left the land during the second week in September, 1952, performances having terminated on Sept. 6, 1952. The enforcement notice was served during the period in 1955 when the land was occupied by a circus.

It was contended on behalf of the appellant (i) that the condition in the planning permission was complied with in 1952 when the use of the land as a site for a circus ceased in September, 1952. (ii) Although it was not admitted that such was the case, if the circus had remained for a few days after Sept. 7, 1952, so that the condition had not been complied with, it would be harsh and unconscionable for the enforcement notice to be upheld in view of the unchallenged use of the land as a site for a circus in 1953 and 1954. (iii) Section 12 (5) (b) of the Town and Country Planning Act, 1947, applied exactly to this case. The land had been used as a site for a circus on occasions before the appointed day under the Act, and the appellant was entitled to use it on similar occasions after the appointed day. It did not matter that the occasions had only extended over two years. There was no qualifying period before a right could be claimed under s. 12 (5) (b). In addition to the right, the appellant was permitted by the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728), art. 3 and Sch. 1, Class 4, para. 2, to use the land for twenty-eight days in any one year. The application for planning permission was a surplusage, and had been made under pressure from the Bridlington Corporation, as agents for the planning authority. Planning permission was not necessary, the condition imposed on the permission was, therefore, invalid, and there was no foundation for the enforcement notice. (iv) Section 23 (4) of the Act of 1947 enabled a person aggrieved by the service of an enforcement notice to seek to have the notice quashed by the magistrates' court on three grounds. If the condition in the planning permission was not complied with in 1952 when the use of the land as a site for a circus ceased in September, 1952, then planning permission had been granted by the Town and Country Planning General Development Orders, 1948 and 1950, as to the first twenty-eight days' use in each year, and no planning permission was necessary by s. 12 (5) (b) of the Act as to the period in excess of twenty-eight days in each year. The enforcement notice should be quashed on these grounds.

It was contended on behalf of the respondents (i) that, so far as the use of land for circuses was concerned, this use had been continued in each year following the permitted period in 1952. It could not, therefore, be said that the use had been discontinued in 1952. (ii) The enforcement notice was not concerned solely with such use as might have been made of the land after the expiration of the permitted period in 1952. It was concerned also with, and applied to, every continuation of the use of the land for circuses in 1953, 1954 and 1955. (iii) The use made of the land in each of the years 1947 and 1948 was insufficient to establish a right under s. 12 (5) (b) of the Act of 1947, nor was such use a use " on occasions " within the meaning of those provisions. (iv) If the foregoing contentions were wrong, any right established under s. 12 (5) (b) of the Act would be confined to the use of the land on similar occasions amounting at most to a matter of a few days each. After July 1, 1948, the permission granted by the Town and Country Planning General Development Order, 1950, art. 3, and Sch. 1, Class 4, which permitted any land unoccupied by buildings to be used for any purpose on not more than twenty-eight days in any calendar year, could not be used to extend any rights which might be derived from s. 12 (5) (b) of the Act. (v) Having regard to the permission granted by the Town and Country Planning General Development Orders, the use which had been made of the land for circuses in 1948 and 1949 was use under a planning permission. It was not until 1950, when the land was used for circuses for more than twenty-eight days in the year, that any use exceeded what was so permitted. Permission was still required for any use in excess of twenty-eight days in 1952, when the appellant properly applied for, and obtained, planning permission. (vi) The only ground on which the magistrates could consider quashing the enforcement notice was that the condition, subject to which planning permission had been granted in 1952, had, in fact, been complied with. Any contention or evidence concerning other matters was irrelevant. This was shown by the provisions of s. 23 (1), (2) and (4) of the Act of 1947, which clearly distinguished between enforcement notices relating to development carried out without permission, and enforcement notices relating to breach of condition attached to a planning permission; and between the grounds on which the magistrates might consider quashing either type of notice. (vii) As it was admitted that the use of the land for circuses had continued in 1953 and subsequent years, there was no ground on which the enforcement notice could be quashed.

The justices dismissed the appeal and the appellant now appealed.

J. P. Widgery for the appellant.
Harold Williams, Q.C., and *B. S. Wingate-Saul* for the respondents.

LORD GODDARD, C.J.: This is a Case Stated by justices for the East Riding County Council, before whom a complaint was preferred by the appellant, seeking, as a person aggrieved by an enforcement notice served under the provisions of the Town and Country Planning Act, 1947, to have that notice quashed. The point for our determination is really a very short one.

The appellant is the owner of a field, and for a considerable number of years past he has been in the habit of letting this field to travelling circuses for a short period during the summer. He let his field for an average of about eleven days in each year. No doubt to use this field as a circus site would amount to development under the Town and Country Planning Act, 1947, but that Act provides, by s. 12 (5) (b), that permission is not required in the case of land which, on the appointed day, July 1, 1948,

> " is normally used for one purpose and is also used on occasions, whether at regular intervals or not, for any other purpose, in respect of the use of the land for that other purpose on similar occasions after the appointed day."

Permission, therefore, was not required for the use of this land for a circus site for eleven days in any year. In addition to that, the Minister, by the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728), art. 3, and Sch. 1, Class 4, para. 2, granted permission for use of land for any particular purpose for a period not exceeding twenty-eight days.

In 1952 the appellant applied for, and was granted, planning permission to use the land from July 20, 1952, until Sept. 7, 1952*, for the purpose of a circus being held there; that period was longer than the eleven days to which he had a right, and to which it is conceded he had a right without any permission, whether the twenty-eight days is added on or not. The circus was discontinued and left the land on Sept. 6, 1952. The appellant did not apply for any permission in 1953 or in 1954. On Sept. 7, 1955, when a circus was on the land, an enforcement notice was served on the appellant. It was said that there had been a breach of the condition* in that the use of the land as a site for a circus was not discontinued from and after Sept. 7, 1952.

Section 23 (4) of the Act provides:

> " If any person on whom an enforcement notice is served under this section is aggrieved by the notice, he may . . . appeal . . . to a court of summary jurisdiction for the petty sessional division or place within which the land to which the notice relates is situated; and on any such appeal the court—(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates."

The justices held that, although in September, 1952, the appellant did discontinue, in the sense that the field ceased to be used as the site of a circus, yet because in the next year and in 1954, the land was again used for the circus the condition under which permission had been given in 1952 had been broken. This court cannot take that view. We think the condition under which planning permission was given was that the use in 1952 should cease on Sept. 7, 1952, and it did cease on that day. It is agreed that in 1953 he could have used his field for the circus at any rate for eleven days. It is also contended that he could have used it for eleven days plus twenty-eight days under the Order of 1950. This court does not think that it is necessary to decide whether or not he could have used it for the twenty-eight days in addition to the eleven days, but, at any rate, he could have used it for eleven days. It is said, however, that he had broken the condition in 1952, because in 1953 he allowed the circus to come back again, as he certainly was entitled to do for some period. We think that, as the justices found that the circus did cease on Sept. 7, 1952, there was no breach of condition, and, therefore, the justices ought to have quashed the notice. The only point is whether or not there was a discontinuance in 1952, and, as there was a discontinuance, the respondents had no power to serve an enforcement notice. This appeal, therefore, must be allowed.

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* The permission was subject to the condition that the use should be discontinued at the expiration of the period ending Sept. 7, 1952.

STREATFEILD, J.: I am of the same opinion. I think the case narrows down to the one question whether the condition of discontinuance on Sept. 7, 1952, had been fulfilled. The facts stated in the Case show that the circus was discontinued, and the user of the land for that purpose was discontinued on Sept. 7, 1952. A distinction must be drawn between continuance of user and a repeated user for the same purpose after a substantial interval of time. I am unable to take the view that a resumption or repetition of the same user starting some ten months later in 1953 was a continuance of the same user in 1952; so also in 1954 and 1955.

For these reasons, I agree that the facts show that the condition in the 1952 permission was fulfilled. This being so it is laid down in s. 23 (4) (a) of the Town and Country Planning Act, 1947, that the justices should have quashed the enforcement notice. I agree, therefore, that this appeal should be allowed.

DONOVAN, J.: I agree. I add only this, that the word " discontinued " does not necessarily mean permanently discontinued. One discontinues many things that may be discontinued only for a time, and when one resumes what one has discontinued it does not mean there has never been any discontinuance. There has been a discontinuance followed by a revival or resumption, and, for these reasons, I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Collyer-Bristow & Co.*, agents for *Harland, Woodhouse & Turnbull*, Bridlington (for the appellant); *Sharpe, Pritchard & Co.*, agents for *R. A. Whitley*, Beverley (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

NYALI, LTD. *v.* ATTORNEY-GENERAL.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Radcliffe and Lord Cohen), April 16, 17, June 8, 1956.]

Crown—Kenya Protectorate—Franchise of pontage—Grant contained in agreement with bridge company—Exemption from tolls for " military on duty "—Whether exemption extended to all soldiers of the Queen.

By an agreement dated Oct. 9, 1929, and made between the Government of Kenya Colony and Protectorate under its public seal of the one part and the plaintiff company under its common seal of the other part, it was provided that the government gave the company permission to erect a pontoon bridge connecting the island of Mombasa with the mainland of Kenya Protectorate on the terms therein contained. By cl. 12 it was provided that on completion and on permission being given by the government to the company to open the bridge, then " . . . subject to the payment of the tolls hereinafter laid down the bridge shall be kept open to every vehicle . . . and to all foot passengers and animals . . ." By cl. 13 responsibility for repairing the bridge rested with the company who were entitled to charge tolls. Clause 22 provided the maximum amount of tolls chargeable in respect of the following: (A) All passenger vehicles (persons limited to six); (B) Motor bicycles and rickshaws; (C) Push bicycles; (D) Foot passengers or persons in excess of six in number travelling in any vehicle; (G) Vehicles for commercial purposes loaded or empty not exceeding 1½ tons; and (H) Vehicles between 1½ and 5 tons. By cl. 23 it was provided: " No tolls shall be levied in respect of police or military on duty or their equipment baggage or transport ". By cl. 24 it was provided: " Tolls payable by government or government servants on duty other than as provided under cl. 23 shall be those specified in cl. 22 less twenty-five per centum ". At the date of the agreement there was in existence in Kenya Colony and Protectorate only one military unit, the King's African Rifles, established under the King's African Rifles Ordinance of June 12, 1912. No other similar military formation had been created in the territories of the Kenya government.

During and after the 1939-45 war, Imperial troops were sent to Kenya and in 1948 the military authorities refused to pay tolls in respect of military personnel and vehicles using the bridge. At and after that date the main traffic using the bridge consisted of military vehicles in charge of military drivers themselves on duty, carrying, under instructions of the military authorities, soldiers on leave, their families and friends and sometimes soldiers on duty. The company brought an action in England against the Crown for a declaration that Her Majesty's military forces and their vehicles, other than the military forces and vehicles of the Kenya government, were not exempt from liability to pay tolls.

Held: (i) the term the " military " in cl. 23 included all soldiers of the Queen and was not confined to the King's African Rifles.

(ii) (LORD REID and LORD RADCLIFFE dissenting) a military vehicle was the transport of " military on duty " within cl. 23 of the agreement when it was being driven by a military driver who was performing his duty in driving it, notwithstanding that the vehicle was carrying troops on leave.

(iii) on the true construction of the agreement where a military vehicle and its driver were exempt from toll, a toll of ten cents was chargeable under cl. 22 (D) in respect of every person not on duty travelling in the vehicle in excess of six persons including the driver.

Decision of the Court of Appeal ([1955] 1 All E.R. 646) affirmed.

[As to the exemption of the armed forces from tolls, see 28 Halsbury's Laws (2nd Edn.) 682, para. 1406.]

Case referred to:

(1) *Stamford Corpn.* v. *Pawlett*, (1830), 1 Cr. & J. 57; 148 E.R. 1334; 11 Digest (Repl.) 654, *786*.

Appeal.

Appeal from an order of the Court of Appeal, dated Feb. 21, 1955, and reported [1955] 1 All E.R. 646, reversing an order of Hilbery, J., dated July 28, 1954, whereby he made a declaration in favour of the appellant company that Imperial troops, other than the King's African Rifles, were not exempt from liability to pay tolls when using the Nyali Bridge built by the appellant company. The facts appear in the opinion of Viscount Simonds, the only point at issue in the House being the construction of the agreement of Oct. 9, 1929.

Charles Russell, Q.C., and *M. Littman* for the appellant company.
John Megaw, Q.C., and *Rodger Winn* for the Crown.

The House took time for consideration.

June 8. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the issues in this case now turn on the meaning and effect of a very few words in an agreement made on Oct. 9, 1929, between the appellant company and the Government of Kenya Colony and Protectorate. I say " now turn ", because questions of interest and importance arising on the nature and scope of the royal prerogative and on the meaning of s. 143 of the Army Act, which were discussed in the courts below, have not been raised in this appeal.

It was provided by the agreement to which I have referred that the appellant company should, under the supervision of the government, construct within two years and maintain a bridge, which will be called the Nyali Bridge, connecting the island of Mombasa with the mainland of Africa. I do not think it necessary to refer to any of the clauses of the agreement except cl. 12, cl. 22, cl. 23 and cl. 24 which were as follows:

> " 12. Upon completion of the bridge the company shall apply to the government through the Colonial Secretary for permission to open the bridge to traffic and the bridge shall not be opened to traffic unless and until the government through the Colonial Secretary shall have given such permission in writing. Upon such permission being given the company shall open the bridge to traffic and subject to the payment of the tolls hereinafter laid down the bridge shall be kept open to every vehicle the weight of which when laden is less than five tons and to all foot passengers and animals provided that no metal-shod vehicles of any description shall be permitted to use the bridge except such vehicles as government may for public purposes require to take or to be taken across the bridge. The government by its duly authorised agents may for public purposes require the company to allow vehicles the weight of which when laden does not exceed ten tons to cross the bridge provided that while any such vehicle is crossing the bridge the bridge shall be closed to all other traffic. And provided further that all or any damage of a substantial nature caused to the decking or structure of the bridge by metal-shod vehicles taken over the bridge under the provisions of this clause shall be made good at the expense of the government.

> "22. Tolls payable by members of the public for crossing the bridge shall not exceed the following:—
>
> | | *Shgs.* | *Cts.* | |
> |---|---|---|---|
> | (A) All passenger vehicles (persons limited to six) ... | 2 | 00 | each |
> | (B) Motor bicycles and rickshaws ... ... | | 50 | each |
> | (C) Push bicycles ... ... | | 25 | each |
> | (D) Foot passengers or persons in excess of six in number travelling in any vehicle ... ... | | 10 | each |
> | (E) Animals ... ... | | 10 | each |
> | (F) Animals laden ... ... | | 25 | each |
> | (G) Vehicles for commercial purposes loaded or empty not exceeding 1½ tons ... ... | 2 | 50 | each |
> | (H) Vehicles exceeding 1½ tons but not exceeding 5 tons (limit 5 tons without permission as in cl. 12) ... ... | 4 | 00 | each |
>
> NOTE: The tolls payable under (A) (B) (C) and (D) shall cover all baggage goods etcetera conveyed.
>
> "23. No tolls shall be levied in respect of police or military on duty or their equipment baggage or transport.
>
> "24. Tolls payable by government or government servants on duty other than as provided under cl. 23 shall be those specified in cl. 22 less twenty-five per centum."

The bridge was duly completed and opened, and has been maintained and kept open ever since. At the time of the agreement, there was in existence in Kenya Colony and Protectorate only one military unit, the King's African Rifles, a regiment established under the King's African Rifles Ordinance of June 12, 1912. No other similar military formation has been created in the territories of the Kenya government. I mention this fact, which otherwise might seem unimportant, because it is the main ground on which the appellant company relies, for limiting the scope of the exemption from tolls provided by cl. 23 of the agreement.

Before the outbreak of the second Great War, no difficulties arose in managing the charges in respect of the bridge. But, in September, 1939, the tolls received by the appellant company declined owing to the fall in normal traffic and to the fact that most of the lorries in Mombasa were then commandeered for military duty and did not pay tolls. As a result, an arrangement, admittedly temporary, was made by which certain payments were made for all government, police and military traffic without regard to the strict rights of the parties under the agreement. In the meantime, the Imperial Army authorities set up a large transit or leave and holiday camp at Nyali, which was used by a large number of troops other than the King's African Rifles; and the bridge, which was the only means of passage between the island and the camp, was largely used for purposes of military traffic of all kinds. In 1948, however, the military authorities of the East Africa Command determined to put an end to the arrangement, claiming exemption from tolls not only under the royal prerogative and the Army Act, with which your Lordships are not concerned, but also under the express provision of cl. 23 of the agreement. Eventually, in 1952, the action out of which this appeal arises was brought by the appellant company against the Attorney-General, claiming specifically a declaration that

> "whether the camp be treated as a transit or a leave or holiday camp members of the military forces of H.M. Government and their vehicles (other than the military forces and vehicles of the Kenya government) are not exempt from liability to tolls chargeable by the plaintiffs in respect of the said Nyali Bridge."

As the case has developed, three main questions on the scope of the exempting provisions have emerged. The first and most important is whether the expression " military ", in cl. 23, is confined to the King's African Rifles or, I suppose, to any troops locally raised in the same way that that unit was raised under the provisions of a local ordinance. On this question, the Court of Appeal was unanimously in favour of the Crown, and I agree with that decision. The words " military on duty " are wide enough in their natural meaning to include all the armed forces of the Crown and, though the royal prerogative is not relied on as per se a ground of exemption, it is legitimate, in construing the agreement, to observe that it would be a strange thing to give a limiting meaning to the words " the military " so as to give the subject the right to demand of the Queen a toll for the passage of her armed forces. The terms of cl. 24 were relied on as showing that " the military " were being treated as government servants, and that the only military who could be so treated were the King's African Rifles. It is true that the terms of enlistment under the Police Ordinance (Laws of Kenya c. 36) were in many respects, in particular in respect of the oath of allegiance, similar to those of the King's African Rifles Ordinance, but that does not diminish the force of the argument, which prevailed with Morris, L.J., and Parker, L.J., that ample content is found for cl. 24 if the police are for this purpose regarded, as in my opinion they should be regarded, as " government servants ".

The second question is one of far greater difficulty and complexity. Indeed, in a certain view, I see no end to its complexity. It turns on the meaning of the words " military on duty or their equipment baggage or transport ". An example will indicate the problem. A military driver is ordered by his commanding officer to take a party of soldiers on leave in an army vehicle from the camp to the island, or from the island to the camp. In either case, the vehicle must cross the bridge. Is a toll payable under cl. 22 (a) of the agreement? " Yes ", says the appellant company, because the soldiers on leave are not " military on duty ", and the vehicle is " their transport ". " No ", says the Crown, because the driver is a soldier on duty and (in the words of Denning, L.J. ([1955] 1 All E.R. at p. 655)):

> " The driver is the person who gives the character to the vehicle. If he is on duty, the vehicle is on duty ",

or (as Parker, L.J., said (ibid., at p. 663)) because

> " where the only person on duty is the driver I should have thought that the vehicle was transporting him notwithstanding that he was the driver and that accordingly the vehicle could properly be described as his transport."

There are other and slightly different answers that may be given, and I return to them. But the complexity of the question may be seen from the fact that counsel for the appellant company admitted that, if the military driver had carried one soldier on duty in addition to a party of soldiers on leave, no toll would be payable, and he admitted, too, that, if the driver brought back the vehicle empty, again no toll would be payable. I think that he did not concede that the carriage of a soldier whose duty it was to guard the vehicle would be sufficient to leaven the lump of non-duty men, and so provide exemption.

My Lords, undoubtedly the word " their " in the expression " their transport " cannot be read in the possessive sense, if transport refers to the material thing, the vehicle. For the vehicle is not their property, nor is their equipment their property, nor is their baggage in the sense in which I think that word is used here. It is obviously a somewhat loose expression. It does not help much to substitute the phrase " the means by which they are transported ", for this, though it gets away from the idea of possession or ownership, still leaves open the question whose transport it is, when it is driven by a soldier on duty and carries a mixed party of soldiers on duty and soldiers on leave, or carries military stores and soldiers on leave, or carries no one except the driver or carries only soldiers on leave. My Lords, my own view, which has the merit of simplicity and of enabling the agreement to be easily worked without any consideration of the problems that I have mentioned and many others, is that a military vehicle is the transport of military on duty when it is being used for a military purpose. This is, in effect, what is meant by Denning, L.J.'s words (ibid., at p. 655):

> " The vehicle is, so to speak, on duty, and it is exempt, no matter whether it is carrying baggage, stores or men."

I do not think that it carries the matter any further, or, indeed, carries it any way at all, to ask what is the purpose for which the vehicle is being used, as soon as it is established that it is being used for the purpose for which the military authority has ordered its use, i.e., for the performance of a military duty. And I would venture to add, with great respect to those who take a different view, that this seems to me the plain commonsense of the matter. For it may be as much a part of the ordinary military routine and organisation to carry troops on leave to and from a particular place as to carry soldiers for sentry or other outpost duty. On this question, therefore, I conclude by saying that a military vehicle does not pay toll if it is being used for a military purpose, i.e., when the driver is a soldier who is performing his military duty by driving it.

The next question assumes that the vehicle is exempted, and asks what tolls are payable in respect of any, and how many, passengers who are not themselves military on duty. On this question, there was a difference of opinion in the Court of Appeal, the majority holding that a toll of ten cents per person was payable in respect of any person not on military duty in excess of six persons, but Denning, L.J., holding that a reasonable toll ought to be paid in respect of every person not on military duty, whether or not in excess of six.

My Lords, I do not think that this is an altogether easy question, but I favour the view of the majority of the Court of Appeal. Counsel for the appellant company in the first place relied not so much on the view of Denning, L.J., that here was a casus omissus and a reasonable toll must be paid, as on the argument that, on its true construction, the agreement provided for a levy of a toll of ten cents on every person not on military duty. But I find nothing in the agreement to support this construction. The toll chargeable in respect of persons carried in vehicles is to be found only in cl. 22 (d), and it is only " persons in excess of six in number in any vehicle " who are charged. It is not possible to read into this charging clause some such words as " but if the vehicle is itself exempted from toll, then every person travelling in that vehicle ". It is contended, or conceded, by the Crown that the words " in any vehicle " include a military vehicle which is itself toll-free, and that a toll is chargeable in respect of every person not on duty in excess of six. I think that this is the fair and literal meaning of the clause, and that no valid reason can be found for limiting the meaning of the words " in any vehicle ".

Denning, L.J., did not accept this view. He thought that there was no provision apt to cover the case of persons not on military duty who were carried in a toll-free car, that there was a casus omissus, and that, therefore, all such persons should pay a reasonable toll. If your Lordships take the view, as I do, that express provision is made for such persons in excess of six paying the prescribed toll of ten cents, you cannot, I think, conclude that there is a casus omissus for which provision should be made. The maxim " expressio unius " would clearly apply. But I must express my dissent from the view that, if there is such a casus omissus, the gap can be filled in this way. In my opinion, cl. 12 provides a conclusive answer to such a claim. The obligation is thereby laid on the appellant company to open the bridge to traffic, " and subject to the payment of the tolls hereinafter laid down " to keep it open to every vehicle as therein described, and to all foot passengers and animals. The bargain is made and the tolls prescribed. So far as they are not prescribed, passage over the bridge is open and free. I cast no doubt on the authority of such cases as *Stamford Corpn.* v. *Pawlett* (1) ((1830), 1 Cr. & J. 57), which the learned lord justice cited. The grant of a franchise of a fair or marked " cum omnibus tolnetis pertinentibus et spectantibus " must carry a right to levy a reasonable toll, though the amount of toll is not specified. But that is no authority for saying that, where the franchise is the subject of an agreement, in which the tolls chargeable are specified with particularity, some other toll is also chargeable. This contention on behalf of the appellant company must also, therefore, be rejected.

On the whole case, I am of opinion and move that the appeal be dismissed with costs.

LORD MORTON OF HENRYTON: My Lords, I agree with the speech which has just been delivered by my noble and learned friend on the Woolsack, and I do not desire to add any observations of my own.

LORD REID: My Lords, this case turns on the true construction of cl. 23 of the agreement made on Oct. 9, 1929, between the appellants and the Kenya government, under which the appellant company constructed a bridge connecting the island of Mombasa with the mainland, and were authorised to charge certain tolls. Clause 22 sets out a table of tolls, including (A) All passenger vehicles (persons limited to six) 2s. each, and (D) Foot passengers or persons in excess of six in number travelling in any vehicle ten cents each. Clause 23 provides " No tolls shall be levied in respect of police or military on duty or their equipment baggage or transport ". Clause 24 provides for a reduction of twenty-five per cent. on tolls payable by government or government servants on duty other than as provided under cl. 23. I do not think that any other clause in the agreement need be considered.

Circumstances have altered greatly since the agreement was made, and it is not surprising that difficult questions have arisen in applying the terms of the agreement to the new situation. It is said that in 1929 the only military in the area were the King's African Rifles and that, for various reasons, the word " military ", in cl. 23, only applies to that regiment. But I agree with your Lordships in rejecting that argument.

I find much more substance in the appellant company's alternative argument. Much of the traffic which now crosses the bridge consists of military vehicles driven by a military driver on duty, but conveying either members of the forces on leave or parties of civilians, generally soldiers' families, for such purposes as shopping. The appellant company maintains that, in such cases, neither the vehicle nor the passengers are exempted from toll by cl. 23. The Crown's first answer to this argument is that the words " their equipment baggage or transport " refer only to the words " police or military ", and not to " police or military on duty ". This means that every military vehicle would be exempt, no matter who was driving it or what was the purpose of its journey. I cannot accept that argument; the structure of the sentence appears to me to be against it. It would have been easy to say " police or military on duty or police or military equipment baggage or transport " if that had been intended. In my judgment, the word " their " refers to " military on duty "; their equipment and baggage means equipment and baggage which is being taken for the use of military on duty, or which they are taking with them, and their transport means the transport which is conveying them. Military on duty do not own, and generally do not even possess, " their " equipment, baggage or transport; but things being used by people are commonly called " their " things without regard to legal ownership or possession, and these clauses are not drafted in the language of conveyancers.

Then the Crown says that, even if that be so, the drivers of the vehicles are on duty and the vehicles are " their " transport and, therefore, exempt from toll. It is true that the drivers are in charge of the vehicles which they are driving, and the vehicles might well be said to be their vehicles while they are in charge. But are the vehicles " their transport " ? It appears to me that, when a vehicle is sent out with a driver to convey passengers to their destination, it would commonly be said that the vehicle is the passengers' transport. So, where a vehicle and driver are provided to transport a shopping party across the bridge to Mombasa, it appears to me more natural to say that the vehicle is their transport than to say that it is not their transport but is the transport of the driver. The driver is only there to transport the passengers. And, if that be so, then I am of opinion that a vehicle on such a journey does not come within the exemption under cl. 23. And, as it is admitted that men on leave are not " military on duty ", the same applies to vehicles conveying men on leave.

A military vehicle may be conveying passengers, of whom some are military on duty and some are not, or it may not be conveying any passengers at all. I do not think it necessary to deal with such cases, because the appellant company admits that no tolls are payable in respect of the vehicles in such cases. I would allow the appeal to the extent of allowing the appellant company to recover toll in respect of military vehicles carrying passengers none of whom are military on duty, and also in respect of persons in excess of six in number travelling in such vehicles. If I am wrong in so holding, then the question arises whether all passengers in such vehicles who are not military on duty must pay ten cents each, or whether the first five passengers go free. The only power to charge passengers is under head (D) of cl. 22. It is quite clear— " persons in excess of six in number travelling in any vehicle ". I cannot read this as meaning all persons not themselves exempt who are travelling in a vehicle which is exempt from toll. This means that a certain number of persons who would have had to pay ten cents each if they had crossed the bridge on foot do not have to pay if they cross as passengers in a vehicle which is exempt. When the vehicle pays toll, that toll includes the toll of the driver and five passengers, but, if the vehicle does not pay toll, then nothing is paid in respect of these non-exempt passengers. The illogicality of this result goes some way to strengthen my opinion that the vehicle itself is not exempt when carrying persons who are not military on duty.

LORD RADCLIFFE: My Lords, I agree with the opinion that has been expressed by my noble and learned friend, Lord Reid, and the conclusion to which he comes, and I will not take up much time in explaining why I prefer it to any alternative view.

We have to construe an agreement made in 1929 which is plainly not a very skilled piece of draftsmanship. Even so, it would have taken a prophet, as well as a master in the draftsman's art, to provide completely for all the combinations and complications which can present themselves nowadays, owing to the installation at Nyali of the leave camp for soldiers and, it seems, for members of their families. We have, therefore, to make the best sense we can of the effect of the toll clauses, so far as a fair reading of the words will allow. No reading of them, I think, escapes difficulties under certain conditions, and some produce absurdities. The arguments to which your Lordships listened during the course of the hearing showed, at least, how much verbal ingenuity can be brought to bear on these brief phrases, whether the result is to elucidate or to obscure their real meaning. For myself, I find it best to start with the fact that cl. 22 of the agreement provides what is intended to be a general tariff to be paid by persons using the bridge, with variations of charge according to the circumstance of their using it as foot passengers or as persons conveyed or accompanied by transport. When the following clause says that " No tolls shall be levied in respect of police or military on duty or their equipment baggage or transport " A I take it to be fairly clear that an exception is being made for police or military on duty on any occasion when they are users of the bridge and for the equipment, baggage or transport that conveys or accompanies the persons so exempted.

If we now take the case that has caused difficulty, the leave or shopping parties, I think it useful to see how the toll charges fall. No one suggests that the members of the party are themselves " military on duty ". If they B approach the bridge on foot and walk over it, therefore, they are clearly chargeable for their use of the facility. If they approach on a motor bicycle, or a push bicycle, or in a rickshaw, or on a donkey, the same result follows according to the appropriate tariff. They have used the bridge, they are not on duty, and they must pay for the use at the rate prescribed for their particular means of transport. But if they approach and cross the bridge in, or on, another C form of transport, namely, a lorry provided for their benefit with a military driver on duty, a most remarkable change comes about in the toll situation, if the Crown's argument is right. The vehicle uses the bridge without payment, though it has no purpose in crossing the bridge except to convey the leave or shopping party. More remarkable still, an unidentifiable group of the passengers up to the number of five becomes similarly exempt from payments, although D no one knows which ones they are, and the purpose of the whole party in using the bridge remains exactly the same as it would be if they were walking or bicycling over it and so liable to toll.

My Lords, I hope that I shall not be thought captious if I say that I do not regard this as a very happy result of construing the agreement. And I think that it overrates the merits of this construction to say that it is the simple one. E The question is whether the wording employed does actually require it. In my opinion, not only does it not require it, but this odd result is only produced because, in the Crown's argument, a strained and unnatural meaning is given to the words " their . . . transport " in cl. 23. In this context, " their " is not used strictly in any possessive sense, but it is used in the attributive sense as attributing the transport to the military on duty whose actual crossing of the F bridge raises the question of toll. In that context, it seems to me quite unreal to attribute the vehicle to the driver of it whose job it is to convey the party of leave men or shoppers over the bridge, rather than to the party themselves. On such occasions, it is their transport, since it is their purposes, not his, that it serves in crossing the bridge. And the test that the agreement provides for deciding whether military users are to pay toll or not is whether, as users, they G are crossing in pursuance of military duty. What is that but to charge them according to their purpose ? Of course, the driver himself is on duty when he drives the party over the bridge. But if I tell my chauffeur to drive me on a journey, I should be very surprised to be told that, in doing so, he is pursuing his purposes to the exclusion of mine. And, if you please, the vehicle is " on duty ". But the agreement does not deal with vehicles on duty. It deals H with vehicles that are attributed to persons who are, or are not, themselves on duty.

In my opinion, therefore, exemption from toll depends on the purpose for which the journey is made by the military conveyed by the vehicle, and, in the simple case of driver and off-duty party, I think that it is their purpose alone that matters. I have no doubt at all that a vehicle containing a number of I military, some on, and some off, duty, would present a problem which the agreement provides no explicit means of solving. It would have to be solved, if at all, by some rough and ready determination of the main purpose of the journey. But the fact that the agreement has not been so framed as to take care of these various complications which may arise does not present itself to me as a good enough reason for giving to it what seems so strained a meaning in the main set of circumstances that we are asked to consider.

LORD COHEN: My Lords, the dispute between the parties is as to the extent of the right of the appellant company to tolls on traffic crossing the Nyali Bridge between the mainland of Kenya and Mombasa island, and as to the scope of the exemption from tolls provided for by cl. 23 of the agreement dated Oct. 9, 1929, between the appellant company and the Government of Kenya Colony and Protectorate. That clause provides that no tolls shall be levied in respect of police or military on duty or their equipment, baggage or transport.

The appellant company claims that—(i) this exemption covers only the military forces and vehicles of the Kenya government (i.e., the King's African Rifles and their vehicles), and does not extend to other military forces of Her Majesty and their vehicles.

If this claim is rejected, the appellant company claims in the alternative—(ii) (a) toll under cl. 22 (A) of the agreement in respect of any vehicle belonging to Her Majesty's forces crossing Nyali Bridge, if the sole purpose of the vehicle's journey is the transport of, what were called in the course of the argument for convenience, leave and shopping parties; (b) toll under cl. 22 (D) in respect of each person not being military on duty travelling in any vehicle adjudged liable to toll under (a), except in so far as such persons when added to the number travelling thereon who are military on duty do not exceed a total of six; (c) toll at the rate of ten cents for each person not being military on duty travelling in any vehicle of Her Majesty's military forces crossing Nyali Bridge, being a vehicle not adjudged liable to toll under (a) above.

In the further alternative, the appellant company claims—(iii) that if your Lordships should be of opinion that the fact that the driver of a vehicle is on military duty is sufficient in all cases to exempt the vehicle from toll, none the less toll is payable at the rate of ten cents for each person not being military on duty travelling in any vehicle of Her Majesty's forces crossing Nyali Bridge.

The trial judge accepted the first claim, but this was rejected by the Court of Appeal. I find myself in such complete agreement with the reasons given by the Court of Appeal, and by your Lordships, for rejecting this claim that I will not add any reasons of my own for reaching this conclusion. I am also in agreement with the decision of the Court of Appeal on the other issues between the parties, but, as there is some difference of opinion among your Lordships on those issues, I must state shortly my reasons for my conclusion.

Claim (ii) (a) is based on the argument that, if the only military on duty in the vehicle are the driver and the guard carried for the purpose of protecting the vehicle, the vehicle is the transport of the leave and shopping party and not of military on duty. I am unable to accede to this argument. Counsel for the appellant company felt bound to admit that if the vehicle was returning empty after depositing the leave and shopping party, toll would not be payable on the vehicle under cl. 22 (A). I think he was bound to make this admission, but, if so, it could only be because the vehicle was the transport of military on duty. I agree with PARKER, L.J., who, when dealing with the argument of the Crown that, where a military vehicle has been detailed by the military authorities to cross the bridge in charge of a military driver on duty, neither the driver nor the vehicle is chargeable, said ([1955] 1 All E.R. at p. 663):

> ". . . I agree with the learned judge who said: 'I think that the right way to read it here is that it is an exemption, as it says, of military on duty or that which is going with the military on duty, the transport, and that the transport in such a case is going with a driver on military duty, and I think in those circumstances it would be exempt'. When one or more (apart from the driver) of those carried are on duty, then the vehicle is clearly 'their transport' notwithstanding that others in the vehicle may be on leave. Further, where the only person on duty is the driver I should

> have thought that the vehicle was transporting him notwithstanding that he was the driver and that accordingly the vehicle could properly be described as his transport."

I would only add that, as I read cl. 23 of the agreement, " their . . . transport " means transport provided by the police or military authority, as the case may be, for the transport of the public or military on duty. The driver in the class of cases your Lordships are considering was clearly military on duty, and it seems to me that the vehicle he was driving was none the less his transport because he was the human agency by which the same vehicle could be used for the transport of others.

As regards claim (ii) (b), in so far as it was based on the vehicle being liable to toll, it must fail, since, for the reasons I have given, I agree with the Court of Appeal that no toll is payable in respect of the vehicle. But I agree with the Court of Appeal that, for the reasons they give, the appellant company are entitled, under cl. 22 (D), to toll at the rate of ten cents for each person, not being military on duty, travelling in any vehicle except so far as such persons, when added to the number travelling thereon who are military on duty, do not exceed a total of six.

I need not deal separately with claim (ii) (c), since, in my opinion, the reasons I shall give for rejecting claim (iii) are equally fatal to claim (ii) (c).

Claim (iii) is based on two arguments. First, it is said that para. (A) and para. (D) are inter-related, that the words " in excess of six in number " in para. (D) clearly point back to para. (A) and that, therefore, persons travelling in a vehicle are only exempt from toll if the vehicle has paid toll under para. (A). I am unable to accept this argument. It seems to me to disregard the plain meaning of the words used, and to require a complete rewriting of para. (D) so as to make it read: " (D) Foot passengers or persons travelling in any vehicle provided that if the vehicle has paid toll under (A) toll under this paragraph shall only be paid on the number of persons so travelling in excess of six." I see no justification for such a rewriting. In my opinion, the duty of the toll collector is to look at the traffic approaching the bridge. If he sees a vehicle containing passengers, he must count the people in it and, if the number of them exceeds six, he can claim toll only on any excess over six persons.

Alternatively, counsel relied on the argument which found favour with Denning, L.J., in the Court of Appeal, but not with the other members of the court. Denning, L.J., thought that the liability of leave men and wives to pay toll did not arise only under cl. 22 (D) of the agreement. In his view, these people are members of the public crossing the bridge and must, therefore, pay toll unless they can point to some exemption, and there is no exemption covering them. Therefore, in accordance with general principle, there being no rate specified, they must pay a reasonable sum to be determined by the court. He referred in support of this view to *Stamford Corpn.* v. *Pawlett* (1) ((1830), 1 Cr. & J. 57 at p. 80). I do not doubt that, if there were a general power to charge tolls but no rate was specified in the instrument granting that power, the rate must be a reasonable one to be determined in case of dispute by the court, but I am unable to trace in the agreement of Oct. 9, 1929, any such general power. The right to tolls arises from cl. 12 of that document, which provides that, subject to the payment of the tolls thereinafter laid down, the bridge shall be kept open to every vehicle, the weight of which when laden is less than five tons and to all foot passengers and animals. As I read the document, the tolls thereinafter laid down are the tolls for which maxima are fixed by cl. 22, subject to such exemption and partial relief as are granted under cl. 23 and cl. 24. Clause 22 goes into considerable detail, and it does not include any class wide enough to cover the first six persons in any vehicle. It seems to me they constitute, as Parker, L.J., says, a casus omissus, and I do not think it is justifiable to fill the gap by reading into cl. 12 a general power to charge tolls, thus treating cl. 22 not as an enabling clause but as a limitation in certain cases on a general power.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Travers Smith, Braithwaite & Co.* (for the appellant company); *Treasury Solicitor.*

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

NICHOLSON *v.* LITTLE.

[COURT OF APPEAL (Denning, Birkett and Parker, L.JJ.), June 7, 1956.]

County Court—Costs—Discretion of judge—Set-off of full amount claimed—Lesser sum found to be due to defendant—Defendant's right to costs of action—County Court Rules, 1936, *Ord.* 47, *r.* 1.

The defendant, who was a surveyor employed by the plaintiff, received certain war damage moneys in respect of the plaintiff's property. Out of the moneys so received the defendant retained £84 6s. 5d. on account of his fees. The plaintiff sued for the moneys received by the defendant and the defendant claimed to set off an equal amount in respect of fees due to him and counterclaimed for a total of £105 4s. 10d. as fees due. The county court judge having given judgment for the plaintiff for a sum of £22 6s. 11d., with costs and dismissed the counterclaim, the defendant appealed against the order for costs.

Held: having regard to C.C.R., Ord. 47, r. 1, the costs were in the discretion of the county court judge and, although decisions of the court such as of *N. V. Amsterdamsche Lucifersfabrieken* v. *H. & H. Trading Agencies, Ltd.* ([1940] 1 All E.R. 587) were guides in exercising the discretion, they did not fetter its exercise; in the present case the county court judge had not erred in principle in awarding costs to the plaintiff who had had to sue to recover the money due to him, and the court would not interfere with the county court judge's exercise of his discretion.

Appeal dismissed.

[As to costs where claim and counterclaim are both successful, see 29 HALSBURY'S LAWS (2nd Edn.) 518, para. 768; and for cases on the subject, see 40 DIGEST 434-436, *552-568.*]

Cases referred to:

(1) *N. V. Amsterdamsche Lucifersfabrieken* v. *H. & H. Trading Agencies, Ltd.*, [1940] 1 All E.R. 587; 2nd Digest Supp.

(2) *Childs* v. *Blacker, Childs* v. *Gibson,* [1954] 2 All E.R. 243; 3rd Digest Supp.

(3) *The Friedeberg,* (1885), 10 P.D. 112; 54 L.J.P. 75; 52 L.T. 837; 1 Digest 219, *1447.*

Appeal.

The defendant appealed from an order of His Honour JUDGE HODGSON at Wandsworth County Court dated Mar. 26, 1956, whereby the plaintiff was awarded the costs of the action on scale 2 notwithstanding that the defendant's claim was partially successful.

The facts appear in the judgment of DENNING, L.J.

T. H. Tilling for the defendant.

W. D. M. Sumner for the plaintiff.

DENNING, L.J.: This case concerns costs. The plaintiff, the owner of certain properties, employed the defendant, a surveyor, in regard to the war damage. The war damage money was received by the defendant. He paid some of it over to the plaintiff until there was left in his hands the sum of £84 6s. 5d., moneys belonging to the plaintiff paid by the War Damage Commission.

When the plaintiff asked for that money to be paid to him by the defendant A he claimed to retain it on account of his fees. Indeed he said that there was considerably more than £84 6s. 5d. due to him in respect of his fees, viz., in all a sum of £105 4s. 10d. The plaintiff from time to time wrote for his £84. The defendant did not pay. Eventually the plaintiff issued a plaint in the county court claiming the £84 6s. 5d. In his defence the defendant admitted that he had received a sum of £84 6s. 5d. from the War Damage Commission but he B claimed to set-off an equal amount of the fees due to him; and he put in a counterclaim for £105 4s. 10d. The plaintiff agreed that some small amount of fees was owing, but nowhere near £105. In the result the county court judge said that the defendant was not entitled to the full £105 claimed but that the sum due for fees was only £61 19s. 6d. So that meant that the defendant had kept too much of the plaintiff's money: he had kept the whole of the £84 6s. 5d.; C the judge said that was wrong and that there was on balance the sum of £22 6s. 11d. due to the plaintiff from the defendant.

That was the result of the litigation. Then the matter of costs arose. On behalf of the defendant it was said that the only issue fought was on the counterclaim for his fees, that that was the issue which took the time, and that he should have all the costs, subject to the nominal costs of the plaintiff setting down D the case. The judge was referred to the "Dutch Match" case, *N. V. Amsterdamsche Lucifersfabrieken* v. *H. & H. Trading Agencies, Ltd.* (1) ([1940] 1 All E.R. 587); but, notwithstanding that case, the judge did not give the defendant his costs, but gave the plaintiff the costs. He said:

> "I decided the point taken as to costs against the defendant. In view of the plea of set-off there is no real admission. The plaintiff had to come E to court and fight to recover anything, and he has recovered £22 6s. 11d."

So he gave judgment for the plaintiff for £22 6s. 11d., with costs on scale 2, and dismissed the counterclaim. From that decision the defendant appeals to this court. He has again relied on *N. V. Amsterdamsche Lucifersfabrieken* v. *H. & H. Trading Agencies, Ltd.* (1), which he says was followed in a later case F in this court, *Childs* v. *Blacker* (2) ([1954] 2 All E.R. 243). He says that in the face of those authorities the county court judge had no option but to give the defendant the costs. I desire to say at once that those cases cannot be regarded as laying down a rule of law which would fetter the discretion of the judge. The Rule of Court (C.C.R., Ord. 47, r. 1) says:

> "Subject to the provisions of any Act or rule, the costs of proceedings G in a county court shall be in the discretion of the court."

In the face of that rule it is impossible for this or any other court to lay down a rule of law as to costs which would fetter the discretion thus given to the judge. It is interesting to notice that in *The Friedeberg* (3) ((1885), 54 L.J.P. 75) SIR BALIOL BRETT, M.R., said (ibid.):

> "The discretion of the court is to be exercised in each individual case; H but the moment a hard and fast rule is laid down as to costs, the discretion of the judge is fettered."

He pointed out that if a rule were laid down, it would fetter not only an individual judge but also his successors: and that he declined to do.

Although *N. V. Amsterdamsche Lucifersfabrieken* v. *H. & H. Trading Agencies,* I *Ltd.* (1), is no doubt a useful guide in similar cases, it must not be regarded as laying down a rule of law which would fetter the discretion of the judge. Relieved of that case, can we say in this case that the judge has erred in point of principle in awarding the costs as he did ? I can see no fault of principle in what he has done. It is to be remembered that this really was the plaintiff's money, and the defendant was keeping it and claiming it as being his money: he put it in his own pocket for his fees, and it would have remained there but for the fact that the plaintiff brought this action. The plaintiff had to bring this action to recover

A his money; he succeeded, and he did so by greatly reducing the defendant's claim for fees. The judge probably said to himself "It would be unjust for this houseowner, having had to bring this action to recover money due to him, to find himself, by reason of costs, with nothing in hand at all but rather out of pocket". That is a consideration which I think the judge was well entitled to take into account in exercising his discretion; and without saying anything B as to the way in which any other judge or this court might exercise its discretion, it seems to me that there is no ground on which we can interfere with his discretion.

I think that the appeal should be dismissed.

BIRKETT, L.J.: I entirely agree. The question of the discretion of the C county court judge is a matter of extreme importance; the fundamental rule is in C.C.R., Ord. 47, r. 1:

> "Subject to the provisions of any Act or rule, the costs of proceedings in a county court shall be in the discretion of the court."

There are Acts and rules in force which fetter that discretion with regard to witnesses' allowances and special matters, but in general it is wise that there D should be vested in the learned county court judge a complete discretion as to costs; and I agree entirely with what my Lord has said.

The county court judge in the present case listened to the argument, read *N. V. Amsterdamsche Lucifersfabrieken* v. *H. & H. Trading Agencies, Ltd.* (1) ([1940] 1 All E.R. 587), listened to the contentions which have been made in this court and were made to him, and then decided the point taken as to E costs against the defendant. I think that the reason why he did so was that this all springs from one act, namely, the retention by the defendant of the money which had been paid by the War Damage Commission to him as the agent of the plaintiff. It may very well be, and I have no doubt is so, that the War Damage Commission was empowered to send the money to the defendant, but it was the plaintiff's money. The plaintiff was saying, "You have £84 6s. 5d. F of mine" and the defendant was saying, "It is true that I have, but you owe me £105 4s. 10d. and I am keeping that £84 6s. 5d. as against that sum, and I am going to demand from you in due course the balance". The plaintiff sued for his money, and the defendant claimed to set-off an amount of £105 4s. 10d., and in the result it was held that there was a balance of £22 6s. 11d. due to the plaintiff. The learned county court judge, having considered all those matters, G then had to decide what he was going to do about costs. He found that it was not really possible for him to say he would divide it into separate compartments in the ordinary way for it was all mixed up together. The initial fault that brought about this situation was the retention of this money; he found after consideration that there was a balance due to the plaintiff and he decided that in those circumstances he would make the order as to costs.

H I agree with my Lord; I cannot find that the county court judge went wrong, and I think that it is very important that the discretion of the county court judge shall be only limited in the way laid down by C.C.R., Ord. 47, r. 1. I would dismiss the appeal.

PARKER, L.J.: I agree.

Appeal dismissed.

Solicitors: *Gard, Lyell & Co.*, agents for *Theodore Bell, Cotton & Curtis*, Sutton (for the defendant); *R. W. Platt* (for the plaintiff).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

J. LANGLANDS (SWANLEY), LTD. *v.* BRITISH TRANSPORT COMMISSION.

[QUEEN'S BENCH DIVISION (Ormerod, J.), June 13, 1956.]

Railway—Fire—Damage to crops—Loss of deficiency payment under Cereals (Deficiency Payments) Order, 1955 (*S.I.* 1955 *No.* 962)—*Whether recoverable as damage—Railway Fires Act,* 1905 (5 *Edw.* 7 *c.* 11), *s.* 1, *amended by the Railway Fires Act* (1905) *Amendment Act,* 1923 (13 *&* 14 *Geo.* 5 *c.* 27), *s.* 1.

The plaintiffs were farmers and registered growers of cereals within the meaning of the Cereals (Deficiency Payments) Order, 1955, and would have become entitled to a deficiency payment under that order if they had sold and delivered wheat as envisaged by the order. Part of their wheat crop was damaged by two fires in August, 1955, which were caused by sparks from engines on the defendants' railway. The engines were used under statutory powers. The defendants had paid in compensation to the plaintiffs a sum of money equivalent to the market price of the probable yield of the damaged crop. The plaintiffs claimed in addition the amount of the deficiency payment (£49 11s.) which they would have received in respect of the crop. On the question whether this amount was recoverable within the terms of the Railway Fires Act, 1905, s. 1*, which provides that where damage is caused to agricultural land or to agricultural crops by sparks from an engine the fact that the engine was being used under statutory powers shall not affect liability for such damage within the limit of the maximum amount (£200) recoverable,

Held: the purpose of s. 1 of the Railway Fires Act, 1905, was to put the plaintiffs in the position in which they would have been if the defendants had not been acting under statutory powers; and, since the loss of the deficiency payment was not too remote to be recoverable as damages for nuisance, the plaintiffs were entitled to recover the amount of the deficiency payment.

[As to the liability of a railway authority in nuisance for damage caused by sparks from a locomotive, see 27 HALSBURY'S LAWS (2nd Edn.) 17, para. 26, note (e); and as to the Railway Fires Act, 1905, see ibid., para. 29.

For the Railway Fires Act, 1905, s. 1, see 19 HALSBURY'S STATUTES (2nd Edn.) 895.]

Case referred to:

(1) *Vaughan* v. *Taff Vale Ry. Co.,* (1860), 5 H. & N. 679; 29 L.J.Ex. 247; 2 L.T. 394; 24 J.P. 453; 157 E.R. 1351; 38 Digest 23, *127*.

Action.

The plaintiffs, J. Langlands (Swanley), Ltd., claimed damages from the defendants, the British Transport Commission, in respect of damage caused by fire to a crop of wheat. The facts and the contentions of the parties are stated in the judgment.

F. W. Beney, Q.C., and *M. R. Nicholas* for the plaintiffs.
E. S. Fay, Q.C., for the defendants.

ORMEROD, J.: In this case the plaintiffs, J. Langlands (Swanley), Ltd., claim from the British Transport Commission a sum of money, in all £49 11s., which is an agreed sum, so far as the arithmetic is concerned, for damage to a crop of wheat which was growing in a field adjoining a railway track. The plaintiffs are farmers and the defendants, as their name implies, are the authority responsible for the running of railways. The land which the plaintiffs were

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* The terms of the section, so far as relevant, are printed at p. 703, letter E, post.

A farming at the time of the events in question was a farm known as the Home Field Farm, Sutton-at-Hone, in the County of Kent. The plaintiffs were the registered growers of cereals within the meaning of the Cereals (Deficiency Payments) Order, 1955 (S.I. 1955 No. 962). There were two fires caused by sparks from the defendants' locomotives, one occurring on Aug. 16, 1955, and the second occurring on Aug. 18, 1955. In respect of those two fires the defendants B have paid to the plaintiffs a sum of £127 18s. 9d. which they say, and which has been agreed between the parties, was the market price or selling price of the probable yield of the five acres of land on which the crops were damaged in those two fires. The plaintiffs say that the defendants are liable to pay not only the market price or the probable market price of the yield of the crop that was damaged, but, in addition, are liable to pay the sum which the plaintiffs C would have received under the scheme, which I have mentioned, as deficiency payments.

Before the Railway Fires Act, 1905, there was no liability on a railway company for damage done to crops by fire caused from sparks from locomotives, provided that there was no negligence on the part of the railway company. It was laid down in the case of *Vaughan* v. *Taff Vale Ry. Co.* (1) ((1860), 5 H. & N. 679) D that, if a railway operated under statutory sanction and there was no negligence, the railway company could not be responsible in an action for nuisance. Therefore, up to 1905 if no negligence could be established on the part of the railway the owner of land adjoining the railway had no recompense if damage was done to his crops by sparks from locomotives. In 1905 the Railway Fires Act was passed and s. 1 (1), which is the section with which we are primarily concerned E in this case, runs as follows:

> "When, after this Act comes into operation, damage is caused to agricultural land or to agricultural crops, as in this Act defined, by fire arising from sparks or cinders emitted from any locomotive engine used on a railway, the fact that the engine was used under statutory powers shall not affect liability in an action for such damage."

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That, I think, is the only part of the Act to which I need refer, except to point out that s. 1 (3) limited the amount which could be recovered in those circumstances to the sum of £100.

In 1923 a further Act of Parliament [the Railway Fires Act (1905) Amendment Act, 1923] was passed with which we are not concerned, except that the limit of G claim was extended from £100 to £200 and certain provisions were laid down for the time in which notice of claim and particulars of claim should be given to the railway company. No point arises on those matters in this case, because it is not suggested that, so far as the plaintiffs were concerned, there was any deficiency in those respects.

In 1947 the Agriculture Act, 1947, was passed and I think I need refer to that H only in this way. Section 4 of that Act gave the appropriate Minister, either the Home Secretary, the Minister of Agriculture or the Secretary of State for Scotland, power to make regulations dealing with matters relating to guaranteed prices and so on. In accordance with powers contained in s. 4 of that Act the Cereals (Deficiency Payments) Order, 1955 (S.I. 1955 No. 962) was made. That order came into operation on July 1, 1955, some six weeks or so before the fires I occurred which are the subject-matter of this action.

Put quite shortly, the effect of that order, and the scheme which was drawn up in consequence of the order, was this, that either for a statutory period of one year, or for such shorter periods as should be decided by the Minister, the average market price of wheat should be determined and any registered grower of wheat who had sold and delivered his millable wheat to a miller or to some other appropriate purchaser was entitled, on certain formalities being completed and certain certificates having been given, to the payment of a sum of money known as a "deficiency payment", which was the difference between the standard price of wheat, whatever it was at the time, and the average market price which was fixed or is fixed from time to time in accordance with the provisions of the scheme. The plaintiffs say that this crop was damaged by a fire caused by a spark from a locomotive, and that they are therefore entitled, within the limits of £200, not only to the market price of their wheat, but also to the deficiency payment which is, in effect, they say, a part of the value of the wheat and, therefore, a part of the damage which has been done to their crop.

The argument of counsel for the plaintiffs is really a very simple one. He argues that the effect of the section is no more than to remove from the railway company a defence to an action for nuisance which occurs in these circumstances when damage by fire is caused to agricultural land or to agricultural crops by sparks from a locomotive. In other words, it puts the grower of the crops, or the owner of the land adjacent to a railway, in the position that he would be were it not for the fact that the railway is operating under statutory authority and that in those circumstances, an action for nuisance having arisen, to which there is no defence within the limits of £200 as applied by the statute, they, the plaintiffs, are entitled to such damage as directly flows from the consequences of the defendants' nuisance, and in this case that damage is assessed at the loss which the grower has sustained or is liable to sustain by reason of the nuisance, that is to say, not only the loss of the value of the wheat but the loss of the deficiency payment. That is really the whole of counsel's argument. He regards this statute as being one which removes a shield that the defendants would have been able to use if this Act had not been passed and submits that the shield having been removed, within the limits of the £200, the plaintiffs have all the rights that they would have had if the shield had never been there.

If that is the proper construction of this section then I think there can be no doubt that the plaintiffs would be entitled to succeed in this action, because, although counsel for the plaintiffs did go to the trouble of dealing with the authorities on the question of remoteness of damage, I do not think that counsel for the defendants questions the damage, so far as remoteness is concerned, or that, if in fact the plaintiffs are entitled to recover damages for nuisance in the way put by counsel for the plaintiffs, then this deficiency payment is anything other than a direct consequence of the defendants' nuisance and therefore cannot be regarded as too remote.

The argument which was put by counsel for the defendants, an argument which I am bound to say, on the face of it, appears to be an attractive one, is this, that on the real construction of the Railway Fires Act, 1905, which is or should be quite a narrow construction, the damage which the plaintiffs are entitled to recover is limited, and strictly limited, to the damage " to agricultural land "—I use the words in the section—" or to agricultural crops " and cannot include damage which is only consequential to that damage either to land or to crops. In other words, he says the action is really almost an action in rem, as it were, in respect of the damage to the land or crops and in no way an action for any personal damage which the owner of the land, who may have grown the crops, may have sustained.

The argument which counsel for the defendants uses is derived from the words in the section. The section [s. 1 (1)] runs as follows:

> " When, after this Act comes into operation, damage is caused to agricultural land or to agricultural crops, as in this Act defined, by fire . . . the fact that the engine was used under statutory powers shall not affect liability in an action for such damage."

The argument is that the words " for such damage " must relate back to, and be strictly confined to, the terms used in the earlier part of the section and can only relate to damage to " agricultural land or to agricultural crops "; in other

A words, to use the words of counsel for the plaintiffs in his reply, counsel for the defendants seeks to set up that the section not only limits the quantity of damage, or, rather, the Act not only limits the quantity of damage in limiting the amount to £200, but defines and limits the quality of the damage which the plaintiffs are entitled to recover.

I may say at once that I cannot and do not accept that contention. It is much
B too narrow a construction to place on the section and I do not think that it is the construction which was intended by the legislature. Had the railways not been operating under statutory powers and had a nuisance of this kind existed, quite clearly the plaintiffs would have been entitled to damage and they would have been entitled not only to the actual market price of the crops that were damaged, but also to such consequential damages as directly flowed from that
C act of nuisance, whatever it might have been. I am satisfied that the proper construction of this section is that within the limits of £200, as set up by this Act and the amending Act, the purpose of the Act is to place a plaintiff in the position in which he would be were it not that the defendant authority was acting under statutory powers. It follows from that construction that the plaintiffs must succeed.

D There has been a good deal of argument whether in any event the plaintiffs would be entitled to succeed if the defendants' construction of the section is the correct one. Having regard to the decision I have come to on the construction of the section, it does not appear to me to be necessary to go into the question whether, in any event, the loss of the deficiency payment would be damage within the restrictive meaning which counsel for the defendants seeks to put on the
E words of the section. I should, however, say this, that if I had been of a different opinion, so far as the construction of the section is concerned, I would still have been disposed to take the view that the plaintiffs would be entitled to recover the deficiency payments in question. It seems to me that they are so closely a part of the value of the land that it would not be right to say that they could not be recoverable as damages, even on the restricted construction of the section
F which the defendants submit is the correct one.

In those circumstances there must be judgment for the plaintiffs for the sum, which I think is agreed arithmetically at £49 11s.

Judgment for the plaintiffs.

Solicitors: *Kenneth Brown, Baker, Baker* (for the plaintiffs); *M. H. B. Gilmour* (for the defendants).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

EVANS MEDICAL SUPPLIES, LTD. v. MORIARTY (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Upjohn, J.), April 26, 27, May 1, 18, 1956.]

Income Tax—Income—Payment of lump sum for imparting of secret processes and technical data—Whether income or capital payment—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *Sch. D, Case I.*

The taxpayer company, which carried on the business of manufacturers of pharmaceutical products and wholesale druggists with a world-wide trade and an agency in Burma, entered into an agreement with the Burmese government under which it undertook to supply the government with information as to secret processes (which the government were not to divulge) relating to the manufacture of pharmaceutical products and also technical data, drawings, designs and plans for the erection of a factory and the installation of machinery suitable for the manufacture of pharmaceutical and other products in Burma. The company retained the right to carry on its wholesale trade in Burma and could impart knowledge of its secret processes to others in Burma. As consideration for this undertaking it received a "capital sum" of £100,000. The Special Commissioners of Income Tax held that the sum was properly included in the computation of its profits for income tax purposes, on the ground that it was received in respect of the provision of services and arose to the company in the course of carrying on either its existing trade or a new trade commenced at the date of the agreement. On appeal,

Held: the £100,000 should be excluded from the computation of the company's profits for income tax purposes since

(i) it was not part of the profits or gains of the company's trade of wholesale druggists and there was no evidence that the company was starting a trade of exploiting its secret processes by disclosing them to chosen instruments in foreign countries, and

(ii) having regard to what was the quid pro quo for the payment of £100,000, it was a capital payment, as the company was parting for ever with secret information in order to enable a new and competing business to be set up (see p. 715, letters A to E, post).

Nethersole v. *Withers* ([1946] 1 All E.R. 711; *affd.* H.L., [1948] 1 All E.R. 400, *Rustproof Metal Window Co., Ltd.* v. *Inland Revenue Comrs.* ([1947] 2 All E.R. 454), and *Handley Page* v. *Butterworth* (1933) (19 Tax Cas. 328) applied.

[As to what constitute trade receipts for income tax purposes, see 17 HALSBURY'S LAWS (2nd Edn.) 147-149, paras. 306-308; as to capital payments, see ibid., 118, para. 222; and for cases on the subject, see 28 DIGEST 17-20, *87-99*.]

Cases referred to:

(1) *Rustproof Metal Window Co., Ltd.* v. *Inland Revenue Comrs.*, [1947] 2 All E.R. 454; [1947] L.J.R. 1479; 177 L.T. 657; 29 Tax Cas. 243; 2nd Digest Supp.

(2) *Stevenson* (*Stephenson*) *Jordan & Harrison, Ltd.* v. *MacDonald & Evans*, [1952] 1 T.L.R. 101; 69 R.P.C. 10; 3rd Digest Supp.

(3) *Californian Copper Syndicate, Ltd.* v. *Harris* (*Surveyor of Taxes*), (1905), 5 Tax Cas. 159; 28 Digest 23, *b*.

(4) *Ducker* v. *Rees Roturbo Development Syndicate, Inland Revenue Comrs.* v. *Rees Roturbo Development Syndicate*, [1928] A.C. 132; 97 L.J.K.B. 317; 138 L.T. 598; sub nom. *Rees Roturbo Development Syndicate, Ltd.* v. *Ducker, Rees Roturbo Development Syndicate, Ltd.* v. *Inland Revenue Comrs.*, 13 Tax Cas. 366; Digest Supp.

(5) *Gliksten (J.) & Son, Ltd.* v. *Green*, [1929] A.C. 381; 98 L.J.K.B. 363; 140 L.T. 625; 14 Tax Cas. 364; Digest Supp.

(6) *Nethersole* v. *Withers*, [1946] 1 All E.R. 711; *affd.* H.L., sub nom. *Withers* v. *Nethersole*, [1948] 1 All E.R. 400; [1948] L.J.R. 805; 28 Tax Cas. 501; 2nd Digest Supp.

(7) *Constantinesco* v. *R.*, (1927), 11 Tax Cas. 730; 28 Digest 19, *97*.

(8) *Desoutter Bros., Ltd.* v. *Hanger & Co., Ltd. & Artificial Limb Makers, Ltd.*, [1936] 1 All E.R. 535; Digest Supp.

(9) *Inland Revenue Comrs.* v. *British Salmson Aero Engines, Ltd.*, *British Salmson Aero Engines, Ltd.* v. *Inland Revenue Comrs.*, [1938] 3 All E.R. 283; [1938] 2 K.B. 482; 107 L.J.K.B. 648; 159 L.T. 147; 22 Tax Cas. 29; Digest Supp.

(10) *Handley Page* v. *Butterworth*, (1933), 19 Tax Cas. 328; 150 L.T. 262; *affd.* H.L., sub nom. *Butterworth* v. *Page*, (1935), 153 L.T. 34; Digest Supp.

(11) *Exchange Telegraph Co., Ltd.* v. *Gregory & Co.*, [1896] 1 Q.B. 147; 65 L.J.Q.B. 262; 74 L.T. 83; 60 J.P. 52; 13 Digest 179, *147*.

Case Stated.

The appellant taxpayer company appealed to the Special Commissioners of Income Tax against an assessment to income tax for 1954-55 made on it under Case I of Sch. D to the Income Tax Act, 1952, in the sum of £281,163, less capital allowances £56,305, in respect of its profits as wholesale druggists. The sole question for determination was whether a sum of £100,000 paid to the company by the Government of the Union of Burma was a receipt of the company's trade liable to be included in the computation of its profits for the purposes of the assessment.

The company was incorporated on Nov. 24, 1925, to take over a business begun in 1809, and to carry on business as manufacturing chemists, wholesale druggists, drug grinders, importers, exporters, and manufacturers of pharmaceutical, medicinal, bacteriological and chemical preparations and articles. It was one of the leading pharmaceutical manufacturers with a world-wide trade. It carried on its trade abroad by subsidiary companies and foreign agencies and for a considerable period before 1953 had an agency in Burma. In 1953 the Burmese government decided to build a factory and laboratories in Burma for the purpose of establishing an industry there for the production of pharmaceutical and other products. They sent a trade mission to Europe with a view to inducing some leading firm of manufacturing chemists to advise as to the erection of such a factory and the supply of equipment for manufacture, and to impart to them the processes, formulae and knowledge necessary to the production and manufacture of pharmaceutical products in Burma. The trade mission got into touch with firms of wholesale manufacturing chemists on the continent of Europe and with the association of the British pharmaceutical industry and finally treated with three leading firms of manufacturing chemists in the United Kingdom of which the taxpayer company was one. There was keen continental competition. Negotiations were opened with the company. The company suggested a lump sum payment of £350,000 for the sale of drawings, designs, plans and technical and other data and " know-how " necessary for the establishment, erection and installation of the factory and commencement of production and management services for a period of years, but the Burmese government were unwilling to agree on a single lump sum, desiring that part of the consideration should be fees based on production. Fresh proposals by the company were accepted and embodied in an agreement of Oct. 20, 1953.

Under Part 1 of the agreement, the company was to provide the knowledge which would make large scale manufacture of medical products possible in Burma, and the facilities were to be exclusive to the Burmese government and not to be furnished to any other person or corporation in Burma during the currency of the agreement (seven years, subject to renewal). The consideration for A this was described as "a capital sum of £100,000 . . . payable in the United Kingdom free from any deduction whatsoever."

Under Part II of the agreement, the company was to act as purchasing agent for all plant and equipment, to advise on the selection of architects and consulting engineers and on the design and lay-out of a factory on a site chosen by the Burmese government; to train Burmese nationals in the United Kingdom and in B Burma for all technical and administrative positions; to provide experimental European staff in the interim period; and to manage the factory for an initial period of seven years. The remuneration for these services was to be an annual fee during the currency of the agreement of five per cent. of the value of all products produced at the factory or the sum of £25,000, whichever was the greater. The company was also entitled to be reimbursed for moneys expended on behalf C of the Burmese government and to remuneration of its directors and employers who proceeded to Burma.

The Burmese government (under Part IV) agreed not to export any of the goods manufactured under the agreement to any other country without the company's prior assent, and a royalty on goods exported with such consent was to be mutually agreed or, failing agreement, to be paid at a rate not exceeding D ten per cent. of sales value. The Burmese government (under Part V) also undertook not to divulge to any other government, person, body or corporation, information conveyed to them by the company without the company's written consent. It was stated to be

> "the desire and intention of the parties to this agreement to enter into similar agreements in respect of other pharmaceutical and similar products." E

The products provided for in the agreement comprised two main classes of biological products and certain pharmaceutical products, all general types not including any of the company's proprietary products. By far the most valuable from the company's point of view were the secret processes involved in the preparation, storage and packing of certain human and veterinary anti-toxins, F sera and vaccines. These had been evolved at great cost in several fields over fifty years and the company considered them superior to those evolved by other companies, though at least two other companies in the United Kingdom and firms in Western Germany and Holland had the necessary knowledge to prepare the products and did prepare them. But over a period of years the company had experimented and perfected its own methods of preparing and preserving the G products and had never previously communicated the methods to any other person or corporation.

The pharmaceutical products numbered about 3,500 out of 6,500 manufactured by the company, and there was no secret as to the composition of the various ointments, pastes, tablets and capsules. The ingredients were set out in the British Pharmacopoeia and similar products were manufactured by other H British and foreign manufacturing chemists. The secret processes consisted in the actual methods of preparation of the products, and in the method of storage and packaging. The company undertook to impart its methods of manufacturing and packaging, e.g., of a special type of ampoule which it used for particular products. The necessary processes could not be learned by the study of textbooks. Knowledge of them was imparted in some cases by training suitable I Burmese or European staff for employment in the factory in Burma and in other cases by the direct communication of written information.

The company might have erected its own factory in Burma, but the directors were convinced that the Burmese government were determined to have their own chemical industry in Burma and that several continental firms were able to provide the Burmese government with the means to have it. In entering into the agreement the company chose the method of developing its business which seemed to the directors to be the best available in the circumstances. It had made no similar agreement with any other foreign government or party. It had retained its agency in Burma since entering into the agreement, and continued to supply the agency with its own products but the agency would become progressively less important as the Burmese government's factory came into production. At the time of the hearing of the appeal, the factory had not been completed, but the £25,000 minimum sum (under Part II) was being paid as from Oct. 20, 1953. This sum was agreed to be a receipt of the company's trade as wholesale druggists, to be brought into account in computing its profits for income tax purposes.

To avoid disclosing the £100,000 in its published accounts for international reasons, with the approval of the Board of Trade only general reference was made to it in the chairman's report, the company's accounts and the supplemental report, and it was included in other items in the balance sheet and profit and loss account. It was common ground that this method of accounting for it was not material to whether the sum was properly included in computing the company's profits.

The company contended that the £100,000 was not properly included in computing its profits for income tax purposes for 1954-55, and in particular because (i) it was a capital sum, since either the company was parting with items of fixed capital under Part I of the agreement to which it was solely annexed, or it was a sum received by the company for an exclusive licence to the Burmese government; or (ii) being received by the company for disposing of the fruits of its experience, the sum did not arise in the course of a trade it carried on. The Crown contended that the £100,000 was properly included in computing the company's profits for income tax purposes for 1954-55, and in particular because: (i) it was received by the company for providing services in the course of carrying on its trade as wholesale druggists; and represented the first instalment of remuneration for such services (Parts I and II of the agreement involving services to the Burmese government being inter-locking and interdependent); (ii) the disposal of secret processes by the company was not the sale or assignment of property of the company but a method of developing and exploiting its business by imparting its knowledge and experience to the Burmese government in return for a consideration of an income nature; and (iii) the provision of the facilities to be furnished under Part I of the agreement was within the trading objects of the company and in so far as it was received in consideration for the provision of those facilities it arose to the company either from the trade which it had previously carried on or from a new trade which it had commenced to carry on on Oct. 20, 1953.

The Special Commissioners held that the Parts of the agreement could not be considered separately, that the £100,000 was not paid simply for the sale or assignment to the Burmese government of secret processes analogous to patents, and the company had not sold or assigned any property; that the agreement was one for the provision of services, the provision of " facilities " not being the sale or assignment of a capital asset in consideration of a capital price or the grant of a licence in consideration of a capital payment; and that the £100,000 arose to the company either in the course of the trade which it had previously carried on or in the course of a new trade which it had commenced on Oct. 20, 1953, and was in either event properly included in the computation of the profits of the company as wholesale druggists for income tax purposes. The company appealed.

J. Senter, Q.C., and *A. P. L. Barber* for the company.

Sir Frank Soskice, Q.C., and *Sir Reginald Hills* for the Crown.

Cur. adv. vult.

May 18. **UPJOHN, J.**, read the following judgment: This is an appeal by the taxpayer company from a decision of the Special Commissioners whereby the company was assessed in a certain sum for 1954-55 in respect of its profits as wholesale druggists. The sole question is whether a sum of £100,000 paid to the company by the Government of the Union of Burma under an agreement, to which I will refer later, was a receipt of the company's trade which fell to be included in the computation of its profits for the purposes of the assessment. A

The facts are fully set out in the Case Stated and I propose to make only a brief résumé of them. The company carries on the business of manufacturers of pharmaceutical products and wholesale druggists, in which field it occupies a leading position and has a world-wide trade. In connection with its business it produces proprietary products with which this case is not concerned, and also some 6,500 pharmaceutical products of known composition or mixture. The company has over many years at great cost evolved many secret processes in connection with the preparation, storage and packing of these known products, which processes it considers are superior to other processes evolved by its competitors. B C

The company sells its products wholesale and the assessment under appeal is on its profits as wholesale druggists. It trades abroad through subsidiary companies or agencies. Before the agreement, the company did not communicate any of its secret processes to any other company or person.

The company carried on its business in Burma through an agency, but in 1953 the Burmese government evinced a desire itself to establish an industry there for the production of pharmaceutical and other products. In the face of great competition from other leading firms of manufacturing chemists in this country and from several continental firms, the company secured the contract from the Burmese government to assist in setting up the industry. D

This contract is contained in the agreement, which is dated Oct. 20, 1953. It is in five parts and is annexed to the Case Stated, and its relevant provisions are fully summarised in paras. 6 to 10 thereof. I do not propose therefore to read any part of it, except the recitals which are not set out in the Case Stated, but which I think are important. They are as follows: E

> " Whereas:—(1) The Government of the Union of Burma propose to build in Burma a factory and laboratories (hereinafter together referred to as ' the factory ') for the purpose of establishing an industry there for the production of pharmaceutical and other products. (2) Evans Medical has developed and own processes formulae and knowledge relating to the manufacture of pharmaceutical products and to the use of machinery plant appliances and devices used in such manufacture. (3) For facilitating the building and running of such factory Evans Medical propose to supply the Government of the Union of Burma with information and to organise the factory in the manner hereinafter mentioned." F G

Part I of the agreement sets out the obligations of the company in consideration of the payment to the company of " the capital sum of £100,000." The use of the word " capital " is of little import in such an agreement;

> " [it] is a mere label attached to the [£100,000] with an eye, no doubt, to tax considerations " H

(see Lord Greene, M.R., in *Rustproof Metal Window Co., Ltd.* v. *Inland Revenue Comrs.* (1), [1947] 2 All E.R. 454 at p. 460). It was suggested, though faintly, that the agreement did not provide for the disposal to the Burmese government of the company's secret processes and it was said that " know-how " was not appropriate to describe a secret process. True, Sir Raymond Evershed, M.R., in *Stevenson* (*Stephenson*) *Jordan & Harrison, Ltd.* v. *MacDonald & Evans* (2) ([1952] 1 T.L.R. 101 at p. 104) said: I

> " ' Know-how ' seems to me to indicate something essentially different from secret and confidential information. It indicates the way in which a skilled man does his job, and is an expression of his individual skill and experience."

A But the word "know-how" is a modern and very useful colloquial expression of no precise meaning and, when used in the agreement in the context of the recitals and not in relation to the expertise of an individual workman, is very apt and appropriate to include the company's knowledge of processes of preparation, packing and preservation of their products, especially having regard to the importance of such matters in tropical countries.

B Two questions arise: the first, logically, is whether, apart altogether from the true construction of the agreement, the receipt of the £100,000 falls to be brought in as a trading receipt as part of the company's annual profits or gains from any trade carried on by it whether in the United Kingdom or elsewhere; secondly, whether, even if the company is not carrying on such a trade, the receipt is on the true construction of the agreement capital or income.

C On the first question, counsel for the Crown concedes that, to come within the section, one must find, not only a receipt as a result of a trading operation, but a profit arising from the carrying on of a trade. On that matter he has a conclusion of the Special Commissioners in his favour in these terms:

> "We also rejected the company's alternative contention that the said sum did not arise to the company as a receipt of its trade as wholesale D druggists because it had never previously entered into such an agreement. On the contrary, we held that the company had, on the evidence in this case, chosen the method which appeared to its directors to be the best means of exploiting its business as wholesale druggists in Burma, such method being in our opinion clearly within the powers taken by the company in its memorandum of association. We, therefore, held that the said sum of E £100,000 arose to the company either in the course of the trade which it had hitherto carried on or in the course of a new trade which it commenced to carry on on Oct. 20, 1953, and that in either event the said sum was properly included in the computation for income tax purposes of the company's profits as wholesale druggists for the said year 1954-55."

F Had there been any evidence that the company was starting a new trade in the sense that it was going to exploit its secret processes by disclosing them to chosen instruments in other countries, that would be a very different matter, but there was no finding of fact in paras. 3-12 of the Case Stated (where the facts are set out) that any such new trade began on Oct. 20, 1953, and counsel for the Crown rightly abandoned any reliance on a new trade. Further, he very properly G told me that the commissioners were in error in stating in para. 14 (iv) that the Crown ever suggested there was a new trade. Apparently, all that the representative of the Crown suggested was that, when the company entered into the agreement, it extended an existing trade which he (counsel) concedes carried the matter no further. I would also point out that a finding that the receipt of the sum "in course of the trade", to use the commissioners' own language, does H not carry the matter home, but I will assume that the commissioners intended to mean that the said receipt was a trading receipt in the course of carrying on the trade.

I was referred to three cases on this point: *Californian Copper Syndicate, Ltd.* v. *Harris* (*Surveyor of Taxes*) (3) ((1905), 5 Tax Cas. 159), *Rees Roturbo Development Syndicate, Ltd.* v. *Inland Revenue Comrs.* (4) ((1928), 13 Tax Cas. 366); and I *J. Gliksten & Son, Ltd.* v. *Green* (5) ((1929), 14 Tax Cas. 364), but the question is essentially a question of fact and those cases do not really assist me on the facts of this case. For myself, I do not see how the receipt of £100,000 under the agreement can be said to be part of the profits or gains of the company in their trade of wholesale druggists. With all respect to the Special Commissioners, the company was not "exploiting" its business in the only sense in which that word is relevant, i.e., of carrying on its trade of wholesale druggists in Burma, but in and by the agreement it entered into the entirely new activity of acting as adviser of the Burmese government by assisting to set up a completely new industry there which involved the disclosure to the government of secrets never disclosed to anyone before, and also involved the gradual cessation of its wholesale trading activities there, for it was found as a fact that

> " the company's Burmese agency will become progressively less important as the government factory in Burma comes into production."

I am content to rest my judgment on this part of the case by saying that, in my view, there was no evidence to support the commissioners' determination or in Lord Radcliffe's words, the true and only reasonable conclusion contradicts their determination*.

I turn then to the second question, viz., assuming the transaction carried out by the agreement not to be a transaction giving rise per se to a trading receipt, nevertheless, ought the receipt of £100,000 to be regarded as a receipt for the purpose of income tax of an income nature or of a capital nature ?

I was referred to many cases on the point, but most of them are only illustrations of the broad principles laid down by Lord Greene, M.R., in *Nethersole* v. *Withers* (6) ([1946] 1 All E.R. 711). In that case Miss Nethersole, a celebrated actress, had obtained from the late Mr. Rudyard Kipling the right to dramatise his book " The Light that Failed ". She was found as a fact not to be carrying on a profession or vocation in respect of dramatic and film rights of that book, and the question was whether a lump sum payment that she received in respect of the assignment to a film company of the sole sound and film rights for a period of ten years was capital or income for tax purposes.

Lord Greene, M.R., after reviewing *Constantinesco* v. *R.* (7) ((1927), 11 Tax Cas. 730), *Desoutter Bros., Ltd.* v. *Hanger & Co., Ltd. & Artificial Limb Makers, Ltd.* (8) ([1936] 1 All E.R. 535), and *Inland Revenue Comrs.* v. *Salmson Aero Engines, Ltd.* (9) ([1938] 3 All E.R. 283) said in reference to the last-mentioned case ([1946] 1 All E.R. at p. 716):

> " This decision is a clear authority, so far as this court is concerned, that a lump sum payment received for the grant of a patent licence for a term of years may be a capital and not a revenue receipt; whether or not it is so must depend on any particular facts which, in the particular case, may throw light upon its real character, including, of course, the terms of the agreement under which the licence is granted. If the lump sum is arrived at by reference to some anticipated quantum of user it will, we think, normally be income in the hands of the recipient. If it is not, and if there is nothing else in the case which points to an income character, it must, in our opinion, be regarded as capital. This distinction is in some respects analogous to the familiar and perhaps equally fine distinction between payments of a purchase price by instalments, and payment of a purchase price by way of an annuity over a period of years.
>
> " In the present case, whether the agreement operates, as we think, as an assignment or as a licence, the result is, in our opinion, the same. But, as we have indicated, there are other circumstances which in any event make it impossible to regard this sum as a revenue receipt. In addition to the assignment or licence, whichever it may be, the agreement operates as a partial realisation by the appellant of her capital asset, viz., the copyright in the play. She confers rights upon the company which, as we have pointed out, cannot, if exercised, fail to affect injuriously the value of her copyright. Any consideration referable to this could not, we think, in any view be anything but capital. It is obviously impossible to split the sum received, and the Crown cannot in any event point to any part of that sum as being revenue."

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* See *Edwards* v. *Bairstow* ([1955] 3 All E.R. 48 at p. 59, letters E to F).

A That case went to the House of Lords, where VISCOUNT SIMON said ([1948] 1 All E.R. 400 at p. 403):

> "The judgment of LORD GREENE, M.R., in the present case seems to me to summarise very accurately the effect of the earlier decisions, and I would, in particular, adopt his observation ([1946] 1 All E.R. at p. 716): '. . . a B lump sum payment received for the grant of a patent licence for a term of years may be a capital and not a revenue receipt; whether or not it is so must depend on any particular facts which, in the particular case, may throw light upon its real character, including, of course, the terms of the agreement under which the licence is granted '."

In *Rustproof Metal Window Co., Ltd.* v. *Inland Revenue Comrs.* (1) ([1947] C 2 All E.R. at p. 458) LORD GREENE, M.R., quoted the passage I have already read down to the sentence which reads ([1946] 1 All E.R. at p. 716):

> "If it is not, and if there is nothing else in the case which points to an income character, it must, in our opinion, be regarded as capital."

He added ([1947] 2 All E.R. at p. 458):

> D "If I have any comment to make on this language, it is that the concluding sentence possibly puts the point too high in favour of capital. It is, however, qualified by the crucial words ' if there is nothing else in the case which points to an income character '."

That was a clear case where the consideration was paid in reference to the E anticipated quantum of user, for it licensed the manufacture of 75,000 ammunition boxes and provided for repayment of part of the consideration if the contract was determined before the manufacture of the whole of them had been completed.

Now, those cases and the cases to which LORD GREENE referred were cases of patents or copyrights, continuing rights protected against all the world in territories where the patent or copyright ran, and I do not forget LORD PORTER's solemn warning in *Withers* v. *Nethersole* (6) that copyright occupies a position F and character of its own dependent on the Copyright Act. Nevertheless, secret processes bear a marked analogy to patent rights and copyright.

In *Handley Page* v. *Butterworth* (10) ((1933), 19 Tax Cas. 328), ROMER, L.J., pointed out (ibid., at p. 359) that a patentee has a monopoly which is a capital asset in his hands and he can prevent others from utilising it; he can exploit it in a variety of ways; by exercising the invention himself, by granting licences G in consideration of royalty payments which will be taxable notwithstanding that the capital asset is yearly diminishing in value, or by selling it or surrendering it. The learned lord justice continued (ibid.):

> "The owner of a secret process, such as was possessed by Mr. Handley Page, stands in a very analogous position; he has not a monopoly at law, H but he has a monopoly in fact—a monopoly in fact arising from the possession by him of the secret knowledge of the process that he is carrying on. That secret knowledge is as much his capital asset as is the patent monopoly the capital asset of the patentee, and, like the patent, he can use that capital asset in either or both of the following ways: he can himself carry on the secret process or he may—it is very seldom done owing to the obvious danger I involved—grant a licence to a third person to carry on the secret process, securing himself against his secret process being divulged by that third party to others. In both these cases the profits he derives from carrying on the secret process himself and the royalty he might derive from the licensee would be annual profits or gains within the meaning of Sch. D. But, supposing he sells his secret process, or supposing, as here, he surrenders his quasi monopoly by making it public to the world, then I say that, if he gets paid for doing either one or the other of those things, the money he receives in payment is a capital asset."

Counsel for the Crown conceded that the authorities established that, if a grantor disposes of a capital asset in a monopoly or secret process for a lump sum consideration, that consideration will be a capital receipt. The same, he says, is true if the grantor grants an exclusive licence which precludes the grantor from himself exercising his monopoly or secret process in the area the subject-matter of the grant, but it is otherwise, he says, if the grantor grants either a non-exclusive licence or an exclusive licence which, however, permits the grantor to continue his own activities in the area. In those last-mentioned cases, he says, the grantor has not disposed of a capital asset and what he receives, even if it be a lump sum payment, is a revenue payment for a licence or services rendered. Further, he submitted that, in order to support a payment as a capital payment, one must show some dissipation of an asset—see Lord Hanworth, M.R., in *Handley Page* v. *Butterworth* (10) (19 Tax Cas. at p. 357), and here, he said, you are not dissipating it, but exploiting it.

The propositions so propounded in relation to the grant of a non-exclusive licence or an exclusive licence not excluding the grantor himself seem to me to conflict with the statement of the law enunciated by Lord Greene, M.R., and, in particular, that part of his statement approved by Viscount Simon, and also with the decision of *Desoutter Bros., Ltd.* v. *Hanger & Co., Ltd.* (8) which was mentioned without any disapproval by Lord Greene in *Nethersole* v. *Withers* (6). In *Desoutter Bros., Ltd.* v. *Hanger & Co., Ltd.* (8), the grantor granted a licence to use a patented invention for five years in consideration of a lump sum payment payable by instalments. It was held that the payment was capital notwithstanding that the licence was not stated to be exclusive and there was no dissipation but rather exploitation of the patent.

I approach the consideration of this contract, therefore, in the light of the broad principles laid down by Lord Greene, M.R. The effect of the contract was this: The company parted with its secret processes to the Burmese government for ever, but on the terms that the government would not without the consent of the company impart such information to another, such consent not to be unreasonably withheld. The company remained at liberty to carry on its wholesale trade there, and, in legal theory, could no doubt have thereafter set up a competing factory in Burma, In addition, the company was to supply technical data, drawings, designs and plans for the erection of a factory and of the installation of machinery appropriate and suitable for the manufacture of these known pharmaceutical products and for their processing by these secret processes. After the expiry of the contract (but not before), the company was at liberty to impart its " know-how " in relation to these matters to others in Burma.

In Part II of the agreement, in consideration of an annual fee admittedly subject to tax, the company undertook the training of personnel and also to act as purchasing agent of the Burmese government.

The commissioners' conclusions on this part of the case are set out in para. 15 (i) to (iii) and may be summarised in this way:—(i) that each part of the agreement could not be considered separately, and that £100,000 was not paid simply for the sale or assignment to the Burmese government of secret processes; (ii) that the company had not sold or assigned any property; (iii) reading the agreement as a whole together, the agreement was one for the provision of services.

These contentions were naturally supported by counsel for the Crown, who compared the services to be rendered by the company to the services rendered by a barrister, an architect or accountant, and he put in the forefront of his argument that this was no real sale by the company of its secret processes, but the provision of confidential information rather on the lines of *Exchange Telegraph Co., Ltd.* v. *Gregory & Co.* (11) ([1896] 1 Q.B. 147).

In my judgment, the commissioners have misunderstood and misconstrued the agreement. While the agreement must be read as a whole, the question to be

A asked is what, on the proper construction of the agreement, was the quid pro quo for payment of the £100,000 ? I cannot see that it bears any relationship to the services rendered by a professional man in the course of carrying on his profession. I have already pointed out that the company was not carrying on a trade in providing the services.

The company was bound to provide its expert knowledge, its "know-how"
B in the manufacture of pharmaceutical products, in the erection of a suitable factory and the provision of proper machinery in order to enable the Burmese government to set up a new industry once and for all in Burma; the recitals are all important. The company was, in fact, parting for ever with its secret information in its methods of preparation, packing and preservation to the Burmese government; that may not in law amount to an assignment of all its rights in
C Burma, for the company in legal theory, though hardly in practical Burmese politics, remained at liberty to use the processes itself in Burma. Of course, it also remained at liberty to carry on its business of wholesale druggists there by selling its products, made in this country, in Burma through its usual agents. It was parting for ever, however, with part of a valuable asset, and was doing so to enable an entirely new and competing industry to be set up there. That
D industry, established by the skill and "know-how" of the company, could embark on an export trade which could compete with the company's own products in other countries. In that sense the company was dissipating its asset, and it must be remembered that a secret process once communicated to another is in jeopardy; if it gets into the wrong hands, the grantor has no protection. Even if it be a necessary ingredient to support a capital payment to
E show some dissipation of a capital asset (which, in my judgment, it is not), that element seems to me to be present here.

Bearing all these considerations in mind, I reach the conclusion that, on the true construction of the agreement viewed in the light of the facts of this particular case, the payment of £100,000 is what it is described to be: a "capital" payment. I allow the appeal. The matter must be remitted to the com-
F missioners to adjust the figures on that footing. The Crown must pay the costs of the appeal.

Appeal allowed.

Solicitors: *Whitfield, Byrne & Dean*, agents for *Whitley & Co.*, Liverpool (for the company); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

STAFFORD ALLEN & SONS, LTD. *v.* PACIFIC STEAM NAVIGATION CO.

[COURT OF APPEAL (Denning, Birkett and Parker, L.JJ.), April 17, 18, 19, 1956.]

Conflict of Laws –Shipping—Carriage of goods by sea—Bill of lading governed by English law—Paramount clause that United States Carriage of Goods by Sea Act, 1936, *should apply to shipments from a port in the United States—Whether applicable to shipment from a port in the Panama Canal Zone.*

Shipping—Carriage by sea—Panama Canal Zone—Clause paramount incorporating United States Carriage of Goods by Sea Act, 1936, *with respect to shipments from United States ports -Whether clause applicable to shipment from a port in the Panama Canal Zone.*

By art. 3 of the Isthmian Canal Convention, signed in 1903, the Republic of Panama granted to the United States of America " all the rights, power and authority within the [Panama Canal] Zone . . . which the United States would possess and exercise if it were the sovereign of the territory . . . to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority ". By s. 3 (8) of the United States Carriage of Goods by Sea Act, 1936, a covenant relieving shipowners from liability for negligence was void, and s. 13 of the Act provided: " This Act shall apply to all contracts for carriage of goods by sea . . . from ports of the United States in foreign trade. As used in this Act the term ' United States ' includes its districts, territories, and possessions . . . Provided further, That every bill of lading . . . which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this Act ".

In 1952 certain goods were shipped from Cristobal, a port in the Panama Canal Zone, to London, on the terms of the usual bill of lading used by the shipowners which was expressly governed by English law. The bill contained an exemption clause which, prima facie, would be wide enough to exempt the shipowners from liability for negligence, but there was also inserted a paramount clause that " With respect to shipments . . . from a port in the United States, all the terms and provisions of the United States Carriage of Goods by Sea Act, 1936 " were to apply to the contract contained in the bill. During transit the goods were damaged. In an action by the owners of the goods for damages for negligence, the shipowners took the preliminary point that, assuming that the goods were damaged by their negligence, they were protected by the exemption clause in the bill of lading. On the question whether Cristobal was " a port in the United States " within the meaning of the paramount clause, with the consequence that the exemption clause would be rendered null and void by the application of s. 3 (8) of the United States Carriage of Goods by Sea Act, 1936,

Held: the shipowners were not protected by the exemption clause from liability for negligence, since

(i) on the true construction of the bill of lading the scope of the application of the paramount clause was intended to be co-extensive with the application of the local law, viz., the United States Carriage of Goods by Sea Act, 1936, and

(ii) on the evidence before the court the Panama Canal Zone was a possession of the United States to which the Act of 1936 applied.

Appeal dismissed.

[As to the Hague Rules as to carriage of goods by sea, see 30 HALSBURY'S LAWS (2nd Edn.) 170, note (d), and as to the rights and immunities under the Carriage of Goods by Sea Act, 1924, see ibid., 614, para. 772.]

A Cases referred to:

(1) *Macomber & Whyte Rope Co.* v. *United Fruit Co.* (*State of Illinois*), (1922), 225 Ill. App. 286.
(2) *Luckenbach S.S. Co.* v. *United States*, (1930), 280 U.S. 173.
(3) *United States* v. *Alabama Great Southern Railroad Co.*, (1892), 142 U.S. 615.
(4) *Panama Railroad Co.* v. *Johnson*, (1924), 264 U.S. 375.

B **Appeal.**

The defendants, the shipowners, appealed from a judgment of SELLERS, J., dated Jan. 30, 1956, whereby he gave judgment for the plaintiffs, the owners of the goods, on a preliminary point of law in an action for damages for negligence in respect of the carriage of goods from Cristobal, in the Panama Canal Zone, to London.

C The facts appear in the judgment of DENNING, L.J.,

G. G. Honeyman, Q.C., and *J. S. Wordie* for the defendants, the shipowners.
H. V. Brandon for the plaintiffs, the owners of the goods.

DENNING, L.J.: In February, 1952, shippers in Corinto, on the west coast of Nicaragua in Central America, shipped ten boxes of ipecacuanha roots for D transport to London, England, on a bill of lading issued by the Grace Line. The goods were carried from Corinto down the west coast to the Panama Canal, and then through the Canal to Cristobal, a port in the Canal Zone, on the east coast. At Cristobal they were transhipped into a steamer, the Samanco, for transport to London, that steamer being owned by the defendants, the Pacific Steam Navigation Co. In the course of transit from Cristobal to London, the goods E were damaged, and for the purposes of this action we have to assume that they were damaged by the negligence of the shipowners. The owners of the goods now claim damages against the shipping company for the negligence. The shipowners set up an exception saying that they are not liable for any negligence. The question is whether there is any such exception to avail them.

The transit from Cristobal to London was on the terms of the regular bill of F lading used by the shipowners. The regular bill of lading used in that particular service at that time was that of the Royal Mail Lines, Ltd. (North Pacific Coast Service) which was expressly governed by English law. There was an exemption clause in that bill of lading, which, prima facie, would be wide enough to exempt the shipowners from liability for negligence, but there was at the end a clause paramount, cl. 29. That clause paramount was plainly inserted by the ship- G owners so as to comply with the local law about shipments from the coast of the American continent. The clause paramount, 29a, said with regard to Canada:

> " With respect to shipments . . . from a port in Canada all the terms, provisions and conditions of the Canadian Water Carriage of Goods Act, 1936, and the Schedule thereto are to apply to the contract contained in this bill of lading."

H

I need not go further with the Canadian clause because we are not concerned with it. Then cl. 29b reads:

> " U.S.A.: With respect to shipments (other than live animals and deck cargo) from a port in the United States, all the terms and provisions of the Carriage of Goods by Sea Act, 1936, of the United States are to apply to the I contract contained in this bill of lading."

If that clause paramount applies to this shipment from Cristobal to London, it means that the shipowners are not entitled to avail themselves of the exception, because the United States Carriage of Goods by Sea Act, 1936, s. 3 (8), makes such an exemption clause null and void and of no effect.

The sole question, therefore, in this case, is whether the shipment from Cristobal in the Panama Canal Zone was a shipment from " a port in the United States " within the meaning of that clause paramount. In ordinary use the term " United

States " means the continental area of the United States of America, and does not include outlying possessions such as the Panama Canal Zone. In construing this clause, however, we must have regard to the law of the port of shipment. We must, I think, attribute to the shipowners an intention to do what is lawful by the local law. If the law of the Panama Canal Zone requires a shipowner to insert a clause paramount so as to deprive the shipowner of the benefit of the exempting clause, we should construe the bill of lading so as to comply with that law rather than to ignore it.

What, then, is the law of the Panama Canal Zone on this matter? It is said to be contained in the United States Carriage of Goods by Sea Act, 1936, which says in s. 13 that:

> " This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade . . ."

Then there are these important words:

> " As used in this Act the term ' United States ' includes its districts, territories, and possessions . . ."

Later on the section provides for a clause to be inserted in every bill of lading:

> " Provided further, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this Act."

The crucial words of s. 13 of the Act for present purposes are these: ". . . the term ' United States ' includes its districts, territories, and possessions ". The Panama Canal Zone is not a " district " of the United States like the District of Columbia. It is not a " territory " of the United States, if we accept the ruling to that effect of the Appellate Court of Illinois in *Macomber & Whyte Rope Co.* v. *United Fruit Co.* (*State of Illinois*) (1) ((1922), 225 Ill. App. 286). The question is whether the Canal Zone is a " possession " of the United States. We have been supplied on this point with an agreed statement of facts relating to Cristobal and the Canal Zone, and we have been referred to all the relevant authorities in the United States on the subject.

Cristobal is a port on the eastern shore of Limon Bay near the entrance to the Panama Canal from the Caribbean Sea; and the Zone is a stretch of land in the Isthmus of Panama extending generally five miles on each side of the centre line of the Panama Canal. The rights of the United States of America in and over the Zone derive from the Isthmian Canal Convention between the United States of America and the Republic of Panama, signed on Nov. 18, 1903, art. 3 of which says:

> " The Republic of Panama grants to the United States all the rights, power and authority within the Zone . . . which the United States would possess and exercise if it were the sovereign of the territory . . . to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."

The United States Supreme Court in *Luckenbach S.S. Co.* v. *United States* (2) ((1930), 280 U.S. 173), held that a port in the Panama Canal Zone was a " foreign port ". That was a special decision on a special statute. It arose out of the fact that there was a subsidy in respect of the carriage of mails from certain ports within the United States to foreign ports. If there was carriage to the ports of Panama or to Colon, which are not in the Canal Zone but in the Republic of Panama, the shipowners would get the subsidy. It was argued that, if the mails went to Balboa or Cristobal, which are in the Canal Zone next door to those ports, the subsidy would not be payable. That would be contrary to a long current of practice, and the Supreme Court held that the subsidy was payable to the shipowners whether the mails were carried to Panama or Colon in the

Republic of Panama, or to Balboa or Cristobal in the Canal Zone. The case is not of general application.

Relieved of that case, it seems to me that, if we give the word " possession " in this Act its ordinary meaning, then the Canal Zone is a possession of the United States. In THE AMERICAN LAW OF OCEAN BILLS OF LADING, at p. 149, MR. ARNOULD KNAUTH, dealing with the definition in s. 13 of the Act of 1936, says: " The term ' United States ' includes the Canal Zone at Panama, Alaska, Hawaii, Midway, and Guam . . . " and other places. In THE CANAL ZONE CODE, which is a publication embodying all the laws applicable to the Canal Zone, in the Cumulative Supplement No. 2, at p. 124, the compiler states in regard to the Act of 1936:

> " It would seem that this Act is applicable to contracts for the carriage of goods by sea to or from the ports of the Canal Zone, in foreign trade."

In the course of the case, inquiry was made, on behalf of the parties, of the United States authorities on the matter, and a report by them tells us that the Panama Canal Company has successfully maintained the applicability of the Act to the Canal Zone in two or three law suits in the United States District Court for the District of the Canal Zone. The decisions are unreported, the cases being decided on demurrer or in similar ways.

On the material which has been put before this court, it seems to me that the term " United States " in the Act of 1936 includes the Panama Canal Zone. If this conclusion is right, it means that the local law affecting shipments from Cristobal requires the shipowners to insert in the bill of lading a paramount clause bringing into operation the United States Carriage of Goods by Sea Act, 1936. That is a most material circumstance which we must bear in mind when construing this paramount clause. So construed, it seems to me that a " port in the United States " in the clause means a port in the United States, its districts, territories or possessions. Cristobal is such a port. The paramount clause, therefore, brings into operation the terms and provisions of the United States Carriage of Goods by Sea Act, 1936, and by those provisions the exempting clause is rendered null and void. For these reasons, it seems to me that the shipowners cannot rely on the exempting clause. The paramount clause is not an exception on an exception. It is paramount. I think, therefore, that the appeal should be dismissed.

BIRKETT, L.J.: I am of the same opinion, and, in view of the judgment of my Lord, I can confine my observations to a brief space. The simple question is: Does the Carriage of Goods by Sea Act, 1936, of the United States apply in this case? If the Act does apply, then immediately another question arises, and that is on the meaning of cl. 29 in the bill of lading, the clause paramount, because it is the wording of that clause on which so much dispute both here and in the court below has taken place. Clause 29b reads:

> " U.S.A.: With respect to shipments (other than live animals and deck cargo) from a port in the United States, all the terms and provisions of the Carriage of Goods by Sea Act, 1936, of the United States are to apply to the contract contained in this bill of lading."

At first sight it would seem difficult to assert that Cristobal in the Panama Canal Zone was " a port in the United States ". The United States, as people have been wont to consider them, are the forty-eight states which have been federated together forming the United States. When, however, one begins to examine that, apparently, simple matter, great difficulties immediately arise. In the Act of Congress of 1936, the Carriage of Goods by Sea Act, 1936, s. 13, appears to deal with this point:

> " This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this Act the term ' United States ' includes its districts, territories, and possessions . . ."

Thus, the term "United States" is enlarged from the conception of the forty-eight states, as we normally think of them, to the United States plus any of its territories, any of its districts, or any of its possessions.

To show how complicated the matter is, there was cited to us *Luckenbach S.S. Co.* v. *United States* (2) ((1930), 280 U.S. 173) in the Supreme Court, a judgment of TAFT, C.J., who had taken the position of Chief Justice after holding the high office of President of the United States. The question for determination in that case dealt with kindred matters, and it was held that ports in the Canal Zone were to be regarded as foreign ports within the meaning of the particular statute with which the court was there concerned. I think that one of the governing considerations in that decision of the Supreme Court was that the court had before them a decision to which they attached great weight, namely, *United States* v. *Alabama Great Southern Railroad Co.* (3) ((1892), 142 U.S. 615), where the court said (ibid., at p. 621):

> "We think the . . . construction . . . given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the Act, certainly consorts with the equities of the case—should be considered as decisive in this suit."

I think the reason for the decision in *Luckenbach S.S. Co.* v. *United States* (2) was that traders had traded in the faith that the ports of the Panama Zone should be regarded as foreign ports for the purposes of carrying mails, and, accordingly, the court held that for this specific purpose, under this particular statute with regard to the carriage of mails, the ports of the Panama Zone were foreign ports.

The present case is not to be decided by merely saying the Supreme Court of the United States held that the "United States" meant this or that, or "the Panama Zone ports" means this or that in any particular case within the meaning of the statute. We have, I think, to look at the particular document with which we are concerned, and to construe it accordingly.

We had before us the opinion of Mr. Penifer, the counsel of the American Department, and SELLERS, J., paid great attention to that opinion, which is an extensive review of the question in this case. It arose because SELLERS, J., felt that it would be helpful to the court to have an authoritative view expressed. The opinion, which was given on Nov. 15, 1955, states:

> "Reference is made to the memorandum of Nov. 1, from the office of the Legal Adviser of the Department of State to you requesting an opinion as to the applicability of s. 13 of the United States Carriage of Goods by Sea Act, 1936, to a shipment in foreign trade from Cristobal under a bill of lading providing . . ."

The provision is then set out, as in the clause paramount. Then comes this passage:

> "According to Clyde & Co., the solicitors who made the request to the London Embassy, the two issues are whether Cristobal was to be regarded as a port in the United States, and whether the Canal Zone is a district, possession or territory of the United States within the meaning of s. 13 of the United States Carriage of Goods by Sea Act, 1936."

The following pages deal with the matter in great detail, setting out the relevant decisions which have been made and which might be of assistance, and the opinion concludes:

> "The position of the Panama Canal Co. that the Carriage of Goods by Sea Act is applicable to the Canal Zone and is part of the Canal Zone Code is consonant with the ruling of the Supreme Court of the United States in *Panama Railroad Co.* v. *Johnson* (4) ((1924), 264 U.S. 375), which is cited

> in respect to the requirements of the constitution of uniformity of maritime law throughout the territorial limits of the United States government."

SELLERS, J., in his judgment, expressly said that he accepted the opinions which had been given with such care on the precise questions which had been addressed to him and which were the issues and questions raised in the case.

The second matter is that an opinion given by a New York lawyer, Mr. Arnould Knauth, of the New York Bar, was before the learned judge. In the preface to CARVER'S CARRIAGE OF GOODS BY SEA (9th Edn.) (1952), the editor goes out of his way to thank Mr. Arnould W. Knauth of the New York Bar for " his valuable help with regard to United States law ", and I take it that the author of the opinion is the New York lawyer to whom that acknowledgment is made, because, in a note to s. 13 of the United States Carriage of Goods by Sea Act, 1936, which is set out in CARVER, at pp. 1110, 1111, it is stated, at p. 1111: " Thus, 'United States' here includes the Canal Zone at Panama, Alaska . . . Guam . . ." and various other places. SELLERS, J., was also influenced by that matter. Having regard to the evidence which was set out in the agreed statement of facts, I see no difficulty in this case in holding that Cristobal is a port in one of the possessions of the United States of America, although its precise position is as DENNING, L.J., stated, quoting from the agreed statement of facts. If that be right, it would follow, I think, that the provisions of the Carriage of Goods by Sea Act, 1936, apply in this case, and I am of opinion that they do. In those circumstances, it seems to me that the view which was formed by SELLERS, J., was the right one, and that this appeal ought to be dismissed.

PARKER, L.J.: I agree, and I would only add a few words in deference to the argument of counsel for the shipowners. He contended, in the first instance (and I think rightly), that the application of the Carriage of Goods by Sea Act, 1936, of the United States is a conditional application. Accordingly, the first question is on the construction of that condition. His argument goes on: If that construction is clear, it is unnecessary to look at anything further, and, indeed, it would be wrong to go on and construe as contractual terms the terms of the Act of the United States. Only if the condition is ambiguous, so runs the argument, would it be relevant to consider that Act. It is at that point where I part company with counsel.

The object in any question of construction is to ascertain what the parties intended by the words which they used. When one is construing a contract or other written document, I think in every case it is for the court to bear in mind the context in which the words are used, including the position of the parties, the nature of the transaction, the object of the venture. In this case the plaintiffs are the owners of goods on a steamship owned by the defendant shipowners. The contract in question is a bill of lading evidencing a contract for the carriage of those goods. It is well known that both the United States and this country have adopted the Hague Rules. Accordingly, when one comes across a clause paramount dealing with shipments from ports of Canada and ports in the United States, it is perfectly obvious to anybody in trade why the paramount clause has been inserted by the shipowners. It is an insertion very much against their interest, because it, in effect, cuts out the elaborate exception clause on which otherwise they might rely. They have done it in order to comply with the local law, the law of Canada and the law of the United States. Accordingly, unless there are clear words to the contrary, one must presume, I think, that the application of the clause is co-extensive with the application of the Act.

At that point it becomes, therefore, necessary to consider what is the ambit of the Act of the United States. My Lords have dealt with that fully. In these courts foreign law is a matter of fact, and it is sufficient for me to say that there was evidence here—true not cross-examined to, and perhaps not made as clear as one might have hoped—that, for the purposes of the Act of 1936, Cristobal in

the Canal Zone is a possession of the United States within the definition in that A
Act. It seems to me clear, on the opinion of Mr. Penifer, that, at any rate, in the courts of the Canal Zone, it would be held that Cristobal was a possession of the United States. He referred to the fact that there have been two, or possibly three, cases, true unreported, in the Canal Zone courts where the courts have so held. I would dismiss the appeal.

Appeal dismissed. B

Solicitors: *Hill, Dickinson & Co.* (for the defendants); *Clyde & Co.* (for the plaintiffs).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

C

MASSEY-HARRIS-FERGUSON (MANUFACTURING), LTD. *v.* PIPER.

[Queen's Bench Division (Lord Goddard, C.J., Streatfeild and Donovan, JJ.), June 6, 1956.]

Factory—Electricity regulations—Electrical apparatus not so worked as to prevent D
danger—Servant of independent contractor electrocuted—No evidence of danger to servants of occupier—Liability of occupier to penalty—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 60 (1) (*as amended by Factories Act,* 1948 (11 *&* 12 *Geo.* 6 *c.* 55), *s.* 12 (1) *and Sch.* 1), *s.* 133—*Regulations for the Generation, etc., of Electrical Energy,* 1908 (*S.R. & O.* 1908 *No.* 1312), *definitions, reg.* 1. E

The appellants were the occupiers of a factory which was subject to the Regulations for the Generation, etc., of Electrical Energy, 1908*, which take effect under s. 60 (1) of the Factories Act, 1937. In a bay of the factory, at some twenty-one feet above the floor, there were some exposed trolley wires which supplied electrical power to an overhead travelling crane. The supply
of power to the wires was controlled at the material time by a switch in an F
electrical sub-station at some distance from the bay, but it was formerly controlled by a switch near the bay, and, although this switch had been disconnected, it had not been removed and there was no indication on or near it that it no longer controlled the supply of electric power to the wires. There was no danger to the appellants' servants who were not required to approach
the wires. The appellants engaged a firm of contractors to paint the walls G
and crane work in the bay. Before the painter employed by the contractors started the work, he asked a crane driver employed by the appellants whether the electric power was turned off. The crane driver, not knowing that the switch near the bay had been disconnected, turned it into the " off " position and informed the painter that the power was switched off. The
painter, on coming into contact with the trolley wires, was electrocuted and H
died of his injuries. The appellants were prosecuted under s. 133† of the Act of 1937, on the ground that they had contravened reg. 1‡ of the Regulations of 1908 in that the switch controlling electricity supply to the overhead travelling crane was not so worked as to prevent danger (defined as " danger to life . . . from . . . burn, or other injury to persons employed ") so far
as was reasonably practicable. The appellants contended that they were I
not liable because the Regulations of 1908 were made for the benefit only of

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* These regulations, which were made under the Factory and Workshop Act, 1901, are continued in force by virtue of s. 60 and s. 159 (1) of the Factories Act, 1937, and are deemed to be made under s. 60 (1) of the Act of 1937, amended by s. 12 (1) of and Sch. 1 to the Factories Act, 1948. The terms of s. 60 (1) as amended are printed at p. 725, letter C, post.

† The terms of the section are printed at p. 725, letter G, post.

‡ The terms of the regulation are printed at p. 725, letter E, post.

persons employed by the occupier of the factory and there had been no danger to servants of the occupier.

Held: the appellants had contravened reg. 1 of the Regulations of 1908 because the regulation extended to danger to any person employed in the factory, whether the servant of the occupier or the servant of an independent contractor.

Smith v. *Cammell Laird & Co., Ltd.* ([1939] 4 All E.R. 381) and *Mulready* v. *J. H. & W. Bell* ([1953] 2 All E.R. 215) applied.

Hartley v. *Mayoh & Co.* ([1954] 1 All E.R. 375) explained and distinguished.

Appeal dismissed.

[**Editorial Note.** In so far as the determination of the extent of the regulations considered in this case depended on the subsequent provisions either of the Factories Act, 1937, s. 60 or the Factories Act, 1948, s. 12 (1) and Sch. 1, comparison should be made with *Garcia* v. *Harland & Wolff, Ltd.* ([1943] 2 All E.R. 477 at p. 482).

For the Factories Act, 1937, s. 60 (1) and s. 133, see 9 HALSBURY'S STATUTES (2nd Edn.) 1046, 1105.

For the Regulations for the Generation, etc., of Electrical Energy, 1908, definitions, and reg. 1, see 8 HALSBURY'S STATUTORY INSTRUMENTS 87, 89.]

Cases referred to:

(1) *Hartley* v. *Mayoh & Co.*, [1954] 1 All E.R. 375; [1954] 1 Q.B. 383; 118 J.P. 178; 3rd Digest Supp.

(2) *Stanton Ironworks Co., Ltd.* v. *Skipper*, [1955] 3 All E.R. 544; [1956] 1 Q.B. 255; 120 J.P. 51.

(3) *Smith* v. *Cammell Laird & Co., Ltd.*, [1939] 4 All E.R. 381; [1940] A.C. 242; 109 L.J.K.B. 134; 163 L.T. 9; 104 J.P. 51; 2nd Digest Supp.

(4) *Mulready* v. *Bell* (*J. H. & W.*), [1953] 2 All E.R. 215; [1953] 2 Q.B. 117; 3rd Digest Supp.

Case Stated.

This was a Case Stated by justices for the County of Lancaster in respect of their adjudication as a magistrates' court sitting at Strangeways on Dec. 9, 1955. On Nov. 21, 1955, the respondent, one of Her Majesty's Inspectors of Factories, preferred an information against the appellants that, on Sept. 6, 1955, at Ashburton Road, Trafford Park, in the County of Lancaster, they were the occupiers of a factory within the meaning of the Factories Act, 1937, that the factory was subject to the Electricity (Factories Act) Special Regulations, 1908 and 1944, and that there was a contravention of reg. 1 of the principal regulations (the Regulations for the Generation, etc., of Electrical Energy, 1908 (S.R. & O. 1908 No. 1312)), in that the switch controlling electricity supply to the overhead travelling crane in No. 3 bay of the factory was not so worked as to prevent danger so far as was reasonably practicable and that in consequence of such contravention, George Lyth, who was working in the factory, suffered bodily injury, whereby the appellants, without prejudice to any other penalty, were liable to a fine not exceeding £100 in accordance with the Factories Act, 1937, s. 133. The following facts were found. The premises referred to in the information were a factory within the meaning of the Factories Act, 1937, and subject to the regulations, and the appellants were the occupiers. In No. 3 bay of the factory there were certain exposed trolley wires, which supplied electrical power to an overhead travelling crane. The wires ran along a crane track girder close to the wall of the bay some twenty-one or twenty-three feet above the floor of the bay, and were so constructed, installed, protected, worked and maintained as to prevent danger save as hereinafter appears. On Sept. 6, 1955, painting of the walls and the crane work was in progress. The painting work was being carried out by a firm of painters and decorators, T. E. Edwards & Co., who were independent contractors, and the men employed on the work were not servants of the appellants. To facilitate the painting work, the servants of the contractors had erected for their use a scaffold, consisting of a plank supported by two ladders leaning against the wall of the bay at its south end. The plank was about fourteen feet long and seventeen feet above floor level. Mr. Lyth was one of the painters employed on the work, and was required in the course of his employment to work on the plank. He and other servants of the contractors and, in particular, Mr. Carr, had been instructed by the proprietor of the contractors to make sure that the electric power was switched off before going up the ladders. On the evening of the accident, Martin Joseph Roddy, a crane driver in the appellants' employment, had been working the cranes in No. 1 and No. 2 bays. He had not had occasion to work the crane in No. 3 bay on that evening, although on some evenings he worked that crane also. At about 8.0 p.m., when he was on the floor of the factory, one of the painters asked him whether the power was off on No. 3 crane. He went to a switch at the south end of the building and switched it from the " on " to the " off " position, under the impression that the power from the trolley wires of the crane in No. 3 bay had been switched off. He then informed the painters that the power on No. 3 crane was switched off. Later in the evening, Mr. Lyth climbed one of the ladders to the plank, came in contact with the trolley wires, was electrocuted and died of his injuries. The switch operated by Mr. Roddy had, at one time, controlled the supply of electric power to the trolley wires in No. 3 bay, but since that time that switch had been disconnected without Mr. Roddy's knowledge. There was no indication on or near the switch that it no longer controlled the supply of electric power. At the time of the accident, the switch controlling the supply of electric power to the trolley wires in No. 3 bay was situated in an electrical sub-station at the north end of the bay, 215 feet from the scene of the accident. The location of the switch was not known to Mr. Roddy, but was known to others of the appellants' servants, and, in particular, to a security officer, an electrician, and a Mr. Kinder, the driver of the crane in No. 3 bay. At the time of the accident, that switch was in the " on " position, and electric current was, accordingly, flowing through the trolley wires. The door of the sub-station was locked, the key being in the possession of the security officer. The switch in the sub-station was worked by a handle, the power being " on " when the handle was lifted up and " off " when the handle was pressed down. The switch contained conductors which controlled the flow of electricity to the trolley wires. The switch had been left in the " on " position by Mr. Kinder, who operated the crane on the day shift, because the crane was sometimes used at night and he did not know that painters might be working near the trolley wires. If he knew that anyone wanted to work near the wires, he switched the power off. Maintenance work on the trolley wires was done by outside contractors. The appellants' servants were not called on to approach the wires and were not in any way endangered by them. The switch in the sub-station was in good order, mechanically and electrically.

It was contended on behalf of the appellants that the prosecution was misconceived, in that the material allegations related to the state and operation of the trolley wires and not of the switch, which was not apparatus within the meaning of reg. 1 of the principal regulations; that failure to operate the switch did not constitute a working of the switch, within the meaning of reg. 1; and that the proper construction of the word " danger " in reg. 1 was danger to persons employed by the occupier, and there was no evidence of danger within the meaning of reg. 1. It was contended on behalf of the respondent that the switch constituted apparatus within the meaning of reg. 1, and that failure to turn off the switch constituted a failure to work the switch so as to prevent danger within the meaning of reg. 1.

The justices convicted the appellants and they now appealed.

D. Naylor for the appellants.

S. B. R. Cooke for the respondent.

LORD GODDARD, C.J., stated the facts, and continued: No one disputes that the electrical installation in the appellants' factory was in the condition in which it ought to have been under the Electricity (Factories Act) Special Regulations, 1908 and 1944, except in one respect. It is submitted that there can be no liability in respect of the accident to the deceased because the Electricity Regulations are made only for the benefit of the servants of the occupier of a factory, and, in this case, there was no danger to the servants of the occupier of the factory because the appellants always employed outside contractors to do maintenance work. We, therefore, have to look at the Factories Act, 1937, and the regulations. Section 60 (1) of the Factories Act, 1937, as amended by the Factories Act, 1948, s. 12 (1) and Sch. 1, provides:

> " Where [the Minister of Labour and National Service*] is satisfied that any manufacture, machinery, plant, equipment, appliance, process, or description of manual labour, used in factories is of such a nature as to cause risk of bodily injury to the persons employed, or any class of those persons, he may, subject to the provisions of this Act, make such special regulations as appear to him to be reasonably practicable and to meet the necessity of the case."

The Minister was apparently satisfied that electrical appliances were of such a nature as to cause bodily injury, as, of course, they would be, because live electricity is attended with grave risks. Accordingly, the Regulations for the Generation, etc., of Electrical Energy, 1908, which were made under the Factory and Workshop Act, 1901, s. 79, and were continued in force by virtue of s. 60 and s. 159 (1) of the Act of 1937, provide by reg. 1:

> " All apparatus and conductors shall be sufficient in size and power for the work they are called upon to do, and so constructed, installed, protected, worked and maintained as to prevent danger so far as is reasonably practicable."

In the regulations the word " danger " is defined as follows:

> " ' Danger ' means danger to health or danger to life or limb from shock, burn, or other injury to persons employed, or from fire attendant upon the generation, transformation, distribution, or use of electrical energy."

The only other section of the Act of 1937 to which I need refer is s. 133, which provides:

> " If any person is killed, or dies, or suffers any bodily injury, in consequence of the occupier or owner of a factory having contravened any provision of this Act or of any regulation or order made thereunder, the occupier or owner of the factory shall, without prejudice to any other penalty, be liable to a fine not exceeding £100 . . . "

Counsel for the appellants, who argued this point with great care, did not suggest that he could support some of the contentions, but the point which he took was that, as the deceased was not employed by the appellants, none of the regulations applied to him, and, therefore, no offence had been committed. In support of his submission, he relied especially on the decision of the Court of Appeal in *Hartley* v. *Mayoh & Co.* (1) ([1954] 1 All E.R. 375). In that case a fireman, who was employed by the local authority who maintained the fire brigade, was called in, in an emergency, to a fire at a factory, and it was held that he was not a person within the ambit of the Factories Act, 1937. One can understand that; he was a man who always had to be exposed to special dangers, and he was called in to deal with a particular emergency. He was not employed in the factory. He had gone there to quell a fire. He was no more employed in the factory than a police constable is who might be called in to quell a disturbance at the factory or arrest a thief found in the factory. He is not a " person employed ". It seems to me that one cannot use that decision to say that the regulations apply only to the servants of the factory owner. The test is whether a person is employed in the factory, not whether he is employed by the occupier of the factory. It is true that in *Stanton Ironworks Co., Ltd.* v. *Skipper* (2) ([1955] 3 All E.R. 544) ORMEROD, J., thought that, since the decision of the Court of Appeal in *Hartley* v. *Mayoh & Co.* (1), it must be taken that the regulations applied only to persons employed by the occupier of a factory. In my judgment in that case I only said that I assumed for the purposes of my judgment that that was so, because I did not think the matter really arose. In that case a locomotive, which was used in a factory, was being used in breach of the conditions laid down for the use of locomotives in factories. A locomotive is an obvious danger to employees. The man who was killed was not an employee. I said that there was a danger to the employees, and, therefore, there was a breach of the relevant regulations, and death had resulted, and, therefore, there was a liability. The two cases to which counsel for the respondent called our attention, *Smith* v. *Cammell Laird & Co., Ltd.* (3) ([1939] 4 All E.R. 381), in the House of Lords, and *Mulready* v. *J. H. & W. Bell* (4) ([1953] 2 All E.R. 215), a decision of the Court of Appeal, both show quite clearly in my opinion that the words " persons employed " in these cases are not limited to persons who are employed by the occupier of the factory, but apply to men doing work in the factory, it being immaterial by whom they are employed. I was a party to the decision in *Mulready* v. *J. H. & W. Bell* (4), and I hope that I made it clear in that judgment that that was the position. It is not without interest to note that s. 60 (1) of the Factories Act, 1937, was amended by the Factories Act, 1948, s. 12 (1) and Sch. 1, so that the words were made to read " is of such a nature as to cause risk of bodily injury to the persons employed ", perfectly general words, although in the Act of 1937 those words were qualified to this extent, that the section before the amendment read " cause risk of bodily injury to persons employed in connection therewith ". The amendment made in 1948 was obviously intended to widen the scope. I think that there is no question that the regulations now are intended to protect not only the servants of the occupier of the factory but any other persons, such as the servants of contractors, who may be called on to do work in the factory; and, if one comes to think of it, those people particularly need protection. In the present case, the contractors were painters, not people accustomed to the work of the factory, not persons who knew anything about the working of the electric cranes or the details of the electric installation in the factory. Therefore, if outside contractors are employed—and the appellants appear to do all their maintenance work by means of outside contractors—it is all the more important that they should be protected. I think it is regrettable that there was such a breakdown of staff work in this case and that, although the deceased had taken the precaution of asking for the current to be turned off, the current was fully on owing to no one having taken the precaution of seeing that the switch was either taken away or that some notice was put on it that it was an ineffective switch.

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* See the Transfer of Functions (Factories, etc., Acts) Order, 1946 (S.R. & O. 1946 No. 376), art. 2; 5 HALSBURY'S STATUTORY INSTRUMENTS 48.

In my opinion, the justices came to a perfectly proper decision in point of law in this case. I do not think that the decision in *Hartley* v. *Mayoh & Co.* (1) can have anything like so wide an effect as has been contended for and as I think ORMEROD, J., thought it had. It has been pointed out that the authorities which I have mentioned were not cited in that case, and at any rate the decision of the Court of Appeal was as I have stated and does not bind this court to decide in the present case that only the employees of the occupier of the factory are protected by these regulations. For those reasons, in my opinion this appeal fails and must be dismissed.

STREATFEILD, J.: I am of the same opinion. Section 60 (1) of the Factories Act, 1937, gives the Minister of Labour and National Service power to make special safety regulations where he is of opinion that the plant in any factory is of such a nature as to cause risk of bodily injury to the persons employed or any class of those persons. In pursuance of a similar power under the Factory and Workshop Act, 1901, s. 79, the Secretary of State made the Regulations for the Generation, etc., of Electrical Energy, 1908, reg. 1 of which lays down that all apparatus and conductors shall be so worked and maintained as to prevent danger so far as is reasonably practicable. " Danger " in this sense is defined as meaning " danger to life or limb from shock, burn, or other injury to persons employed ". The case may be reduced to the one question whether the regulations apply to a person employed by an independent contractor. I have come to the conclusion that they clearly do apply to any person who is employed in the factory, whether the direct servant of the occupier or a servant of an independent contractor, so long as he is employed on work in that factory, as the deceased was in this case. I do not think that the Court of Appeal decided in *Hartley* v. *Mayoh & Co.* (1) ([1954] 1 All E.R. 375) that a regulation such as this applies only to employees of the occupier. The court did no more in that case than decide that the regulation in question did not apply to a fireman, who was not a person employed. Nor do I think that in *Stanton Ironworks Co., Ltd.* v. *Skipper* (2) ([1955] 3 All E. R. 544) this court decided the particular question which is now raised. That case was decided on quite a different issue. I think that *Smith* v. *Cammell Laird & Co., Ltd.* (3) ([1939] 4 All E.R. 381), in the House of Lords, is an ample illustration and authority that a regulation worded like this one applies, not only to the persons employed by the occupier, but to persons working there although employed by an independent contractor. For these reasons, I have no doubt that the decision of the justices in this case was right, and I am glad to be able to reach that conclusion because it is particularly important that safety regulations should be observed for the employees of contractors who may be only occasional workmen in a factory and in respect of whom there is still greater need for protection against receiving fatal electric shocks. I agree that this appeal should be dismissed.

DONOVAN, J.: I also agree, and can usefully add no more.

Appeal dismissed.

Solicitors: *Gibson & Weldon*, agents for *John Whittle, Robinson & Bailey*, Manchester (for the appellants); *Solicitor, Ministry of Labour and National Service* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

SOUTHERN RAILWAY OF PERU, LTD. v. OWEN (INSPECTOR OF TAXES).

[House of Lords (Earl Jowitt, Lord Oaksey, Lord MacDermott, Lord Radcliffe and Lord Tucker), April 23, 24, 25, 26, June 21, 1956.]

Income Tax—Deduction in computing profits—Contingent liability—Provision for retirement benefits—Future payment of lump sums.

The appellant operated a railway in Peru under a statutory scheme by virtue of which its employees were entitled to receive from it a lump sum payment on retirement, death or other termination of service. Entitlement did not depend on any prescribed length of service, and an employee could forfeit his right to payment by conduct such as dishonesty or insubordination, or by failure to give due notice of retirement. Employees on fixed term contracts were required to complete their term without breach, except where the appellant was itself in default. The amount of the benefit, none of which was payable until service with the appellant had been terminated, was arrived at by taking a prescribed portion of the salary of the closing year of employment and multiplying it by the number of years of service; but if an employee's rate of salary were reduced during his service, the reduction was not to impair " the rights acquired for services rendered . . . as compensation should be calculated per years of service in accordance with the remuneration received until the time of the reduction. Following compensation will be calculated in accordance with the reduced remuneration ". The sum paid represented " remuneration which the employer pays for the work of his employee ". The question arose how the effects of the statutory scheme ought to be reflected in the appellant's accounts of the annual profits arising from its trade. The appellant's method was to calculate what sum would be required to be paid to each employee in respect of retirement benefit if he retired, without forfeiture, at the close of the year, and the aggregate of what was required was set aside in so far as the year had contributed to the aggregate. The Crown contended that, as had been done in former years, payments of compensation should be charged in the years in which they were paid.

Held: (i) (per Earl Jowitt, Lord MacDermott, Lord Radcliffe and Lord Tucker) although it would have been proper in computing the appellant's profits of a year for income tax purposes to allow some accountancy provision evaluating the appellant's future liability in respect of compensation attributable to the year, yet neither the finding of the Special Commissioners nor the evidence in the case supplied material on which the proper provision could be determined, and the appellant's contention that it was entitled to the accountancy provision claimed before the commissioners failed; and accordingly, as the Crown's alternative method, albeit a rough and ready method, was available and had been acted on in the past, the case would not (Lord MacDermott dissenting) be remitted to the commissioners, and

(ii) (per Earl Jowitt, Lord Radcliffe and Lord Tucker) the finding of the Special Commissioners that it was correct accountancy practice in England to make provision for the compensation payments by the appellant's method could not be regarded as conclusive because it disregarded the factor, among other factors, of allowing discount for the periods during which compensation payments were deferred (see p. 740, letters B to D, post), and

(iii) (per Earl Jowitt, Lord Radcliffe and Lord Tucker) there is no rule of law that forbids the introduction (in computing profits for income tax purposes) of any accountancy provision for future payments in or payments out if the right to receive them or the liability to make them is contingent at the closing of the year of computation (see p. 738, letters B and I, p. 741, letter G, post); and (Lord MacDermott concurring,

p. 733, letter A, post, but LORD OAKSEY dissenting, see p. 731, letters A to D, post) the decision in *Sun Insurance Office* v. *Clark* ((1912), 6 Tax Cas. 59) is not confined to insurance business, and

(iv) the appeal would be dismissed.

Per LORD RADCLIFFE (EARL JOWITT concurring): the test [whether an accountancy provision of a particular amount in respect of a liability payable in the future should be charged in computing the profits of a year] was whether the sum provided was an essential charge against the receipts of the trade in order to enable a true profit from that source to be stated (see p. 741, letter D, post).

Appeal dismissed.

[As to computation of profit, see 17 HALSBURY'S LAWS (2nd Edn.) 117, para. 221; and for cases on the subject, see 28 DIGEST 37-39, *199-204.*]

Cases referred to:

(1) *Sun Insurance Office* v. *Clark*, [1912] A.C. 443; 81 L.J.K.B. 488; 106 L.T. 438; 6 Tax Cas. 59; 28 Digest 58, *295*.

(2) *Holden (Isaac) & Sons* v. *Inland Revenue Comrs.*, (1924), 12 Tax Cas. 768.

(3) *Newcastle Breweries, Ltd.* v. *Inland Revenue Comrs.*, (1927), 96 L.J.K.B. 735; 137 L.T. 426; 12 Tax Cas. 927; Digest Supp.

(4) *Gardner, Mountain & D'Ambrumenil, Ltd.* v. *Inland Revenue Comrs.*, [1947] 1 All E.R. 650; 177 L.T. 16; 29 Tax Cas. 69; 2nd Digest Supp.

(5) *Harrison* v. *Cronk & Sons, Ltd.*, [1936] 3 All E.R. 747; [1937] A.C. 185; 106 L.J.K.B. 70; 156 L.T. 20; sub nom. *Cronk & Sons, Ltd.* v. *Harrison*, 20 Tax Cas. 612; Digest Supp.

(6) *Absalom* v. *Talbot*, [1944] 1 All E.R. 642; [1944] A.C. 204; 113 L.J.Ch. 369; 171 L.T. 53; 26 Tax Cas. 166; 2nd Digest Supp.

(7) *Try, Ltd.* v. *Johnson*, [1946] 1 All E.R. 532; sub nom. *Johnson* v. *Try, Ltd.*, 174 L.T. 399; 27 Tax Cas. 167; 2nd Digest Supp.

(8) *Ford (H.) & Co., Ltd.* v. *Inland Revenue Comrs.*, (1926), 12 Tax Cas. 997.

(9) *Peter Merchant, Ltd.* v. *Stedeford*, (1948), 30 Tax Cas. 496; 2nd Digest Supp.

(10) *Spencer & Co.* v. *Inland Revenue*, 1950 S.C. 345; 32 Tax Cas. 111; 2nd Digest Supp.

(11) *Whimster & Co.* v. *Inland Revenue*, 1926 S.C. 20; 12 Tax Cas. 813.

Appeal.

Appeal by the taxpayer, Southern Railway of Peru, Ltd., from an order of the Court of Appeal, dated Mar. 17, 1955, affirming an order of UPJOHN, J., dated Oct. 15, 1954, allowing an appeal by the Crown on a Case Stated by the Commissioners for the Special Purposes of the Income Tax Acts. The appellant was incorporated on Dec. 30, 1890, under the Companies Acts, 1862-1886, and its registered office was situate in England. At all material times it operated a railway in the Republic of Peru which it controlled from the United Kingdom. Under the law of the Republic of Peru the appellant was liable in the event of the determination of any service contract whether from the employee's death, expiry of the term or notice of determination given on either side, to pay to the employee or his representatives compensation of an amount equivalent to one month's salary at the rate in force at the date of determination for every year of service. The right to compensation accrued up to any point of time was not liable to be diminished in amount by subsequent reduction in salary. There were exceptions to this in the case of fixed term contracts where the contract had been determined by the employee before expiry of the term otherwise than on account of infringement by the appellant and, in the case of all contracts of service, where there had been wrongful conduct of certain kinds by the employee. The right to this compensation was regarded as part of the remuneration for the services rendered by the employee, and an employee employed otherwise than for a fixed term might always at the end of any year, by retiring, having given notice, and subject to the performance of his contract until expiry of notice, obtain payment of all compensation accrued up to the end of that year. In computing its profits for the year to June 30, 1947, and subsequent years, the appellant made provision in its balance sheet and a charge in its revenue account in respect of liabilities under the Peruvian social legislation. The charge was calculated in respect of each employee by reference to the number of years for which each such employee had served and the then prevailing rates of pay. If the employee's salary increased during the year, the amount included in the charge was an amount equal to one month's salary at the higher rate, together with a sum equal to the amount of the increase in annual salary multiplied by the number of years of employment prior to that year. The sums ultimately payable by the appellant in respect of any employee would be increased if the employee's rate of pay were subsequently increased, but would not be reduced if his rate of pay were subsequently reduced. No instance had yet occurred in which the appellant had refused to pay an employee or workman the compensation provided for in the social legislation either for wrongful conduct of the employee or on any other ground. The appellant appealed to the Special Commissioners against assessments to income tax under the Income Tax Act, 1918, Sch. D, Case I, for the years 1947-52 on the grounds that in computing the amounts of the assessments, no allowance had been made in respect of accrued liabilities which arose under the Peruvian social legislation and were properly deductible therefrom. The Special Commissioners found that the appellant's auditors would not have signed the balance sheet without a qualification unless the above provision had been made, because the making of such provision in the circumstances was correct accountancy practice. The Special Commissioners further found that whatever might be the correct legal description of the appellant's obligation under the Peruvian social legislation with respect to the amounts of compensation calculated to have accrued due to its employees at the end of each financial year, it was a matter of correct accountancy practice in England to make provision in the accounts for the sums in question in the circumstances of the case, and that the sums in question formed a proper deduction in computing the appellant's liability to income tax under the Income Tax Act, 1918, Sch. D, Case I.

J. Pennycuick, Q.C., *F. N. Bucher, Q.C.*, and *M. P. Nolan* for the appellant.

The Attorney-General, (*Sir Reginald Manningham-Buller, Q.C.*), *C. Montgomery White, Q.C.*, and *Sir Reginald Hills* for the Crown.

The House took time for consideration.

June 21. The following opinions were read.

EARL JOWITT: My Lords, I have had the advantage of reading the opinion which is about to be delivered by my noble and learned friend, Lord Radcliffe, with which I agree, and have nothing to add.

LORD OAKSEY: My Lords, I agree that this appeal should be dismissed. Counsel for the appellant, in his able argument, contended that the social legislation of Peru conferred on the appellant's employees a right to the compensation therein referred to in the year of taxation and that, as an employee could at any time give the requisite period of notice and claim the compensation at the expiration of that period, the amount of compensation which would then be due was a sum which the appellant was entitled to charge against the profits of the year although, in fact, the employee had given no such notice during the year. In my opinion, the fallacy of this argument lies in the fact that the employees, whose compensation the appellant sought to charge against its profits, had not, as a matter of fact, given their notices or terminated their contracts, and it is clear and not disputed that no compensation was payable to them until their service was duly terminated. The Peruvian legislation contains certain provisions which entitle the appellant to dismiss its employees for misconduct, and it is clear that, until the contract of service is duly completed, no liability to pay the compensation arises.

Reliance was placed, during the argument, on *Sun Insurance Office* v. *Clark* (1) ((1912), 6 Tax Cas. 59), in which this House held that a percentage of the premium income of an insurance company might be deferred as a receipt to a future year because it was paid as consideration for future liability, but the principle of that decision is not, in my opinion, applicable to the present case. The premium income was only deferred and would suffer tax in a future year, whereas, in the present case, if the appellant is permitted to deduct compensation which it has not paid and which it may never have to pay, that compensation will escape tax altogether. There is, in my opinion, a fundamental distinction between a contingent liability and a payment dependent on a contingency. When a debt is not paid at the time it is incurred its payment is, of course, contingent on the solvency of the debtor but the liability is not contingent. Similarly, the liability in *Sun Insurance Office* v. *Clark* (1) was not, in my opinion, contingent but remained in force throughout the period of the insurance, though payment in pursuance of that liability might, or might not, have to be made. The circumstances in the present case may put an end to the liability altogether, but in the case of insurance for a period the circumstance of loss does not put an end to the liability but merely makes payment obligatory in pursuance of the liability.

After all, the only question in the present case is whether the compensation should be deducted when it is in fact paid or should be deducted before it is paid and in circumstances in which it may never be paid. In my opinion, the reasoning and the judgments in the Court of Appeal are correct and should be affirmed.

LORD MACDERMOTT: My Lords, in this appeal, the appellant claims that, in the computation of its profits for each of the years of assessment under review, an allowance should be made in respect of its liability to pay to the employees then in its service in Peru certain lump sums which, under Peruvian legislation, those employees will be entitled to receive from the appellant on the due completion of their service. The appeal is, therefore, concerned with payments to be made after—and it may be long after—each of the relevant accounting periods has ended. No question arises as to the deduction of wages and salaries currently paid for services rendered. What the appellant contends is, in effect, that the total cost of those services each year included, in addition to current wages and salaries, a provision to meet the amount by which the services rendered that year have enhanced the lump sums that will eventually be payable under the Peruvian legislation. In short, the appellant maintains that its employees earn each year a deferred as well as a present remuneration, and that the former, no less than the latter, must be taken into account if the true yearly profits are to be ascertained for the purposes of taxation.

My Lords, as a general proposition it is, I think, right to say that, in computing his taxable profits for a particular year, a trader who is under a definite obligation to pay his employees *for their services in that year* an immediate payment, and also a future payment in some subsequent year, may properly deduct not only the immediate payment but the present value of the future payment, provided such present value can be satisfactorily determined or fairly estimated. Apart from special circumstances, such a procedure, if practicable, is justified because it brings the true costs of trading in the particular year into account for that year and thus promotes the ascertainment of the " annual profits or gains arising or accruing from " the trade. As I read the judgments, the substance of this proposition was accepted in the Court of Appeal; and before your Lordships, the Crown, without making any formal concession, was not concerned to argue strenuously against it. The Crown's contention—and the view taken in the courts below—was rather to the effect that the proposition did not apply to the appellant's case because—(i) the appellant was not under a definite obligation in any relevant year to pay its employees lump sums at the end of their engagements since, in each individual instance, the right to receive a lump sum depended

on the fulfilment of certain conditions that made the appellant's prospective A
liability contingent until the service was duly terminated; and (ii) it was
impossible, in the circumstances, to regard any part of the lump sums as earned
in or payable in respect of any particular year of service.

The first of these arguments necessitates a reference to the effect of the relevant
Peruvian legislation. This was summarised in the Court of Appeal by JENKINS,
L.J., in two paragaphs which were accepted by both parties and which read as B
follows:

> "1. 'In the event of,' that is, 'upon' the determination of any service
> contract between the company and any employee, whether from the
> employee's death, expiry of the term, or notice of determination given
> on either side, the company is liable to pay compensation calculated as later
> appears to the employee or his representatives. C
>
> "2. The above general proposition is subject to exceptions: (A) in the
> case of fixed term contracts where the contract has been determined by the
> employee before expiry of the term otherwise than on account of infringement by the company; and (B) in the case (apparently) of all contracts
> of service where there has been wrongful conduct of certain kinds by the
> employee, e.g., dishonesty or insubordination." D

The position, therefore, was that the appellant's liability to pay a lump sum
could only be avoided by some breach of contract or grave misconduct on the
part of the employee concerned. It may be correct to call such a liability
contingent, but I must say the contingency seems to me too remote to justify
a prudent trader or, for that matter, a competent accountant, in ignoring the E
liability until the day for payment has arrived. Whether, if this appeal related
to but one employee and one lump sum, the degree of the contingency would,
nevertheless, be such as to preclude a present allowance in respect of the future
liability is a question which, in my opinion, does not call for decision on the facts
of this case. I do not forget that the Court of Appeal looked at this contingency
argument from the point of view of the individual employee and may, therefore, F
be taken as of a different opinion. With respect, however, I think that that was
the wrong approach or, perhaps more accurately, that it should have been taken
a stage further. The question, as I see it, on this branch of the case, was not
whether, in a given year, the appellant's liability to pay this employee or that
was contingent: it was whether the appellant's liability to make some payment
in respect of the lump sums accruing for the benefit of all its employees in that G
year was in any relevant sense contingent. If that is the right view, I think the
Crown's contention on this point must fail. It is clear from the accounts that
the appellant's employees during the material years were numerous, and the
chances of all, or even a substantial proportion of them, acting so as to forfeit
their lump sum rights seem to me to be much too distant and improbable to
merit significance. Here, the case bears a close resemblance to the state of H
affairs with which this House had to deal in *Sun Insurance Office* v. *Clark* (1)
((1912), 6 Tax Cas. 59). There the taxpayer, a fire insurance company, was held
entitled, in determining its taxable profits, to deduct from its premium income for
the year an allowance for unexpired risks on policies outstanding at the end of
the year. Forty per cent. of the premium income was accepted as a fair and
reasonable estimate of such risks, and the deduction was allowed as a proper I
method of ascertaining the true gains for the year in which the premiums were
paid. Liability on each outstanding policy was, of course, highly contingent.
But that there would be a loss on the collective risk was a matter of commercial
certainty. On the facts, the situation in this appeal appears to me to be essentially the same. However one may describe the appellant's liability as respects
the lump sum which may become payable to a single employee, its liability to
make some payment at a future date on foot of the body of presently accruing
lump sum rights cannot well be regarded as contingent within the world of

ordinary business affairs. Whether this future liability can be quantified for the purposes of taxation is another matter; but in the degree of its certainty it is not, in my opinion, to be distinguished in any material respect from the future liability which was taken into account in *Sun Insurance Office* v. *Clark* (1). It was said that that decision related only to insurance business and had no application to the facts of this appeal. I see no reason for confining the scope of the decision in this way. Its ratio is much wider than that, and is, in my view, applicable to cases producing the same sort of problem, whether they relate to contracts of insurance or not.

The Crown's second submission raises a very different and, as it seems to me, a more difficult issue. It turns on the true nature of the lump sum payment made to an employee at the end of his service. If the correct view were that such payment should be regarded merely as a statutory bounty, as something independent of the length or value of the services rendered except for arithmetical purposes, I should, as at present advised, find it difficult to resist the Crown's claim that it could only be allowed for in the year of payment. On this hypothesis, it would be a trading expense of that year and not, I think, of any other year. It is, however, clear that such is not the nature of the payment in question. The Crown conceded that it was deferred remuneration, and that is what the Special Commissioners and the Court of Appeal have held it to be. As JENKINS, L.J., put it, " The right to this compensation is regarded as part of the remuneration for the services rendered by the employee ". There can, I think, be no doubt that this accords with the tenor of the Peruvian legislation. Thus, Law No. 6871, having made provision for the calculation of the lump sum in art. 1 (as modified) " at the rate of one month's salary per yearly service time ", says, in art. 2:

> " Payment, such as is referred to in the foregoing article, from the legal viewpoint, represents a remuneration which the employer pays for the work of his employee, whether the latter's engagement is for an indefinite period or for a fixed time . . ."

And Law No. 9463, speaking in the same strain, adds:

> " A reduction in remuneration accepted by an employee shall not impair in any way the rights acquired for services rendered . . . as compensation should be calculated per years of service in accordance with the remuneration received until the time of the reduction. Following compensation will be calculated in accordance with the reduced remuneration."

The lump sum payment has, therefore, to be regarded as deferred remuneration in respect of the entire period of service. This at once puts an obstacle in the way of debiting the whole sum in the accounts for the last year of service, as the Crown contends should be done, since to do so would be to inflate the cost of the services rendered for that year beyond the actual figure and thus produce a corresponding error in the amount of the annual profits. This obstacle may not conclude the matter, and the error it induces may have to be accepted if no better way of computing the true profits is open; but before that can be conceded, a negative answer must be found to one or other of two questions. The first of these, which is that raised by the submission under consideration, comes to this—can the amount of a lump sum payment properly be regarded as made up of parcels, each of which is attributable to a particular year of service? The second question is whether, if the lump sum can be allocated in that manner, a fair estimate can be made for each year of the provision required to meet the prospective liability.

My Lords, the first of these questions would present little difficulty if each lump sum was simply the amount found by adding together a twelfth part of the remuneration actually paid in each year of service. In that event, the method of computation, coupled with the circumstance that the lump sum is to be regarded as deferred remuneration, would seem to relate the payment to each year of service almost automatically. But that is not the scheme of the Peruvian legislation, the effect of which, in this connection, is thus summarised by Jenkins, L.J.:

> "The compensation is an amount equivalent to one month's salary or one-twelfth of a year's salary at the rate in force at the date of determination for every year of service, provided that the right to compensation accrued up to any point of time is not liable to be diminished in amount by subsequent reduction in pay."

This provision undoubtedly leads to anomalies if one is to regard each year's accretion to a lump sum as remuneration earned in that year, the possible effect of an increase of remuneration (to take what is, perhaps, the most glaring example) being to raise the increment for the year of increase above that of subsequent as well as previous years. It is, I think, true to say that this consideration led Upjohn, J., and, in the Court of Appeal, Jenkins, L.J., to hold against the appellant on this aspect of the matter. But, while I find the point far from easy, I am of opinion that the anomalies referred to have been given more than their due weight, and that the true view is that the yearly increments by which a lump sum is built up ought to be reckoned for present purposes as remuneration in respect of the years in which they accrue. It must be remembered that the anomalies are the result of a statutory scheme and that the criterion of what is sensible or reasonable contractually does not arise. Moreover, if, as I think, the lump sum is to be regarded as deferred remuneration in respect of the entire service, the case for relating each incremental step to the remuneration for the year in which it occurs cannot be lightly disregarded. After all, and whatever may be said of the manner in which the increments may fluctuate in amount, the scheme is such that, at the end of each year, an employee can tell with certainty not only what his lump sum will be if he then retires and does not forfeit his rights, but also how much each year of previous service has added to his entitlement. And, finally, the language of Law No. 9463 with its reference to "rights acquired for services rendered" in a context relating to a point during the service and not at its end, goes at any rate some way to show that the legislation regarded the lump sum as accruing throughout the service.

For these reasons, I consider that the Crown has failed in both the submissions discussed and, accordingly, I would hold that the appellant was right in contending that, in principle, it was entitled to make a deduction each year in respect of its prospective lump sum liabilities, provided such deduction can be fairly estimated or otherwise satisfactorily assessed.

There remains the question which this proviso raises, and which I have already posed. The difficulty here is that the deduction sought by the appellant throughout has been the aggregate of the yearly increments by which the value of the future lump sums payments has been increased. That, I think, must be wrong as, apart from any adjustment to be made on account of possible forfeitures, this deduction makes no attempt to reflect the present value of payments which may not have to be made for anything up to the span of a man's industrial life. If the position is that no fair estimate or satisfactory computation of the provision to be made as respects the appellant's prospective liabilities can be arrived at, then that is an end of the matter and the appeal must be dismissed. I am not disposed, however, to assume that that is the position, or that it is beyond the power of those skilled in such matters to produce a series of acceptable deductions for the years affected by these proceedings. I express no opinion whether or not this can be done. I do not know. But, on the whole, I feel the appellant should have an opportunity of putting this question to the test. If one may judge from the terms of the Case Stated, it was not debated before the Special Commissioners and it must, I think, have been obscured in the courts below by the other issues which were the subject of a vigorous controversy throughout and were decided, wrongly as I consider, against the appellant. While I appreciate that your Lordships would be reluctant to take any step likely to start this

A litigation on a further round of the courts, the outstanding point is now so much a matter of fact that there is, I think, but little danger of this. For my part, therefore, I would favour a remit to the Special Commissioners to ascertain whether it is practicable to arrive at satisfactory deductions and, if so, to determine what they should be.

LORD RADCLIFFE: My Lords, the appellant has been operating its B railway in Peru under the obligations of a statutory scheme by virtue of which its employees, generally speaking, are entitled to receive from it a lump sum payment on retirement, death or other termination of service. In effect, entitlement does not depend on any prescribed length of service; on the other hand, an employee can forfeit his right to payment by wrongful conduct such as dishonesty or insubordination or by failure to give due notice of retirement, which, C in many cases, is only a short one. Employees on fixed term contracts must complete their term without breach, except in the case where the company itself is in default.

In my opinion, the solution of this case does not depend on any precise analysis of the appellant's obligations under Peruvian law. In this I am at one with the Special Commissioners, who have set out in the Case all that it is necessary to D know on this point. It amounts, I think, to this. The payments that fall due are retirement benefits and no payment is exigible from the company until service has been terminated. The amount of benefit is arrived at by taking a prescribed proportion of the salary of the closing year and multiplying it by the number of years of service, but this calculation is subject to a not unimportant proviso to the effect that, if an employee's rate of salary or wage is reduced during the course E of his service, the reduction

> " shall not impair in any way the rights acquired for services rendered . . . as compensation should be calculated per years of service in accordance with the remuneration received until the time of the reduction. Following compensation will be calculated in accordance with the reduced remuneration " (Law No. 9463).

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Thus, what is paid in the year of retirement is paid in respect of the whole period of service and is, indeed, declared to represent a " remuneration which the employer pays for the work of his employee " (Law No. 6871). On the other hand, it is a single sum, and I do not think that it can be said that any particular part of what is paid is, in law, the earning of any particular year. It might be G plausible to say so in the case of a salary that never varied; but such a description cannot really be made to fit the case of the salary that increases from time to time during the period of service.

Now the question is, how ought the effects of this statutory scheme to be reflected in the appellant's accounts of the annual profits arising from its trade? One way, which is certainly the simplest one, is to let the payments made fall H entirely as expenses of the year of payment and ignore any question of making provision for the maturing obligation during the years of service that precede it. This is what the appellant seems to have done up to the year ending June 30, 1947, and it is the system which is, according to the Crown, the only one which the law of income tax permits. It has one considerable advantage; no element of estimate or valuation appears in the profit assessment, and nothing is charged I to profits except the actual cash outgoing. But, when this has been conceded, I think that there is the very serious disadvantage to be set against the cash basis that it affords a comparatively inefficient method of arriving at the true profits of any one year. The retirement benefit is not, obviously, paid to obtain the services given in the year of retirement. The incidence of retirement payments must be variable from year to year, and it may inordinately depress the profits of one year, just as it may inordinately inflate the profits of another. It is true that the appellant carries on business from one year to another, but it is not charged on the average of its annual profits. Tax rates and allowances themselves vary and, apart from that, to charge tax on a profit unduly accelerated or unduly deferred is, in my opinion, no more respectable an achievement than to admit that the annual accounts of business do, in some cases, require the introduction of estimates or valuations if a true statement of profit is to be secured.

Another method is that which the appellant is seeking to establish with regard to its assessments for the four years 1947-50. I will say at once that what it aims at (I do not say, what it achieves) appears to me to be a more accurate assessment of true annual profit than that which could be provided by the other method. When I am told, then, that its adoption is banned by some established principle of law, to which your Lordships are bound to give effect, I feel that I must inquire closely what that principle of law is, and on what understanding of accountancy practice the principle is said to be based. For the overriding principle of law is still, I believe, as it was stated by LORD HALDANE in *Sun Insurance Office* v. *Clark* (1) ((1912), 6 Tax Cas. 59 at p. 78):

> " It is plain that the question of what is or is not profit or gain must primarily be one of fact and of fact to be ascertained by the tests applied in ordinary business. Questions of law can only arise when (as was not the case here) some express statutory direction applies and excludes ordinary commercial practice, or where, by reason of its being impracticable to ascertain the facts sufficiently, some presumption has to be invoked to fill the gap."

And our task is not made any easier by the knowledge that, though the law with its system of precedents may sometimes seem to stand still (I hope that it does not), it is quite certain that the techniques and practices of commercial accountancy are very far from static.

What the appellant claims the right to do is to charge against each year's receipts the cost of making provision for the retirement payments that will ultimately be thrown on it by virtue of the fact that it has had the benefit of its employees' services during that year. As a corollary, it will not make any charge to cover the actual payments made in the year in respect of retirement benefits. Only by such a method, it is said, can it bring against the receipts of the year the true cost of the services that it has used to earn those receipts. Generally speaking, this must, I think, be true. For, whereas it is possible that any one of its many employees may forfeit his benefit and so never require a payment, the substantial facts of the situation are that, when the company has paid every salary and wage that is due for current remuneration of the year, it has not by any means wholly discharged itself of the pecuniary burden which falls on it in respect of the year's employment. This is a long-term application of the practice by which provision for holidays with pay in the coming year is charged in part against the receipts of the previous year. It does not seem to me inconsistent with the theory on which the claim is based that, in the year when an increase of salary takes place and the expectation of a larger ultimate payment materialises, an adjustment has to be made to take care of what has thus become the under-provision of earlier years. I agree that it is arbitrary to describe such an adjustment as accruing in respect of that year's service; but, on the other hand, it is a provision which is required in that year to take account of the increased burden which the year's salary for the year's service has thrown on the employer.

Of course, the appellant's claim must be understood in the light of the fact that it is an employer dealing with the cost of services rendered to it, by which it itself has received moneys, say fares and freights, which enter into the current year's receipts. Generally speaking, I suppose, its takings are cash or short-term credits. The considerations which apply to this situation are not necessarily valid in other fields of income or expenditure. But, in this field, I agree that provision for retirement payments is more likely to give an accurate reflection of the true cost of earning the year's receipts than merely charging against them the year's payments to employees who retire in the year.

The courts have not found it impossible hitherto to make considerable adjustments in the actual fall of receipts or payments in order to arrive at a truer statement of the profits of successive years. After all, that is why income and expenditure accounting is preferred to cash accounting for this purpose. As I understand the matter, the principle that justified the attribution of something that was, in fact, received in one year to the profits of an earlier year, as in such cases as *Isaac Holden & Sons* v. *Inland Revenue Comrs.* (2) ((1924), 12 Tax Cas. 768) and *Newcastle Breweries, Ltd.* v. *Inland Revenue Comrs.* (3) ((1927), 12 Tax Cas. 927), was just this, that the payment had been earned by services given in the earlier year and, therefore, a true statement of profit required that the year which had borne the burden of the cost should have appropriated to it the benefit of the receipt. The principle is clearly stated in the speech of Viscount Simon in *Gardner, Mountain & D'Ambrumenil, Ltd.* v. *Inland Revenue Comrs.* (4) ([1947] 1 All E.R. 650), and I take leave to quote his words (ibid., at p. 653):

> " In calculating the taxable profit of a business on income tax principles . . . services completely rendered or goods supplied which are not to be paid for till a subsequent year cannot, generally speaking, be dealt with by treating the taxpayer's outlay as pure loss in the year in which it was incurred and bringing in the remuneration as pure profit in the subsequent year in which it is paid, or is due to be paid. In making an assessment to income tax under Sch. D, the net result of the transaction, setting expense on the one side and a figure for remuneration on the other side, ought to appear (as it would appear in a proper system of accountancy), in the same year's profit and loss account, and that year will be the year when the service was rendered or the goods delivered . . . This may involve, in some instances, an estimate of what the future remuneration will amount to (and in theory, though not usually in practice, a discounting of the amount to be paid in the future) . . . If the accounts . . . were made up before the amount of the commission was ascertained, a provisional estimate of what the amount would be might be inserted in the first place, and could be corrected when the precise figure was known, by additional assessment or by a return of any excess within six years of the original assessment."

Lord Simon's principle is not stated in terms which fully cover the present case. For he speaks of " services completely rendered ". Moreover, the decisions I have mentioned were all cases of receipts, the precise amount of which had been ascertained, though after the end of the year to which they properly belonged. No doubt it is much easier to get a satisfactory method for dealing with such cases. In the present case, the analogue would be to wait until each retiring payment was made and then to write it back in appropriate proportions over the years covering the whole period of service. But such a method, even if ideal, is not practical politics and we can, I think, put it out of our minds. There seems, therefore, to be no alternative between letting each payment fall on the year in which it is made, or adopting some scheme of current provision such as the appellant contends for. It is clear, at any rate, from what I have quoted above that there is nothing improper in admitting valuations or estimates if, by so doing, a truer balance is arrived at between the receipts of a year and the cost of earning them, or the expenses of a year and the fruits of incurring them. Such estimates were, in fact, directed by the Court of Appeal and by this House in *Harrison* v. *Cronk & Sons, Ltd.* (5) ([1936] 3 All E.R. 747), and again by this House in *Absalom* v. *Talbot* (6) ([1944] 1 All E.R. 642). See, too, the judgment of Lord Greene, M.R., in *Try, Ltd.* v. *Johnson* (7) ([1946] 1 All E.R. 532 at p. 540). The decision in the last-mentioned case is, I think, of value in illustrating the point that, however desirable it may be to bring in a valuation or estimate in order to give a better balance to a year's accounts, it cannot be right to do so if the figure which is to be inserted, " hedged round with every kind of contingency and speculation ", is too uncertain to be fairly treated as a receipt. What is true of receipts is true of liabilities. In my opinion, it is that point which constitutes the real difficulty of the present case.

There is no difficulty if we accept the main argument of the Crown. The argument is that, quite simply, there is a rule of law which forbids the introduction of any provision for future payments in or payments out, if the right to receive them or the liability to make them is in legal terms contingent at the closing of the relevant year. The rule, it seems, is absolute and must be adhered to whatever the current principles or practices of commercial accountancy may require as a method of ascertaining the year's profits. And this is the argument which hitherto has prevailed in the High Court and the Court of Appeal. Now, in my opinion, there is no such rule of law governing the ascertainment of annual profits. Where does it come from? Not from anything to be found in the Income Tax Acts, which, indeed, by the well-known rule limiting the exclusion of debts, show a different and, as I think, a more realistic approach to the problem. Not from any decided authority which is binding on your Lordships. On the contrary, there are two decisions of this House which negative the existence of any such rule of law. In *Sun Insurance Office* v. *Clark* (1), the House had to deal with the ascertainment of the profits of a fire insurance business which had two special features: it was growing, and the practice was in some cases to take premiums covering a longer risk than one year. The gross receipts inevitably included payments received in respect of unexpired policies, of each of which it could truly be said that any liability under it was contingent on the future maturing of the risk. No fire, nothing to pay. Yet the decision of the House recognised that it was correct for the insurance company to ascertain its profits for each year by carrying forward a fixed percentage of the gross premium income of the year as a provision against unexpired risk. No doubt the carry-forward was treated as a receipt of the succeeding year, and that year charged again with a new provision in respect of its new premiums. But the point is that the profit of each year was held to be correctly ascertained despite the inclusion of a provision for contingent liabilities. No doubt, too, this was insurance business; but insurance business does not live in a world of its own in income tax law. What it does is to throw up in an accentuated form some of the problems that affect, though perhaps in less degree, the ascertainment of the true profit of many other businesses; and in some cases special rules have to be evolved to deal with them.

The other decision is *Harrison* v. *Cronk & Sons, Ltd.* (5). The trader in that case had acquired by his trading a contingent right to receive certain moneys deposited with a building society. It would be impossible to say of any one of these deposits in the year in which it was made that it represented a certain right for the trader to be paid any part of it in the future for, by the terms of the arrangement with the house purchaser, default on his part might involve forfeiture or reduction of the trader's deposit. It was not money in the trader's hand, and, moreover, it might never be. Yet this House upheld the order of the Court of Appeal that the contingent rights ought to be brought in as receipts of the year in which they arose, though at a valuation (if feasible), not at their face value.

I am satisfied by these decisions that there is no such rule of law as is suggested. The answer to the question what can, or cannot, be admitted into the annual account is not provided by any exact analysis of the legal form of the relevant obligation. In this case, as in *Sun Insurance Office* v. *Clark* (1), you get into a world of unreality if you try to solve your problem in that way, because where you are dealing with a number of similar obligations that arise from trading, although it may be true to say of each separate one that it may never mature, it is the sum of the obligations that matters to the trader, and experience may

A show that, while each remains uncertain, the aggregate can be fixed with some precision. For the trader, the practical question is always the same in these cases—How much more shall I have to pay out or shall I be able to get in than my current accounts of the year are recording? Legal analysis of the obligation may present it in a variety of different forms. There is the deferred payment which is subject to nothing more than the practical contingency that it may not B be received. That is dealt with, as we know, by bringing it in at its face value, subject to allowance, or, in some cases, at a valuation. There is the future payment for work done which is only legally exigible if the whole work is completed. A large part of this particular aspect must be covered by such items of receipt as work in progress, but I do not know enough of the methods of valuing or allowing for this to speak with any confidence about it. And, lastly, C there is the contingent obligation to make a future payment, which is our present case. But, whatever the legal analysis, I think that for liabilities as for debts their proper treatment in annual statements of profit depends not on the legal form but on the trader's answers to two separate questions. The first is—Have I adequately stated my profits for the year if I do not include some figure in respect of these obligations? The second is—Do the circumstances of the case, D which include the techniques of established accounting practice, make it possible to supply a figure reliable enough for the purpose? The authorities *H. Ford & Co., Ltd.* v. *Inland Revenue Comrs.* (8) ((1926), 12 Tax Cas. 997), *Peter Merchant, Ltd.* v. *Stedeford* (9) ((1948), 30 Tax Cas. 496), *Spencer & Co.* v. *Inland Revenue* (10) ((1950), 32 Tax Cas. 111), are, no doubt, very relevant in answering the second question, as must be the mere fact that an obligation is in its own terms E contingent; but I regard them rather as illustrations of the kind of answer that should be given than as laying down any general principle or rule of law.

Nor can I see what useful instruction is to be obtained from the judgment of LORD CLYDE (Lord President) in *Whimster & Co.* v. *Inland Revenue* (11) ((1925), 12 Tax Cas. 813). First, the learned judge's formulation of some general rules according to which annual profits should be determined for purposes of income F tax is explicitly based on his understanding of what he calls (ibid., at p. 823) " the ordinary principles of commercial accounting ". Secondly, his observation, no doubt correct, that annual profits, properly determined, are not to be treated as reduced by the circumstance that some part of them may be prudently reserved from distribution by the owner of the business to take care of an apprehended loss from future trading offers no solution to the problem of the present G case, in which the accountants who have given evidence would say, I suppose, that they were not advocating the making of a reserve, but seeking to evaluate a current cost of working.

This brings me at last to the facts of the present case. I am bound to say that, but for what has been found by the Special Commissioners, I should have thought that the charges for retirement benefits which the appellant has claimed to make H in the four relevant years were well on the wrong side of what was permissible. When account is taken of all the circumstances, I should have thought that the sums charged were a very long way from affording a scientific appraisement of the additional burden arising in respect of the year's services, and were, therefore, in the nature of a rough reserve against the future rather than a measured provision. Because what the appellant has done is simply this. It has calcu- I lated what sum would be required to be paid to each employee in respect of retirement benefit if he retired, without forfeiture, at the close of the year, and the aggregate of what is required is set aside in so far as the year has contributed to the aggregate. I think that that is a sufficiently accurate description of the process as it was explained to us. But it seems to me to leave out of account several factors that are essential to the appraisement.

First, there is the contingency itself that any one benefit may in the end be forfeited. This seems to me the least important of the factors, since it is extremely probable that most will be paid; and, on the fact found that the appellant had never yet failed to pay retirement benefit to an employee on any ground, I think that the weight of the contingency is, in effect, nothing. Secondly, it must not be forgotten that these benefits and their scale are imposed by legislation, not by voluntary contract; and one cannot exclude the possibility that both the form and the scale of what has to be paid may be altered again without the appellant's consent. Thirdly, there is the very important factor of discount. To reserve each year's increment at face value, as the appellant does, presents itself to me as making a serious over-provision. It is true that trade debts on short-term credit are not brought in at a discount; but here we are dealing with liabilities which cover a whole period of service and of which some may be deferred thirty or forty years before payment. No doubt each is at call at the close of the year, in the sense that any employee may retire and claim his accrued benefits on notice. But the point is that most of the staff would not be doing that; and to provide each year's increment at face value on the ground that it is in that sense presently payable seems to me to be falling into the same error of confusing the individual form with the substance of the whole, which I find amiss with the argument for the Crown.

In my opinion, therefore, the appellant must be wrong in omitting to allow for discounting. So much, indeed, was conceded by its counsel in the course of argument. But then, it was said, that would be quite easy to do. I can see that it would be easy if the age of each workman and employee were known, the retirement age were fixed and each of them were to remain in service until that age. But then some will die and some will leave service before retiring age, and these factors accelerate payment and so pro tanto increase the present value of each prospective payment. Well, it is said, given sufficient information, it will be possible to evaluate these factors by averages based on past experience and make adjustments of the discount accordingly. Perhaps it would, but the Case Stated gives us no information at all on the matter; and the averages themselves may be falsified by events, so leading either to over-provision or under-provision for the risks. If one is really going to formulate a water-tight scheme of providing for such a difficult problem, I should expect to find that it included an arrangement for periodical revision of the aggregate of the outstanding appropriations in the light of the current risks, so that anything over-provided could be brought back into taxation.

Bearing these considerations in mind I find it impossible to give any conclusive weight to the finding of the Special Commissioners that the appellant's method of face value appropriations ought to be upheld, because

> " it was a matter of correct accountancy practice in England to make provision in the accounts for the sums in question in the circumstances of this case."

I wish that I could, because I should view with dismay the assertion of legal theories as to the ascertainment of true annual profits which were in conflict with current accountancy practice and were not required by some special statutory provision of the Income Tax Acts. And it is apparent that, in this case, the Special Commissioners' finding was arrived at after hearing the evidence of the appellant's auditor and another independent accountant of distinction. The auditor said, as auditors have said before in other cases, that he " would not have signed the balance sheet without a qualification, unless the afore-mentioned provision had been made." All this is very important, because, of course, accountants are very specially concerned with the problems that attend the true ascertainment of a year's profit and the establishment of techniques that assist in this. But, for all that, there is nothing in the Case that seems to me to fix on the point that is really the heart of this appeal. The requirements that an auditor may make before signing a balance sheet (I assume that the words used in the Case are meant to cover the statutory reference to the profit and loss account) do, no doubt, cover his opinion that that account gives a " true and fair view " of the profit for the financial year; but I do not think that such requirements are necessarily the same thing as the auditor's opinion that some particular provision could not be omitted without compromising the true and fair view. It is not possible completely to equate the balance shown by a company's profit and loss account with the balance of profit arising from the trade for the year. The word " provision " is becoming a technical one in contradistinction to the word " reserve " owing to the definitions of the two terms supplied by the Companies Act, 1948, Sch. 8, Part 4, para. 27; but the word " provision " includes any amount written off or retained

> " for any known liability of which the amount cannot be determined with substantial accuracy ",

and I think that one is bound to say that references to an auditor's duty under the Companies Act, 1948, take us into a field that is not exactly the same as that in which the annual profits of trade should be ascertained for the purposes of income tax. There is nothing in the evidence or the Special Commissioners' finding which supplies an answer to what I regard as the vital question relevant to these cases—is the sum provided an essential charge against the receipts of the trade in order to enable a true profit from that source to be stated for the year in question? As I see it, such a question cannot be answered just by one man's opinion. It is important to know how far it is supported by accepted theory or established practice. In the absence of any light on all these points, I think that your Lordships are bound to use your own judgment, supported, indeed, as it is, by the admissions made by the appellant's counsel during the course of the hearing, and by the fact that an alternative, albeit a rough and ready, method is available which has, after all, been adopted in the past.

My Lords, I feel bound to come to the conclusion that the appeal fails. I do not think that this is an occasion on which the Case should be remitted to the Special Commissioners to see whether a new and more satisfactory method of provision could be extracted from evidence. The appellant has stood throughout on its claim that the provisions that were claimed before the Special Commissioners were those that it was entitled to make, though I gather that, during the course of the various appeals, it was admitted that it might be proper to discount. To send the case back, when it is not even certain that a proper method can be found, is really to start it all over again and would apparently involve the hearing of further evidence. That is to go beyond the function of a final appeal.

LORD TUCKER: My Lords, I have had the advantage of reading in print the opinion of my noble and learned friend, LORD RADCLIFFE, which has just been delivered. I agree with him that there is no such absolute rule of law governing the ascertainment of annual profits as was contended for by the Crown in the present case, and that there is no ground for holding that the decision of this House in *Sun Insurance Office* v. *Clark* (1) ((1912), 6 Tax Cas. 59) must be confined exclusively to insurance companies. I also agree, for the reasons which he has given, that the finding of the Special Commissioners that the appellant's method of accounting is in accordance with " correct accountancy practice " cannot, in the circumstances of this case, be regarded as conclusive.

I would, accordingly, dismiss the appeal.

Appeal dismissed.

Solicitors: *Smiles & Co.* (for the appellant); *Solicitor of Inland Revenue.*

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

REOHORN AND ANOTHER *v.* BARRY CORPORATION.

[Court of Appeal (Denning, Birkett and Parker, L.JJ.), June 6, 7, 1956.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to demolish or reconstruct premises—Proposed inclusion of site in development scheme—Whether firm intention to carry out scheme—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 30 (1) (*f*).

The applicants were the tenants of six and a half acres of land on Barry Island where they carried on the business of a car park. The landlords, Barry Corporation, gave notice terminating the tenancy on May 1, 1956, under the Landlord and Tenant Act, 1954. When the tenants applied for a new tenancy under the Act the landlords opposed the application under s. 30 (1) (f)* on the ground that they intended to develop the site together with adjoining land as part of a comprehensive scheme for Barry Island, by building on it, shops, hotels, boarding houses and a garage on several floors. The scheme, which it was estimated would cost some £500,000, was to be carried out by the landlords' letting the land on a building lease to a development company who had written that they were " agreed in principle to start work in June, 1956, subject to the approval of the council and to the conclusion of satisfactory building arrangements ". There was no evidence as to the financial arrangements, no detailed plans of the proposed development had been agreed nor had the amount of rent nor the terms of the building lease been agreed.

Held: the intention of the landlords referred to in s. 30 (1) (f) of the Landlord and Tenant Act, 1954, connoted an ability on their part to carry that intention into effect; in the present case the development was not going to be carried out by the landlords but by a development company and though the evidence disclosed a reasonable prospect that the development would be carried out it did not establish that the landlords " intended " within the requirements of s. 30 (1) (f) to reconstruct the holding (dictum of Asquith, L.J., in *Cunliffe* v. *Goodman*, [1950] 1 All E.R. at p. 724, applied); in the circumstances, having regard to the fact that the land was ripe for development and the consideration that the development ought not to be impeded, the tenants would be granted a new tenancy from May 1, 1956, to Dec. 31, 1956, and thereafter determinable by six months' notice on either side.

Per Denning, L.J.: the right time at which to judge whether the intention required by s. 30 (1) (f) of the Landlord and Tenant Act, 1954, exists is the hearing (see p. 745, letter D, post).

Appeal allowed.

[**Editorial Note.** In relation to the dictum, summarised above, that the material point of time at which the intention required by s. 30 (1) (f) of the Landlord and Tenant Act, 1954, must be shown to exist is the date of the hearing, comparison should be made with the decision in *Betty's Cafés, Ltd.* v. *Phillips Furnishing Stores, Ltd.* (ante, p. 497); see per Parker, L.J., at p. 749, letter I, post.

For the Landlord and Tenant Act, 1954, s. 30 (1) (f), see 34 Halsbury's Statutes (2nd Edn.) 414.]

Cases referred to:

(1) *Fisher* v. *Taylors Furnishing Stores, Ltd.*, ante, p. 78.
(2) *Herbert* v. *Blakey* (*Bradford*), *Ltd.*, (Jan. 11, 1956), unreported.

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* Section 30 (1) (f) is as follows: " that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding ".

(3) *Gilmour Caterers, Ltd.* v. *St. Bartholomew's Hospital* (*Governors*), [1956] 1 All E.R. 314; [1956] Q.B. 387.

(4) *Cunliffe* v. *Goodman*, [1950] 1 All E.R. 720; [1950] 2 K.B. 237; 31 Digest (Repl.) 378, *5070.*

(5) *Betty's Cafés, Ltd.* v. *Phillips Furnishing Stores, Ltd.*, ante, p. 497.

Appeal.

The tenants appealed from an order of His Honour JUDGE TEMPLE MORRIS at Cardiff and Barry County Court, dated Mar. 22, 1956, whereby their application for a new tenancy of certain land in the Borough of Barry under the Landlord and Tenant Act, 1954, was refused.

The facts appear in the judgment of DENNING, L.J.

J. R. Phillips for the applicants, the tenants.

D. Pennant for the corporation, the landlords.

DENNING, L.J.: The tenants, the two applicants in this case, claim a new tenancy of some six and a half acres of land on Barry Island from Barry Corporation under the Landlord and Tenant Act, 1954. It is used by the tenants as a car park, and has been so used by them for twenty-five years. The tenancy was determined by the corporation, the landlords, by notice served on Oct. 31, 1955, to expire on May 1, 1956. The tenants of these premises are entitled under the Act to an automatic extension of their tenancy of business premises unless the landlords, the defendant corporation, can prove, in accordance with the terms of the Act, that on the termination of the current tenancy they intend to carry out substantial work of construction on the holding and that they could not reasonably do so without obtaining possession of the land. The landlords think that it would be desirable to develop this six and a half acres in conjunction with another five acres of adjoining land which they own and which they have in possession. They contemplate developing it as part of a comprehensive scheme for Barry Island, by building on it shops, hotels, boarding houses, and, in addition, a garage on several floors so as to make room for the cars when the car park is no longer there. An outline plan of the work which is obviously substantial was submitted to us.

The question is whether the landlords have proved the requirement of s. 30 (1) (f) of the Act that they *intend* to carry out that work of construction on the holding. The landlords cannot do the work themselves or by independent contractors for several reasons. One reason is that in these days of credit restrictions they cannot raise the money for the purpose which would involve, we are told, half a million pounds. Another reason is that it might well be beyond their powers to do the work themselves because it is not one of the functions of a local authority to carry on hotels or shops. They propose, therefore, to let the land on a building lease to a development company, say for 999 years, and the building lessees would do the work and pay a rent to the landlords. The landlords would need the sanction of the Ministry of Housing and Local Government for so dealing with their land. They said in evidence in the court below that there would be no difficulty in obtaining the consent; and, indeed, since then the Ministry has given consent, recommending that the rental under such a building lease should be £2,500 a year. The landlords have passed resolutions on the matter. As part of the scheme, they propose building a new road on the north of the site, a road which would, in any event, be of great value in improving access to the shore and beaches on Barry Island. They have approved the expenditure of £2,500 to be laid out on this new road in 1956 and 1957. The tenants say they are quite prepared for that new road to be built during the continuance of the tenancy—indeed it would improve their car park—so the landlords do not need to have possession of the demised premises for the purpose of building the new road. They cannot, however, carry out the rest of this vast scheme without obtaining possession. The evidence showed that the landlords have been in touch with a development company, who have had discussions with the corporation's officials. The development company wrote a letter saying they were agreed " in principle " to start work next June, 1956, " subject to the approval of the council and the conclusion of satisfactory building arrangements ". However, no one was ever called from the development company to give evidence before the court. The correspondence shows that it is proposed that a new company should be formed and that this new company should take the building lease; but what the financial stability and backing of that new company will be, no one knows, or at all events, the court does not know. Plans for the development are hardly started. There is an outline plan which has been supplied to the court, but nothing more. It is obvious that there will still be required long and detailed negotiations about the plans, the nature of the buildings, the amount of rent, the terms of the lease, the timetable, and so forth.

Such being the facts, the question is whether the intention required by the Act is satisfied. In *Fisher* v. *Taylors Furnishing Stores, Ltd.* (1) (ante, p. 78), I pointed out (ibid., at p. 80) that the intention must be

> " . . . a firm and settled intention, not likely to be changed . . . It must be remembered that, if the landlord, having got possession, honestly changes his mind and does not do any work of reconstruction, the tenant has no remedy."

In considering whether the court should be satisfied of the landlord's intention, I think that it may readily be satisfied when the premises are old and worn out or are ripe for development, the proposed work is obviously desirable, plans and arrangements are well in hand, and the landlord has the present means and ability to carry out the work. Such was the position in *Fisher* v. *Taylors Furnishing Stores, Ltd.* (1), and in several other cases which have come before this court. However, the court will not be so readily satisfied when the premises are comparatively new or the desirability of the project is open to doubt, when there are many difficulties still to be surmounted, such as the preparation and approval of plans or the obtaining of finance, or when the landlord has in the past fluctuated in his mind as to what to do with the premises. In those circumstances, even though he should assert at the hearing that he has a firm and settled intention, the court is not bound to accept it because of the likelihood that he may change his mind once he obtains possession. Such was the position in *Herbert* v. *Blakey* (*Bradford*), *Ltd.* (2) (unreported) (a case under s. 30 (1) (g)) which was before this court on Jan. 11, 1956. In the present case, the premises are ripe for development and the proposed work is obviously desirable: the difficulty is to be satisfied that the landlords have the present means and ability to carry out the work. " Intention " connotes an ability to carry it into effect. A man cannot properly be said to " intend " to do a work of reconstruction when he has not the means to carry it out. He may *hope* to do so: he will not have the *intention* to do so. In this case the landlords contemplate turning this land into a splendid estate by the sea. They are exploring the possibilities of it; they are discussing the ways and means, in the shape of a building lease; but that is as far as they have got. Their ability to do the work, or to cause it to be done, is, I think, open to question.

I desire to say at once that there is no objection to their doing it by way of a building lease. Indeed, as I have indicated, it is the only way in which the landlords can develop this land; and no one would wish to hold up development because a building lease was chosen as a means of doing it rather than doing it through independent contractors. The decision of this court in *Gilmour Caterers, Ltd.* v. *St. Bartholomew's Hospital* (*Governors*) (3) ([1956] 1 All E.R. 314) shows that it is permissible for a landlord to cause the work to be done by way of a building lease. In that case, however, the building lease was already executed; the premises were old and ripe for development; the landlords had complete control of the work to be done: it was all specified and ready to be started at once. In this case, however, it is very different. There is no building lease, no lessee in existence at the moment, no plans with any details, no knowledge of any financial backing. There is so much still to be explored and discussed, there are so many factors outside the control of the landlords altogether, that I do not think that there is here that " intention not likely to be changed " which is required before the tenant is to be deprived of a new lease. I can well see that in the course of the next few months difficulties may arise which might lead to the abandonment of this plan, or, at all events, to its suspension for an indefinite period. It would not be right that the tenant should be turned out by the landlords on such an uncertain and unsettled intention. It seems to me that, to apply the words of ASQUITH, L.J., in *Cunliffe* v. *Goodman* (4) ([1950] 1 All E.R. 720 at p. 725) the matter is still in the sphere of the tentative, the provisional and the exploratory and has not yet reached the valley of decision*.

I am aware that the county court judge took a different view. He found that the landlords had the necessary intention. Nevertheless, the facts are not in doubt. The only question is, what is the proper inference from those facts? It seems to me in the circumstances before us that the landlords have not sufficiently proved a " firm and settled intention not likely to be changed ". I ought to say that I look at the intention in this case as did the county court judge—the intention existing at the date of the hearing—which is, I think, the right time to take. Even looking at it at the date of the hearing, I do not think that the intention was sufficiently proved. That being so, the tenants are entitled to the extension of the tenancy. What are the terms of the new tenancy to be? In this case, where the land is ripe for development and the work is obviously desirable, I think that the terms of a new tenancy should not in any way impede the development of the land in due course as and when the intention and the ability are present. Indeed, the first applicant himself said in evidence:

> " If the council requires the whole area for building purposes or development of Barry Island, they can have the lot tomorrow if they wanted to build or let in a few months."

So one of the tenants himself takes the view, very rightly, that he does not want to hold up the development. Possession of the land is not needed for the road; that can be done straight away; and, in order to protect both landlords and tenants, the terms which I suggest for the new tenancy are that it should be from May 1, 1956 (that is the end of the old tenancy), until Dec. 31, 1956, and thereafter until determined by six months' notice to be given by either party to expire at any time on or after Dec. 31, 1956. This means that once the landlords evince a firm and settled intention to carry out this work the tenants will have no claim to stay longer. In view of what the first applicant has said, he will not seek to do so; but in case he should make an application for an extension of this new tenancy which we grant, I would like to say that any court to whom application is made should deal with the application at the earliest possible moment so that the development of this land should not be in any way held up. I would allow the appeal accordingly.

BIRKETT, L.J.: I am of the same opinion and I think the matter is one of considerable importance. The Landlord and Tenant Act, 1954, was designed to deal with what had long been a matter of complaint, namely, the ending of leases of business and professional men, and it was thought proper that an Act of Parliament should give some relief to tenants and should also protect landlords. For example, s. 24 (1) provides:

> " A tenancy to which this Part of this Act applies shall not come to an

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* This judgment of ASQUITH, L.J., is quoted also at [1953] 2 All E.R. 84, letter I, and [1956] 2 All E.R. 506, letter B.

> end unless terminated in accordance with the provisions of this Part of this Act; and, subject to the provisions of s. 29 of this Act, the tenant under such a tenancy may apply to the court for a new tenancy . . ."

Then in s. 25 and s. 26 the conditions are laid down; and s. 26 (6) provides:

> "Within two months of the making of a tenant's request for a new tenancy the landlord may give notice to the tenant that he will oppose an application to the court for the grant of a new tenancy, and any such notice shall state on which of the grounds mentioned in s. 30 of this Act the landlord will oppose the application."

In the present case, the tenants have been in possession of this particular car park for some twenty-five years. The landlords wanted possession of it. The tenants had no objection if possession were really wanted for the development of Barry and the real reason why they ask for this new tenancy and oppose the wish of the landlords is that the tenants do not think that there is that fixed intention on the part of the landlords so to develop the land. Under s. 30 of the Landlord and Tenant Act, 1954, the landlords oppose the tenants' request on the ground that on the termination of the current tenancy the landlords intend to carry out substantial work on this particular land. On a reasonable interpretation, s. 30 (1) (f) premises that it should be the settled intention to end this tenancy for this purpose and that the work will begin on the termination of the tenancy, not at any long delayed time thereafter.

The contest in this court has revolved round the use of this word "intends" in s. 30 (1) (f)—" . . . the landlord intends to demolish." One of the difficulties has been this. The learned county court judge cited from *Fisher* v. *Taylors Furnishing Stores, Ltd.* (1) (ante, p. 78) where Denning, L.J., said (at p. 80):

> " . . . the court must be careful to see that s. 30 (1) (f) is fully satisfied . . . that the intention to reconstruct is genuine and not colourable; that it is a firm and settled intention, not likely to be changed; that the reconstruction is of a substantial part of the premises, indeed so substantial that it cannot be thought to be a device to get possession; that the work is so extensive that it is necessary to get possession of the holding in order to do it; and that it is intended to do the work at once and not after a time."

Counsel said that a learned judge who has read those words and made them part of his judgment cannot be said to have overlooked what is the main matter in the case, namely, the quality and the character of the intention. Indeed, the learned judge continued: "I find that the [landlords] intend to do the work of construction."

The difficulty raised here was whether the learned judge had made a finding of fact. On consideration of the arguments of counsel and on consideration of the sub-section, I am of the same opinion as my Lord on this matter. I think there is no doubt that in this case, in the ordinary use of English language, the landlords "intend" to carry out this work; but it is necessary to be clear and precise as to what the connotation of the words "intend", or "intention", may be. I have been greatly assisted by the judgment of Asquith, L.J., in *Cunliffe* v. *Goodman* (4) ([1950] 1 All E.R. 720), which is another illustration of the clearness of that learned Lord's mind, of his mastery of the English tongue and his great powers of exposition. That case was concerned with s. 18 (1) of the Landlord and Tenant Act, 1927, where the particular words under discussion were these:

> ". . . in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made

> therein as would render valueless the repairs covered by the covenant or agreement."

In the case to which I have referred, the " firm intention " became a matter of supreme importance; and ASQUITH, L.J., said ([1950] 1 All E.R. at p. 724):

> " The question to be answered is whether the tenant (on whom the onus lies) has proved that on Nov. 30, 1945, the landlord ' *intended* ' to pull down the premises on this site. This question is, in my view, one of fact. If the landlord did no more than entertain the idea of this demolition, if she got no further than to contemplate it as a (perhaps attractive) possibility, then one would have to say (and it matters not which way it is put) either that there was *no* evidence of a positive ' intention ' or that the word ' intention ' was incapable, as a matter of construction, of applying to anything so tentative and so indefinite."

If I may stop there and make this comment, it is quite plain that it is not enough for somebody to say " I have an intention to do this thing ": the expression must be carried much further as to the quality of the intention. ASQUITH, L.J., continued (ibid.):

> " An ' intention ', to my mind, connotes a state of affairs which the party ' intending '—I will call him X—does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition. X cannot, with any due regard to the English language, be said to ' intend ' a result which is wholly beyond the control of his will."

Then the lord justice proceeded to give illustrations. It is to be observed that in the course of the argument he made this pungent intervention:

> " Has ' intention ' or ' decision ' any reality where a person is hedged about with so many legal obstructions which he has to surmount before he can make his wish prevail? "

It is quite clear that, in considering and in construing the connotation of the word " intention ", ASQUITH, L.J., had that kind of consideration in mind. He concluded his judgment in this way (ibid.):

> " If there is a sufficiently formidable succession of fences to be surmounted before the result X aims at can be achieved, it may well be unmeaning to say that X ' intended ' that result."

It seems to me that that covers the situation in this case. I do not doubt the good faith of the landlords. When they have said they " intend " to make this development I entertain no doubt that they really mean they " intend " to do it; but when the considerations which ASQUITH, L.J., laid down are considered and applied to the facts of this case then a different situation emerges. In my opinion, " intention " (as used in the Landlord and Tenant Act, 1954, s. 30 (1) (f)) to do something must include the ability to do the thing intended; and when ASQUITH, L.J.'s words are remembered about " the succession of fences " one has only to enumerate them in this case. From the beginning, one was struck by one consideration in regard to a great scheme of this kind; it is estimated to cost £500,000, and if it follows the generality of building contracts in modern days, it is likely far to exceed that figure, which is a matter which would have to be considered. The first thing to be observed on the considerations which have been read from the judgment of ASQUITH, L.J., is that the scheme is really not within the control of the landlords in any true sense of that term. They are not going to do this work themselves. Some of the projects are clearly ultra vires the landlords. There has never been an intention that they should do the work themselves and thus have completely within their control such matters as when to start, how to do it, in what stages, and so on. As my Lord has pointed out, there is to be a building lease of 999 years. Before that is brought into practical possibility, the fences to be overcome are formidable in themselves. All that we have before us is a letter dated Feb. 17, 1956, from the Heybridge Development & Construction Co., Ltd., who had been approached by the town clerk as to their willingness or ability to perform this work of development. The letter from the town clerk had merely said to the solicitors for this company:

> "I shall be glad if you will kindly let me know whether your clients are definitely interested in carrying out proposals as outlined when I shall be pleased to make arrangements for a further meeting between representatives of the [landlords] and your clients at London at the earliest possible date. In the meantime and pending a further discussion, I would suggest that there is no necessity for your clients to take any active steps at this stage for the formation of a new company. If, of course, your clients have any observations to make on the proposals as shown in the plan I shall be pleased to receive them."

The letter from the Heybridge Development & Construction Co., Ltd. to the town clerk reads:

> "Sir, Re the proposed comprehensive development scheme of land Barry Island, we are agreed in principle to start work next June, 1956— [now here is the first matter] subject to the approval of the council [and the second matter] and to the conclusion of satisfactory building arrangements."

It is quite clear that the whole matter is, as my Lord pointed out, and in the words of Asquith, L.J., purely tentative. Asquith, L.J., in *Cunliffe* v. *Goodman* (4) said this ([1950] 1 All E.R. at p. 725):

> "Neither project moved out of the zone of contemplation—out of the sphere of the tentative, the provisional and the exploratory—into the valley of decision."

I should have thought that the present case is entirely within that wording of Asquith, L.J.: there is merely an exploring of the situation—"In principle we would like to do it and are willing to do it and willing to start, but that must be subject to the approval of the council". The landlords have yet to approve, as I understand, something which is still not in being. The landlords say that this is the scheme which they want to be carried out, and the construction company say that they propose to carry out something on these lines, subject to the approval of tho landlords and subject to the conclusion of satisfactory building arrangements.

I think that is the first fence. In addition there is the question of finance. It is a contingency always to be faced that the arrangements for providing finance for so great a scheme might turn out to be unsatisfactory. I do not know; we have no evidence whatever about it; and "the conclusion of satisfactory building arrangements" might mean anything. I do not know what labour is to be employed, what work is to be done first, by what time it is to be completed: all the matters of that sort are entirely in the air. Therefore, whilst the good faith of the landlords is not to be doubted, in the view which I have taken of the construction of the word "intention" there was no evidence of a firm intention on which the learned county court judge could come to the conclusion to which he did. I am of opinion that the "intent" which is referred to in s. 30 (1) (f) of the Landlord and Tenant Act, 1954, is not proved in this case.

I entirely agree with what my Lord said about the terms of the lease and the period for which it ought to be granted. Giving the matter the best consideration I can, and having regard to the wording and purpose of the Act, and the desire that the Act shall be construed fairly to both tenants and landlords, the decision announced by my Lord seems to me to be an ideal solution of a rather difficult situation. I agree that on those terms the appeal should be allowed.

PARKER, L.J.: I have come to the same conclusion. I am satisfied that there was no evidence here on which the county court judge was entitled to hold, as he did, that the landlords had proved that they "intended" to carry out substantial work of construction on the termination of the current tenancy, within the meaning of s. 30 (1) (f) of the Landlord and Tenant Act, 1954. There is no doubt in this case, as is conceded, that the landlords' frame of mind was genuine; but in order that it should amount to a "firm and settled intention" it must be shown that there is a reasonable prospect that they will be able to bring about the construction contemplated. As ASQUITH, L.J., said in *Cunliffe* v. *Goodman* (4) ([1950] 1 All E.R. at p. 724):

> "If there is a sufficiently formidable succession of fences to be surmounted before the result X aims at can be achieved, it may well be unmeaning to say that X 'intended' that result."

Where, as here, the contemplated development is not going to be carried out by the landlords through their servants or agents, in which case the development depends almost entirely on their own volition, but is to be carried out by means of a building lease, the landlords' volition (to use again the words of ASQUITH, L.J.) is "no more than a minor agency". The result will depend ultimately on the volition of the proposed developer who is prepared to enter into the particular building lease. Accordingly, the landlord must prove in such a case that the developer and he have agreed on at least the essential terms of the lease, even though the document has not been signed.

In the present case, the parties had not nearly reached that stage. No plans of the proposed development had been prepared or agreed, nor had any terms as to rent been agreed, nor was there any evidence that the proposed developers were in a position financially to carry it out. They did not give any oral evidence, and the only evidence emanating from them was that contained in the letter of Feb. 17, 1956, to which my Lords have referred, a letter which clearly shows the fences to be surmounted before they committed themselves. Bearing this in mind, I cannot think that this letter could amount to proof that there was a reasonable prospect of the development being carried out. I think that the learned county court judge was influenced by the evidence given by the landlords to the effect that the scheme could not go further till they got vacant possession. They said in evidence that they must be assured of being able to proceed with the scheme. What the landlords no doubt meant by that was that they were not prepared to go further and incur considerable expense in the preparation of plans, etc., until they knew they could obtain possession. However reasonable this attitude may have been from the financial angle, it cannot dispense with the proof which is required to enable them to oppose the tenants' claim successfully. If such proof can only be adduced by incurring such expense, then the landlords must incur the expense and risk failure to obtain possession. After all, there is no discretion involved under para. (f). If a landlord establishes the ground stated in that paragraph the result is automatic. The court then "shall not make an order for the grant of a new tenancy" (see s. 31 (1) of the Landlord and Tenant Act, 1954).

I have assumed that the relevant time to be considered is the time of the application. If, as DANCKWERTS, J., has held in *Betty's Cafés, Ltd.* v. *Phillips Furnishing Stores, Ltd.* (5) (ante, p. 497) the relevant time is the time when the ground of opposition is first stated (in this case, Oct. 29, 1955), the matter is unarguable. At that date no proposed developer had even been approached. Taking the view that I do as to the position even at the hearing, it is unnecessary to consider what is the relevant date, and I leave this over for future consideration when the point arises.

I should add that the intention to construct a road was, I think, proved, but the landlords cannot rely on that as a ground for obtaining possession since, clearly, it was unnecessary to obtain possession of the holding in order to carry out that construction. The position, however, on the evidence is that this waste piece of land now used for a car park is ripe for development. This is a circumstance to be considered when considering the duration of a new tenancy under s. 33 of the Landlord and Tenant Act, 1954, since the Act should clearly not be used as an instrument to defeat development. The new tenancy, therefore, should be one of short duration, and I agree with the proposed terms of the extended tenancy. Accordingly, I would allow the appeal on those terms.

Appeal allowed.

Solicitors: *J. H. Milner & Son* (for the tenants); *Lewin, Gregory Mead & Sons*, agents for *J. Clement Colley*, Barry (for the landlords).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

BOAKS *v.* REECE.

[QUEEN'S BENCH DIVISION (Pilcher, J., sitting with a jury), June 11, 12, 13, 1956.]

Justices—Jurisdiction—Remand in custody for medical examination—Offence not punishable with imprisonment—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 55), *s.* 14 (3).

The plaintiff appeared before the defendant, a metropolitan magistrate, on charges of obstructing the highway. None of the offences charged was punishable with imprisonment. The defendant convicted the plaintiff and remanded him in custody for one week for a medical report as to his mental and physical condition. In a claim by the plaintiff for wrongful imprisonment in respect of this remand the jury found that when the defendant signed the committal warrant the warrant was expressed to be made pursuant to s. 14 (3) of the Magistrates' Courts Act, 1952*. On the question whether the defendant had jurisdiction under that section to remand the plaintiff for medical examination as to his mental and physical condition,

Held: section 14 (3) gave the defendant jurisdiction to remand the plaintiff so that inquiries could be made, including inquiries as to his mental and physical condition.

[**Editorial Note.** The following is the sequence of the legislation relevant to this case. Section 16 of the Summary Jurisdiction Act, 1848, conferred a general power on justices to adjourn the hearing of a case and a discretion to suffer the defendant to go free during the adjournment or to commit him to gaol. It contained no reference to inquiries or to adjournment after the hearing. This power to adjourn was extended by s. 25 (1) of the Criminal Justice Act, 1948, to adjourning a case after conviction to enable inquiries to be made or to determine the most suitable method of dealing with the case. Without prejudice to that power s. 26 (1) of the Act of 1948 obliged the justices, where an offence punishable with imprisonment was charged, to remand a guilty defendant in custody for medical examination if inquiry into his physical or mental condition ought in their opinion to be made. All these enactments were repealed by the Magistrates' Courts Act, 1952, which was an Act to consolidate prior statutes with corrections and improvements. The general power to remand in custody (s. 16 of the Act of 1848) is replaced by s. 14 (1) and s. 105 of the Act of 1952. Section 14 (3) of that Act replaces s. 25 (1) of the Act

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* See p. 751, letter I, post. Section 105 of the Magistrates' Courts Act, 1952, enables a remand under, e.g., s. 14 (3), to be a remand in custody.

A of 1948, and s. 26 (1) of the Act of 1952 replaces s. 26 (1) of the Act of 1948 omitting the qualification "without prejudice" to the power now conferred by s. 14 (3) of the Act of 1952. The ratio decidendi in the present case thus rests on the basis that a remand to enable a medical examination, similar to that envisaged by s. 26 (1) of the Act of 1948, to be made might have been ordered under s. 25 (1) of that Act, although the offence charged was not punishable
B with imprisonment (see p. 752, letters B and H, post).

For the Summary Jurisdiction Act, 1848, s. 16 and the Criminal Justice Act, 1948, s. 25, s. 26, see 14 HALSBURY'S STATUTES (2nd Edn.) 787, 1007, 1008.

For the Magistrates' Courts Act, 1952, s. 14, s. 26, see 32 HALSBURY'S STATUTES (2nd Edn.) 434, 445.]

C **Action for wrongful imprisonment.**

The plaintiff, William George Boaks, claimed damages for wrongful imprisonment against the defendant, Bertram Reece, a metropolitan magistrate in respect of his appearance before the defendant at Bow Street Magistrates' Court on Oct. 3, 1955. The plaintiff was convicted of offences of obstructing the highway contrary to s. 72 of the Highway Act, 1835 and under reg. 89 of
D the Motor Vehicles (Construction and Use) Regulations, 1955 (S.I. 1955 No. 482). Neither of these offences is punishable with imprisonment. The plaintiff had been convicted on six occasions within the preceding two years of offences of obstruction within the metropolitan area. On the occasion to which the conviction of Oct. 3, 1955, related he had been using his car for the purposes of a road courtesy campaign and had caused an obstruction while so doing. The defendant,
E after convicting the plaintiff, remanded him in custody for one week to enable a doctor's report about his mental and physical condition to be obtained. The plaintiff claimed that this remand constituted a wrongful imprisonment. The circumstances in which the remand was ordered was one of the matters in dispute in the case and at the end of the hearing the judge put the following five questions to the jury, which they answered in the terms indicated.

F (1) Whether the defendant in remanding the plaintiff mentioned in open court any particular section of the Magistrates' Courts Act, 1952 ? A.—No.

(2) If yes, which section ? A.—Does not arise.

(3) When the defendant signed the committal warrant which section had been written and not erased in the right-hand top corner of the warrant ? A.—Section 14 (3).

G (4) In making the order was the defendant acting vindictively ? A.—No.

(5) What damages, if any ? A.—£100.

The plaintiff appeared in person.

H. J. Phillimore, Q.C., and *Rodger Winn* for the defendant.

PILCHER, J.: On the answers given by the jury, the only question that
H remains is whether or not the defendant, in making the order which he did under s. 14 (3) of the Magistrates' Courts Act, 1952, was acting within the powers conferred on him by that section.

I have heard argument on this and I am quite satisfied that the defendant was entitled, in this case, to make an order remanding the plaintiff in custody under s. 14 (3). The words of s. 14 (3) of the Magistrates' Courts Act, 1952,
I are as follows:

> "A magistrates' court may, for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with the case, exercise its power to adjourn after convicting the accused and before sentencing him or otherwise dealing with him; but, if it does so, the adjournment shall not be for more than three weeks at a time."

The argument addressed to me by the plaintiff was that inasmuch as s. 26 of the Magistrates' Courts Act, 1952, which deals with remand for medical examination, A only covers cases in which the accused person could be sentenced to imprisonment, it follows that the words of s. 14 (3), " for the purpose of enabling inquiries to be made ", must be limited to inquiries which are not of a medical character into the physical or mental health of the accused.

Counsel for the defendant reminded me of the previous statutory enactments, starting with the Summary Jurisdiction Act, 1848, and continuing with s. 25 and s. 26 of the Criminal Justice Act, 1948, and I do not propose to do more B than to say this. Section 14 (3) of the Magistrates' Courts Act, 1952, is perfectly general in its terms and it is quite clear that there must be many cases in which the offences committed do not carry a prison sentence where it is desirable, in the words of the section, " that inquiries should be made ", and that those inquiries may often be inquiries which are necessarily inquiries into the mental and physical health of the person who has been convicted. C

It is quite clear that s. 25 of the Criminal Justice Act, 1948, was general in its terms. Section 25 (1) read as follows:

> " It is hereby declared that the powers of a court of summary jurisdiction under s. 16 of the Summary Jurisdiction Act, 1848, to adjourn the hearing of a case includes power, after a person has been convicted and before he D has been sentenced or otherwise dealt with, to adjourn the case for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with his case."

That section, I think, was worded as it was to make it clear that even after the accused person had been convicted an adjournment might still be given and the accused person remanded in custody if necessary for inquiries to be E made.

Section 26 of the Criminal Justice Act, 1948, was headed " Remand for inquiry into physical or mental condition " and sub-s. (1) was as follows:

> " Without prejudice to any powers exercisable by a court under the last foregoing section [s. 25] where a person is charged before a court of summary jurisdiction with an offence punishable on summary conviction with imprisonment, F and the court is satisfied that the offence has been committed by that person but is of opinion that an inquiry ought to be made into his physical or mental condition before the method of dealing with him is determined, the court shall remand him in custody or on bail . . ."

That section, where the necessary facts were present, was, in a sense, mandatory, G and it is quite clear, on the facts of this case, that the conduct of the plaintiff, which was known to the defendant, was such as might well cause him to think that an inquiry into the plaintiff's mental condition was desirable. I have no doubt whatsoever that, inasmuch as the Magistrates' Courts Act, 1952, is a consolidating Act and in spite of the fact that no such words appear in that Act as appeared in s. 26 (1) of the Act of 1948, namely, " without prejudice to any powers exercisable by the court under " another section*, none the H less the defendant still had powers under s. 14 (3) of the Magistrates' Courts Act, 1952, being satisfied, as he was, that it was desirable that inquiries should be made, to order inquiries and a report on the mental and physical health of the plaintiff.

The result, therefore, is that there must be judgment for the defendant.

Judgment for the defendant.

Solicitor: *Treasury Solicitor* (for the defendant).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

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* I.e., s. 25 (1) of the Act of 1948 now replaced by s. 14 (3) of the Magistrates' Courts Act, 1952.

A

Re TENNANT'S APPLICATION.

[COURT OF APPEAL (Lord Evershed, M.R., Jenkins and Hodson, L.JJ.), May 29, 30, June 7, 1956.]

B *Bankruptcy—Property—Covenant to make maintenance payments to divorced wife—Wife adjudicated bankrupt—Suspended discharge—Whether payments to be made to bankrupt or trustee in bankruptcy—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5 *c.* 59), *s.* 51 (2).

By a deed dated May 21, 1940, the applicant covenanted to pay to his divorced wife, the debtor, a monthly sum of £50 by way of maintenance during her life. In 1952 the debtor was adjudicated bankrupt and on C Apr. 29, 1955, she obtained her discharge subject to a suspension of two years. By an interpleader summons the applicant sought the direction of the court how, as between the debtor and her trustee in bankruptcy, he should dispose of the monthly sum payable under the deed.

Held: the monthly sum was payable to the debtor unless and until the court, on the application of the trustee in bankruptcy, should make an order D under s. 51 (2) of the Bankruptcy Act, 1914, for the sum, or part of it, to be paid to the trustee, because the monthly sum payable under the deed was "income" within the meaning of s. 51 (2), and the sub-section applied to such income whether the right to receive it had or had not become vested in the trustee under s. 18 (1) and s. 38 of the Act.

Re Landau, Ex p. Trustee ([1934] Ch. 549) and *Ex p. Huggins, Re Huggins* E ((1882), 21 Ch.D. 85) applied.

Decision of UPJOHN, J. ([1956] 1 All E.R. 425) affirmed.

[As to the payment of salary or income of a bankrupt to his trustee by order of the court, see 2 HALSBURY'S LAWS (3rd Edn.) 456, para. 903; and for cases on the subject, see 5 DIGEST 928-930, *7595-7615*.

F For the Bankruptcy Act, 1914, s. 18, s. 38, s. 51, s. 55, and s. 167, see 2 HALSBURY'S STATUTES (2nd Edn.) 345, 373, 387, 392, and 442.]

Cases referred to:

(1) *Ex p. Huggins, Re Huggins,* (1882), 21 Ch.D. 85; 51 L.J.Ch. 935; 47 L.T. 559; 5 Digest 928, *7598*.

G (2) *Re Landau, Ex p. Trustee,* [1934] Ch. 549; 103 L.J.Ch. 294; 151 L.T. 190; Digest Supp.

(3) *Hollinshead* v. *Hazleton,* [1916] 1 A.C. 428; 85 L.J.P.C. 60; 114 L.T. 292; 5 Digest 928, *7599*.

(4) *Ex p. Benwell, Re Hutton,* (1884), 14 Q.B.D. 301; 54 L.J.Q.B. 53; 51 L.T. 677; 5 Digest 928, *7600*.

H (5) *Bennett* v. *Bennett,* [1952] 1 All E.R. 413; [1952] 1 K.B. 249; 3rd Digest Supp.

(6) *Re Shine, Ex p. Shine,* [1892] 1 Q.B. 522; 61 L.J.Q.B. 253; 66 L.T. 146; 5 Digest 928, *7595*.

(7) *Re Garrett,* [1930] 2 Ch. 137; 99 L.J.Ch. 341; 143 L.T. 402; Digest Supp.

Appeal.

I This was an appeal by the trustee in bankruptcy of Mrs. Hermione Willis (referred to hereinafter as "the debtor") from a decision of UPJOHN, J., dated Jan. 19, 1956, and reported ([1956] 1 All E.R. 425), on an originating interpleader summons whereby the applicant, David Francis Tennant, the former husband of the debtor, sought the direction of the court how, as between the debtor and the trustee in bankruptcy, he should dispose of the monthly sum of £50 payable by him to the debtor under a deed of May 21, 1940.

In 1937 the marriage of the applicant and the debtor was dissolved on the petition of the debtor. By a deed dated May 21, 1940, the applicant covenanted to pay to the debtor the monthly sum of £50 during her life. The deed contained provision for security and for the realisation of that security if the applicant failed to make the monthly payments. The applicant continued to make the payments. On Apr. 3, 1952, a receiving order was made against the debtor and she was duly adjudicated bankrupt. On Apr. 29, 1955, she obtained her discharge subject to a suspension of two years. On her adjudication in 1952 the debtor had agreed with her trustee in bankruptcy that he should receive the maintenance payments for the benefit of her creditors. By June, 1955, the debtor's financial position had deteriorated and she gave her trustee notice of revocation of that arrangement which he refused to accept.

UPJOHN, J., held that the monthly sum remained payable to the debtor until, on the application of the trustee in bankruptcy, the court should make an order under s. 51 (2) of the Bankruptcy Act, 1914, for payment of the sum to the trustee.

Raymond Jennings, Q.C., and *P. R. Oliver* for the trustee in bankruptcy.
I. J. Lindner, Q.C., and *E. Grayson* for the debtor.
Gilbert Beyfus, Q.C., and *D. H. M. Davies* for the applicant.

Cur. adv. vult.

June 7. The following judgments were delivered.

LORD EVERSHED, M.R.: I have come to the clear conclusion that UPJOHN, J., was right in this case. The facts may be briefly stated. The applicant, Mr. Tennant (referred to hereinafter as " the applicant "), and the respondent, Mrs. Hermione Willis (referred to hereinafter as " the debtor "), were married in 1926. In 1937 the marriage was dissolved on the petition of the debtor, the decree absolute being dated Nov. 22, 1937. On Dec. 16, 1937, application was made under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, by the debtor for an order for permanent maintenance. As, no doubt, is liable to happen in such cases, the application was followed by negotiations between the legal advisers of the parties, and these negotiations resulted in the execution of a deed of covenant dated May 21, 1940. The parties before us appeared, until the case was actually in our court, to think that, as contemplated by the deed, the debtor's application for permanent maintenance had been dismissed or otherwise disposed of by the Divorce Division of the High Court, in which case the deed would or might have been approved by that court. In fact, however, this was not so: the application remains, in theory at least, still pending. On the view that I take, I need not take time to refer in detail to the terms of the deed of 1940 or to the terms of the supplemental deed of Nov. 1, 1941. Suffice it to say that by the former deed the applicant covenanted to pay to the debtor during her life a sum of £50 per month, the covenant being secured by the transfer by him of certain shares to trustees. The covenant was subject to the proviso that, if the debtor re-married (as has, in fact, happened), she should bring into account by way of deduction from the monthly sums in any calendar year any income to which she became entitled under any settlement made in her favour by a future husband. By cl. 10 of the deed the debtor accepted the provisions of the deed in satisfaction of all claims for maintenance or otherwise under the Supreme Court of Judicature (Consolidation) Act, 1925. The debtor has re-married, but it does not appear that she has become entitled to any annual sum by virtue of any settlement made by her present husband. The applicant has always paid to the debtor, and has said that he is willing and ready to continue to pay, the full sum of £50 per month. In 1952 the debtor was adjudicated bankrupt. By agreement between the debtor and the trustee in her bankruptcy —the appellant, Mr. McLeod—the sums payable under the deed of covenant were paid to the trustee until May, 1955, when, following the discharge of the debtor in April, 1955 (subject to a two years' suspension), the debtor revoked her authority to the applicant to make his payments to the trustee. In the result, the trustee has claimed that the benefit of the deed of covenant is vested in him according to the terms of s. 18 and s. 38 of the Bankruptcy Act, 1914, and that he is, accordingly, now entitled to sell or dispose of the whole of the debtor's rights to receive monthly sums for the rest of her life for the benefit of the creditors in the bankruptcy.

The applicant thereupon issued the present proceedings in the form of an interpleader summons under R.S.C., Ord. 57, making the debtor and the trustee in bankruptcy respondents to the summons. It is to be noted that, in order to bring himself within the rule, it was necessary for the applicant to say (as he, in fact, said in his affidavit in support of the summons) that he was willing to pay the monthly sums to whichever of the two persons, the debtor or the trustee in bankruptcy, the court held entitled to receive them. The debtor's answer to the contention of the trustee has been that the sole rights of the latter are to apply under s. 51 (2) of the Bankruptcy Act, 1914, for a direction for payment of the whole or some less part of the monthly sums to the trustee, to be applied by him according to the court's direction. The view of UPJOHN, J., on the authorities cited before him, was in favour of the debtor. He accordingly made a declaration in the following terms:

> "This court doth declare that the income payable to the respondent Hermione Yolande Ruby Clinton Willis under the said deed of covenant dated May 21, 1940, continues to be payable to the respondent Hermione Yolande Ruby Clinton Willis unless and until an order is made in respect thereof under s. 51 (2) of the Bankruptcy Act, 1914."

From that order the trustee has appealed, making both the applicant and the debtor respondents in his notice of appeal.

On the case coming on first before us, the applicant was not represented. He took the view, implicit in his making the application under R.S.C., Ord. 57, that the matter was one exclusively between the debtor, on the one hand, and her trustee in bankruptcy, on the other. It seemed, however, to this court then that the applicant's interest was or might be somewhat greater, for example, in the event of the trustee succeeding in this court and the debtor then attempting, notwithstanding her promise in cl. 10 of the deed of covenant, to obtain an order from the court for her maintenance. The case was, accordingly, stood over to give an opportunity to the applicant to be represented before us; and he has now appeared by counsel. I shall refer later to the nature of the argument which counsel put before us.

The well known vesting provisions of the Bankruptcy Act, 1914, are found particularly in s. 18 (1) and s. 38 of that Act, and are to the effect that, on adjudication, all the property of the bankrupt (and the widest significance is given to the word " property " by s. 167) becomes divisible among the creditors, and vests in the bankrupt's trustee. Section 51 of the Act (on sub-s. (2) of which the issue in this case turns) occurs in a group of sections headed in the present Act " Realisation of property ". I observe that by s. 55 (being one of the sections in this group) the trustee's power to sell the bankrupt's property is expressed to be " Subject to the provisions of this Act ". Section 50 provides, in the case where the debtor is a beneficed clergyman, for application being made by the trustee for a sequestration of the profits of the benefice. Section 51 (1) empowers the trustee similarly, where the debtor is an officer of the army or the navy, or an officer or clerk in the civil service of the Crown, to make application to the court so as to enable him to receive the whole or part of the debtor's pay or salary. Section 51 (2) is as follows:

> "Where a bankrupt is in receipt of a salary or income other than as aforesaid, or is entitled to any half-pay, or pension, or to any compensation granted by the Treasury, the court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the

> salary, income, half-pay, pension, or compensation, or of any part thereof, to the trustee, to be applied by him in such manner as the court may direct."

The questions, then, before this court are two. First, are the monthly sums paid by the applicant under the deed of covenant of May 21, 1940, "income" within the meaning of s. 51 (2) of the Bankruptcy Act, 1914 ? Secondly, if so, are the trustee's rights in regard to those monthly sums limited to his rights to apply to the court under that sub-section ? As Upjohn, J., observed ([1956] 1 All E.R. at p. 427), if the matter were res integra there would be much to be said, to put it no higher, for the view that "salary or income" in s. 51 (2) referred only to salary or income which, by reason of their being non-assignable, could not and did not vest in the trustee, and were not receivable by him under the other provisions of the Act, and, therefore, incapable of realisation by him for the benefit of the creditors. In my judgment, however, the decisions of this court on the meaning and effect of the relevant sections of the present Bankruptcy Act or of analogous provisions of the earlier legislation preclude us from so deciding, and preclude us also from accepting the contention of counsel for the trustee that s. 51 (2) is an enabling provision, so that, in the case of property or rights vesting in the trustee by virtue of s. 18 or s. 38 of the Act (and counsel says that the benefit of the husband's covenant under the deed in question is within that description), the trustee may either dispose of such property or rights outright by sale or otherwise, or he may apply under s. 51 (2), as may be most appropriate or advantageous to the creditors.

The first of the cases is *Ex p. Huggins, Re Huggins* (1) ((1882), 21 Ch.D. 85). This was a case of a retired chief justice of the colony of Sierra Leone, who was in receipt of a pension from the Colonial Office and who had gone bankrupt as a result of a business venture. As appears from the facts stated in the report, the Secretary of State had refused to recognise any assignment of the pension, and the trustee had applied, accordingly, for an order under s. 90 of the Bankruptcy Act, 1869, a section now represented by s. 51 (2) of the Act of 1914, and not in any material respect or in its context different from the latter subsection. This court held that, notwithstanding the refusal of the Secretary of State to recognise the assignment, the pension was the property of the bankrupt which vested in the trustee; but the court held also that the effect of s. 90, and the effect also of the two preceding sections, s. 88 and s. 89, corresponding to s. 50 and s. 51 (1), respectively, of the present Act, was that the vesting in the trustee by virtue of the earlier sections of the Act was controlled and limited by the later sections; in other words, in the case before the court it was held that s. 90, so far from being merely an enabling section, conferring additional powers to those inherent in the vesting, controlled and qualified the effect of the vesting, as regards cases within its scope, to the powers contained in s. 90. The point and the argument in *Ex p. Huggins, Re Huggins* (1) were different from those in the present case, for the argument for the bankrupt in the former was that the pension was altogether outside the scope of the bankruptcy; but the ratio decidendi of the decision undoubtedly, as I think, was as I have stated it. I refer to a passage in the judgment of Sir George Jessel, M.R., where he said (21 Ch.D. at p. 92):

> "Therefore, in the case of a beneficed clergyman, s. 15 and s. 17 [of the Act of 1869] must be read as subject to the provisions of s. 88, and the benefice does not vest in an unqualified way in the trustee. Then comes s. 89, which provides for the cases of officers in the army or navy, and officers or clerks in the civil service of the Crown. In such cases s. 15 is controlled by s. 89, and a person who holds such a position and who becomes a bankrupt, is not necessarily to be left to starve, however improvident he may have been, but a discretion is given to the court to fix how much of his pay and salary is to be made available for the payment of his creditors. If this be so, why do not the cases which are dealt with by s. 90 stand in a

> similar position ? Section 90 applies to a bankrupt 'who is in the receipt of a salary or income other than as aforesaid'. The present appellant's income is not a 'salary', but it is 'income'. The word 'income' is as large a word as can be used. It is not the less 'income', because it has to be voted every year by the colonial legislature. The court is empowered to 'make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the trustee'. That means that, though the salary or income would vest in the trustee by virtue of s. 15 and s. 17, the court may order that only a part of it shall be set aside for the benefit of the creditors. This is a specific provision which to that extent controls the operation of s. 15 and s. 17."

To that citation I add one short sentence from the judgment of Lindley, L.J., who said (ibid., at p. 93):

> "As I understand them, these sections [the group of sections, s. 87 to s. 95 of the Act of 1869, relating to 'property devolving on the trustee'] are modifications and qualifications of s. 15."

The third member of the court, Bowen, L.J., expressed concurrence with the other members of the court.

Notwithstanding what might have been at first sight the contrary implication of the language which I have quoted, later decisions have established clearly that s. 51 (2) is not limited to income vested in the trustee. So much clearly appears from the later decision of this court in *Re Landau, Ex p. Trustee* (2) ([1934] Ch. 549), to which I shall come presently; but I need not pursue that aspect of the matter, since the whole case of counsel for the trustee rests on the premise that the benefit of the covenant in the deed of 1940 is vested in the trustee, and for the purpose of the present appeal it is unnecessary to decide, and I do not decide, whether the benefit of that covenant is or is not, as counsel for the debtor says it is not, assignable, or is or is not vested in the trustee.

Before dealing with *Re Landau, Ex p. Trustee* (2), I should refer to *Hollinshead* v. *Hazleton* (3) ([1916] 1 A.C. 428), a decision of the House of Lords in a case which arose under the corresponding provisions of the Irish bankruptcy legislation. I make the reference because counsel for the trustee relied on one passage in the opinion in that case of Lord Parker of Waddington. The nature of the case sufficiently appears from the headnote, which reads:

> "The annual payment of £400 to members of Parliament under the resolution of the House of Commons of Aug. 10, 1911, is 'salary or income' within s. 51 of the Bankruptcy (Ireland) Amendment Act, 1872, and, therefore, where a bankrupt is a member of Parliament, the court may make an order appropriating a portion of his salary for the benefit of his creditors."

The passage in Lord Parker's speech to which counsel for the trustee particularly referred is as follows. Referring to the Irish Bankrupt and Insolvent Act, 1857, s. 319 (which corresponds in substance, though not closely in terms, with s. 50 (1) of the English Bankruptcy Act, 1914), and s. 51 of the Bankruptcy (Ireland) Amendment Act, 1872, which sections have to be read together as part of one Act, Lord Parker of Waddington said ([1916] 1 A.C. at p. 458):

> "[Section 319] enables the salaries or periodic payments with which it deals to be made available to some extent for the creditors of a bankrupt notwithstanding the policy of the common law. Section 51 of the later Act deals with all salaries or income not falling within the provisions of s. 319 of the earlier Act. It enables the salaries or income with which it deals to be made similarly available. The only difference between the two sections is that the extent to which salaries or periodic payments

> falling within s. 319 can be made available depends on the discretion of the judge in bankruptcy, to be exercised with the consent of the public official therein referred to, whereas the extent to which salaries or income falling within s. 51 can be made available depends on the discretion of the judge in bankruptcy alone."

Then comes the most important sentence:

> "If the sections be read together it is reasonably clear that s. 51 embraces all salaries which were not assignable or capable of being taken in execution by common law other than those specified in s. 319."

If that language of LORD PARKER OF WADDINGTON were the only authority relevant to the present case, then it would plainly lend support to the view which, as I have earlier stated, would, to my mind, have a strong appeal to conviction if the matter were res integra, namely, that the salary or income comprehended in s. 51 (2) of the Act of 1914 is limited to salary or income not, by the vesting provisions or otherwise, made available to or receivable by the trustee; but, if LORD PARKER's dictum has that meaning, it was unnecessary to the decision before the House, and is not to be found reflected in the other speeches. See, for example, the language of LORD SUMNER where he said ([1916] 1 A.C. at p. 463):

> "As s. 319 proceeds by enumeration of departments, and necessarily does not name this salary, and as the respondent is not a subordinate in any department, the case does not fall within s. 319. The two sections read together clearly mean that all salaries or incomes not brought in by the first shall be comprehensively brought in by the second."

Finally, it is inconsistent with the conclusion of this court in *Ex p. Huggins, Re Huggins* (1), to which the House was referred in *Hollinshead* v. *Hazleton* (3) and which was cited in the speeches in that case with approval, and with the later case of *Re Landau, Ex p. Trustee* (2), to which I now come.

In *Re Landau* (2) the debtor was, like the debtor in the present case, a lady who had divorced her husband. She had then proceeded to obtain an order against her husband under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, for payment, inter alia, during their joint lives of an annual sum for maintenance; and the question was whether the trustee could obtain an order in regard to that annual sum under s. 51 (2)—in other words, whether such annual sums were income within the meaning of that sub-section. This court held that they were, and that an order could, accordingly, be made under the sub-section. It is sufficient for this purpose to read a passage from the judgment of ROMER, L.J. ([1934] Ch. at p. 560):

> "The only other question which remains is whether the payments in question in this case can properly be described as income within the meaning of s. 51 (2). I confess that, even after hearing Mr. Tindale Davis's interesting argument [on behalf of the debtor], I have not the least idea now why this annual sum paid by the husband to the wife under the direction contained in the order of the Divorce Court is not her income. It is true that LORD ESHER in *Ex p. Benwell, Re Hutton* (4) ((1884), 14 Q.B.D. at p. 308) said that income in the old section corresponding to s. 51 (2) was income ejusdem generis with salary; but, with all respect to that learned judge, I do not think such a statement assists us very much unless the statement goes on to tell us to what genus the salary payment belongs."

I do not forget that the question raised in *Re Landau* (2) was, again, not the same as the question raised in the present case. None the less, it is quite impossible, in my view, for this court to distinguish for present purposes the monthly sums payable under the deed of covenant of 1940 in the present case from the maintenance ordered to be paid by the Divorce Court in *Re Landau* (2).

It, therefore, in my judgment, inescapably follows from the combined effect of *Ex p. Huggins* (1) and *Re Landau* (2) that the monthly sums with which we are here concerned constitute income within s. 51 (2), and that, if the property in these sums did vest in the trustee (as I do not decide), then the effect of the vesting is controlled and qualified by s. 51 (2), so that the trustee's rights and powers in regard to them are limited to those stated in that sub-section.

I desire to emphasise that I am confining my decision in this appeal to the facts of this case and the questions raised in this case. It was said by counsel for the trustee that, if Upjohn, J., was right, then the same result would follow in the case, for example, of a person who is absolutely entitled to income as life tenant under a settlement of some fund or to an annuity under a testator's will. Those cases are not before us, and I express no view on them. Incomes of those kinds may or may not be within s. 51 (2), and, if they are, the trustee in bankruptcy may or may not, nevertheless, be able to exercise other rights or powers in regard to the income concerned. All I decide is that sums payable under the deed of 1940 by the applicant in this case are within s. 51 (2), and that the sub-section controls any vesting thereof which there may be in the trustee.

I turn, finally, to the contention of counsel for the applicant. It was to the effect that, particularly as the result of the decision of this court in *Bennett* v. *Bennett* (5) ([1952] 1 All E.R. 413), the covenants in the deed of 1940, or, at least, the debtor's promise to accept the provisions of that deed in satisfaction of all claims under s. 190 of the Act of 1925 (which promise, he said, was the sole consideration for those provisions) are or is wholly unenforceable. On this matter also it is unnecessary to express any view, and I do not do so. Our decision in this case cannot bind in this respect either the applicant or the debtor if the question of enforceability should hereafter arise. As I stated at the beginning of this judgment, the present position is that the applicant has always regularly paid the monthly sums, and he has sworn in his affidavit—and has very properly and very naturally said the same thing through his counsel—that he is ready and willing, at any rate as things now are, to continue so to do. The result is, I think, that the declaration made by Upjohn, J., was right, and I would dismiss this appeal.

JENKINS, L.J.: I agree. In *Ex p. Huggins, Re Huggins* (1) ((1882), 21 Ch.D. 85), it was held by the Court of Appeal that s. 90 of the Bankruptcy Act, 1869 (corresponding to s. 51 (2) of the Bankruptcy Act, 1914) applied to property which vested in the trustee in the bankruptcy, provided that it was income within the meaning of the section, and that the section controlled and qualified the operation of the vesting provisions of the Act with respect to any income to which the section applied. In *Re Shine, Ex p. Shine* (6) ([1892] 1 Q.B. 522), the Court of Appeal held that s. 53 (2) of the Bankruptcy Act, 1883 (corresponding to s. 51 (2) of the Bankruptcy Act, 1914), applied to property which did not vest in the trustee in bankruptcy, provided that it was income within the meaning of the section. In *Re Garrett* (7) ([1930] 2 Ch. 137), Farwell, J., citing *Ex p. Huggins* (1) and *Re Shine* (6), held ([1930] 2 Ch. at p. 141) that s. 51 (2) of the Bankruptcy Act, 1914, " applies both to property that vests in the trustee under s. 18 (1), and also to property not so vesting ". In *Re Landau, Ex p. Trustee* (2) ([1934] Ch. 549), the Court of Appeal came to the same conclusion as Farwell, J., had reached in *Re Garrett* (7) and expressly approved that decision. Further, in *Re Landau* (2) the Court of Appeal held that a yearly sum payable to the bankrupt by her former husband for maintenance under an order made by consent in divorce proceedings between them was income within the meaning of s. 51 (2).

In this state of the authorities, and apart from the question raised before us as to the validity of the deed of May 21, 1940, to which I will return, I think that we are bound to hold that the monthly sum payable under the deed of

May 21, 1940, is " income " within the meaning of s. 51 (2), for I see no distinction A for the present purpose between maintenance payable under a consent order and maintenance payable under a covenant in a deed, and that we are also bound to hold that s. 51 (2) applies to such income whether the right to receive it has or has not become vested in the trustee under the general vesting provisions contained in the Act.

On the footing that the income now in question has not vested in the trustee, B the effect of s. 51 (2) in regard to it must, I think, clearly be that it is payable to the debtor unless and until the court, on the application of the trustee, orders it, or some part of it, to be paid to the trustee.

On the footing that the income now in question has vested in the trustee, I think we are bound by *Ex p. Huggins* (1) to hold that the effect of s. 51 (2) in regard to it is the same as if it had not so vested, that is to say, it is, notwith- C standing such vesting, payable to the debtor, unless and until an order for its payment wholly or in part to the trustee is made by the court on the application of the trustee. Indeed, given acceptance of the view, which we are bound on the authorities to accept, that s. 51 (2) does apply to property vested in the trustee as well as to property not so vested, it is difficult to see what other effect can be attributed to the sub-section so far as property vested in the trustee D is concerned. As pointed out by UPJOHN, J., the trustee is the only person who can make an application under the sub-section; and plainly he would never apply if the alternative was open to him of asserting his title to the whole of the property in question by virtue of the statutory vesting of it in him. The sub-section would thus be to all intents and purposes futile so far as property vested in the trustee is concerned, unless it is treated as controlling or qualifying E the operation of the general vesting provision in relation to the particular kinds of property to which it refers.

I confess that, had the question been res integra, I would have been inclined, as I think the learned judge would have been inclined, to hold that s. 51 (2) applied only to cases where the salary or income did not vest in the trustee under the general vesting provisions, and, therefore, would not, apart from a F special order under the sub-section, be recoverable by the trustee for distribution amongst the creditors. But that view, whether right or wrong, is not open to us on the authorities; and I think that on the authorities, and on the admission necessarily made by the applicant for the purposes of the interpleader summons that he was liable under the deed to pay the monthly sum in question either to the bankrupt or to the trustee, the learned judge came to a right conclusion G in holding, as he did, that the monthly sum in question continued to be payable to the bankrupt unless and until an order was made in respect thereof under s. 51 (2) of the Bankruptcy Act, 1914.

When the matter first came before this court, the applicant was not represented. In the course of the hearing a suggestion fell from the court that his covenant to pay the monthly sum might, on the principles discussed in *Bennett* v. *Bennett* (5) H ([1952] 1 All E.R. 413), be void on the ground that the consideration for it, in the shape of the debtor's agreement to accept the provision made for her

> " . . . in satisfaction of all rights or claims in respect of maintenance or otherwise which she would otherwise be entitled to enforce under the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925 . . ." I

was void as contrary to public policy. The case was accordingly adjourned to give the applicant an opportunity of making such submissions on the question of the validity of the deed as he might be advised. At the resumed hearing, the applicant was represented by counsel, who submitted that, on the ground which I have stated, the applicant was under no valid obligation to pay the monthly sum, which, accordingly, was in the nature of a mere voluntary payment. I find it unnecessary to embark on this question for the purpose of disposing

A of the present appeal. There is no appeal by the applicant, and there could not well have been any appeal by him inasmuch as he necessarily, for the purposes of the summons, assumed the role of a mere stakeholder who admitted liability either to the debtor or to the trustee, and asked the court to decide to which of them payment should be made. Dealing with the matter on this footing—the only footing on which he could deal with it in view of the form of the pro-B ceedings—the learned judge declared that the monthly sum in question continued to be payable to the debtor unless and until an order was made in respect thereof under s. 51 (2).

The only question in this appeal is whether the learned judge, instead of making a declaration in those terms, ought to have declared that the monthly sum in question was payable to the trustee. I have already given my reasons C for holding that this question should be answered in the negative. In these circumstances, I think that the only course open to this court is to dismiss the appeal. If and when the trustee applies for an order under s. 51 (2), the applicant will be able, if so advised, to seek to raise the question of invalidity, and it will then be for the court hearing the application to decide whether it is open to him to take the point, and, if so, whether in all the circumstances of the case the point D is well taken. The debtor might, I suppose, conceivably be advised herself to seek to raise the same point with a view to defeating the claim of the trustee, although she might over-reach herself in so doing. As to the outcome of any submissions, whether by the debtor or by the present applicant, on any application under s. 51 (2), I say nothing. So far as the present proceedings are concerned, in my judgment all we can do is to dismiss the appeal.

E

HODSON, L.J.: I am of the same opinion.

[The court then heard argument as to costs.]

LORD EVERSHED, M.R.: This is one of those cases where it is difficult to feel that any decision as to costs which is approached on broad principles is entirely just; but we did invite the applicant to come here, and he could, F in practice, do little other than come. Counsel for the applicant took the point which, I think, he was, in the circumstances, bound to take. The best we feel that we can do is to say that the trustee will pay the costs of both respondents, but that in the case of the applicant it should be limited to the sum of £50.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Stafford Clark & Co.* (for the trustee in bankruptcy); *C. Butcher & Simon Burns* (for the debtor); *Vizard, Oldham, Crowder & Cash* (for the applicant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

NOTE.

USHER *v.* USHER (by her guardian).
ABLEY *v.* ABLEY (by her guardian).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), June 11, 1956.]

Divorce—Insanity—Incurable unsoundness of mind—Care and treatment for five years—Delegation by medical superintendent of clinical treatment—Evidence of consultants—Evidence by affidavit.

Divorce—Evidence—Affidavit—Medical evidence as to incurable unsoundness of mind—Care and treatment for five years—Delegation by medical superintendent of clinical treatment—Evidence of consultants in addition to that of medical superintendent.

[As to evidence on affidavit by medical superintendent, see 12 HALSBURY'S LAWS (3rd Edn.) 378, para. 823, note (u); and for a Practice Note on the subject, see 27 DIGEST (Repl.) 369, *3051*.]

USHER *v.* USHER

Petition.

The parties were married in 1935 and there were no children of the marriage. The wife was a voluntary patient at a mental hospital from July 25 to Dec. 1, 1949. On Sept. 7, 1950, she was certified as a person of unsound mind and admitted to the same hospital under a reception order of the same date. She remained at the hospital for the next ensuing five years and was there on Dec. 17, 1955, when the husband presented a petition for divorce alleging:

> " That the [wife] is incurably of unsound mind and has been continuously under care and treatment for at least five years immediately preceding the presentation of this petition."

By her answer the wife, by the Official Solicitor as her guardian ad litem, formally denied that she was incurably of unsound mind or that she had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. The Official Solicitor agreed that the medical evidence to be called by the husband should be given by affidavit, and, in accordance with the Practice Direction of Feb. 18, 1946, as amended*, affidavits were filed. These were affidavits of the evidence of the medical superintendent of the hospital and of two consultants.

In his affidavit the medical superintendent of the hospital stated:

> " 4. The [wife] was continuously under my care in my capacity as medical superintendent at this hospital from Sept. 7, 1950, until Dec. 29, 1955 . . . The wife was continuously under treatment at this hospital from Sept. 7, 1950, until Dec. 19, 1955; she was, however, not under my responsibility for such treatment but that of R.H.F.S., and J.F.E., both of this hospital."

R.H.F.S., a consultant psychiatrist at the hospital, stated in his affidavit:

> " 2. The [wife] came under my care for treatment at . . . hospital on July 21, 1949, as a voluntary patient . . . and left [the] hospital at her own request on Dec. 1, 1949. 3. The [wife] was re-admitted to . . . hospital on Sept. 5, 1950, on a summary reception order and was placed under my care . . . In my opinion she was suffering from paraphrenia and was incurably of unsound mind. 4. The [wife] was continuously under my treatment from Sept. 7, 1950, until July 31, 1953."

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* RAYDEN ON DIVORCE (6th Edn.), at p. 1014.

J.F.E., also a consultant psychiatrist at the hospital, stated in his affidavit:

> " 2. The [wife] was under my continuous medical care and treatment in . . . hospital from Aug. 1, 1953, until she was transferred elsewhere as a certified patient on Dec. 29, 1955 . . . 3. The [wife] was a certified patient for the whole of the time that she was under my care and I considered her of unsound mind . . . The hospital records indicate that the [wife] had suffered from such mental illness since Sept. 7, 1950, continuously and I considered her, in the present state of medical knowledge, to be incurably of unsound mind."

During the hearing of the suit counsel for the husband applied for leave to read the affidavits and the court gave leave and, having considered the evidence, granted the husband a decree nisi. The case is reported only for the observations of LORD MERRIMAN, P., regarding the practice in connection with such affidavit evidence.

John Latey for the husband.
R. F. Ormrod for the Official Solicitor.

LORD MERRIMAN, P.: The present case affords a convenient opportunity for calling attention to a change in the practice in connection with the affidavits of medical superintendents of mental hospitals in suits based on incurable insanity. I am speaking after consultation with the judges of this Division, and with the Official Solicitor, who in the majority of such cases, as in the present case, is the guardian ad litem of the respondent.

Owing to the fact that the Ministry of Health has sanctioned a certain amount of delegation by the medical superintendent of a mental hospital to consultants on his staff of responsibility for the clinical treatment of patients (as distinct from the general care, which remains vested in the medical superintendent) he is sometimes unable, as in the present case, to give first-hand evidence about the diagnosis of the respondent's mental illness and the nature of the treatment which the respondent is undergoing. Accordingly, in addition to the matters usually covered by the affidavit of the medical superintendent, in so far as he is able to deal with them, he should state, if it be the fact, that he has delegated responsibility for the respondent's treatment to a consultant on the staff of his hospital, giving the full name of the consultant presently vested with this responsibility and the date of the delegation.

In such cases an affidavit will also be required from the consultant giving the diagnosis of the respondent's mental illness and the nature of the treatment prescribed, whether the respondent has received any special treatment, and if so what form of treatment and the effect thereof, also, if it be the fact, that in the opinion of the deponent and in the light of present-day medical knowledge the respondent is incurably of unsound mind, and the deponent's reasons for this opinion; also whether the respondent is able to appreciate extra comforts, and if so to what amount, and any other matters relevant to the issue.

If for any reason the period of the delegation to the consultant who has most recently treated the respondent before the presentation of the petition is on the face of it insufficient to enable him to depose with certainty, the deponent should be the consultant who has treated the respondent for an earlier period of sufficient duration, but in that case the evidence must be brought up to the date of presentation of the petition, either by the consultant then treating the respondent or by the medical superintendent, whichever is more appropriate. The date of the assumption of responsibility by each and every consultant, and its duration, must be specifically stated.

Decree nisi granted.

Solicitors: *Jaques & Co.* (for the husband); *Official Solicitor.*

A

ABLEY *v.* ABLEY.

Petition.

The parties were married on Oct. 5, 1912, and there were four children of the marriage, now all of full age. On Nov. 16, 1931, the wife was certified as a person of unsound mind and admitted under a reception order to a mental hospital. She had remained there ever since that date. B

On June 28, 1955, the husband presented a petition for divorce alleging

> " that the wife is incurably of unsound mind and has been continuously under care and treatment for at least five years immediately preceding the presentation of this petition."

By her answer, the wife, by the Official Solicitor as her guardian ad litem, formally denied that she was of unsound mind or that she had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. C

It was also agreed that the medical evidence should be given by affidavit, and three affidavits were filed.

The medical superintendent in his affidavit stated:

D

> " 2. Pursuant to a reception order dated Nov. 16, 1931, the [wife] was admitted to . . . hospital on Nov. 16, 1931, and since that date she has been continuously under care and treatment in that hospital without any leave of absence. 3. The [wife] at the date of her admission to hospital was suffering from schizophrenia . . . 4. On Sept. 5, 1955, I personally examined the [wife] and found that she was still suffering from schizophrenia and in my opinion and in the light of present-day medical knowledge she is still insane and a proper person for detention in a mental hospital and incurably of unsound mind." E

The first consultant stated:

> " That from the month of January, 1949, until the month of March, 1953*, the [wife] was continuously under my care and treatment at the hospital F without any leave of absence. That the responsibility for the care and treatment of the [wife] during the said period was delegated to me by the medical superintendent . . . That . . . in my opinion and in the light of present-day medical knowledge she is still insane and a proper person for detention in a mental hospital and incurably of unsound mind."

The other consultant swore an affidavit in similar terms, covering the period G from August, 1953*, to the date of the affidavit.

R. L. Bayne-Powell for the husband.
H. T. Walker for the Official Solicitor.

LORD MERRIMAN, P., gave leave for the affidavits to be read, and, having considered the evidence, granted the husband a decree nisi. H

Decree nisi granted.

Solicitors: *J. A. H. Powell* (for the husband); *Official Solicitor.*

[*Reported by* A. T. Hoolahan, Esq., *Barrister-at-Law.*]

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* There was thus a gap, viz., the period between March and August, 1953, in the aggregate period covered by evidence of consultants.

A

Re SONGEST (*deceased*).

MAYGER AND ANOTHER *v.* FORCES HELP SOCIETY AND LORD ROBERTS WORKSHOPS AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Jenkins and Hodson, L.JJ.), June 15, 1956.]

B *Charity—Cy-près doctrine—Impossibility of determining which of two claimants entitled—Gift to "Disabled Soldiers Sailors and Airmen's Association"—Association of that name not in existence—Claim by two charities caring for disabled ex-service men.*

By her will made in 1943 the testatrix, who died in 1947, gave the residue C of her estate "upon trust for the Disabled Soldiers Sailors and Airmen's Association absolutely". There never was an association of that name. Two well known societies whose purpose was the care of disabled ex-service men contended that the testatrix meant one of them to the exclusion of the other. There was no relevant evidence to help in the determination which of the two the testatrix had intended.

D **Held**: it would be directed by way of scheme that, subject to the approval of the Attorney-General, the residue should be equally divided between the two institutions because it was clearly established that the testatrix's intention was to benefit disabled ex-service men, but it was impossible to determine which of the two claimants (who were the only possible claimants) she meant to benefit.

E *Re Alchin's Trusts* ((1872), L.R. 14 Eq. 230) approved.

Appeal allowed.

[As to cy-près scheme where the gift is to an object which has never existed, see 4 HALSBURY'S LAWS (3rd Edn.) 327, para. 673; and for cases on the subject, see 8 DIGEST (Repl.) 417, *1082-1090*.]

Cases referred to:

F (1) *Re Alchin's Trusts, Ex p. Furley, Ex p. Romney (Earl)*, (1872), L.R. 14 Eq. 230; 26 L.T. 824; 8 Digest (Repl.) 412, *1042*.

(2) *Re Kilvert's Trusts*, (1871), 7 Ch. App. 170; 41 L.J.Ch. 351; 26 L.T. 221; 8 Digest (Repl.) 407, *988*.

Appeal.

This was an appeal by the third defendant, the Star and Garter Home for G Disabled Sailors, Soldiers and Airmen, from an order of VAISEY, J., dated Feb. 3, 1956. On an originating summons taken out by the trustees of the will of Mrs. Florence Songest, VAISEY, J., held that the first defendant, the Forces Help Society and Lord Roberts Workshops, was entitled to the residuary estate of the testatrix under a gift "to the Disabled Soldiers Sailors and Airmen's Association."

H *N. S. S. Warren* for the third defendant, the Star and Garter Home for Disabled Sailors, Soldiers and Airmen.

Ian Campbell for the first defendant, the Forces Help Society and Lord Roberts Workshops.

G. M. Parbury for the plaintiffs, the trustees.

I The second defendant was not a party to the appeal.

LORD EVERSHED, M.R.: The testatrix in this case, Mrs. Florence Songest, made her will in 1943, whereby, in the event (which happened) of her husband predeceasing her, she gave her residue as follows:

> "upon trust for the Disabled Soldiers Sailors and Airmen's Association absolutely and I direct that the receipt of the secretary or treasurer for the time being of the said association shall be a good and sufficient discharge to my trustees."

The testatrix made a codicil, the only relevance of which is that she thereby confirmed, without further elucidation, this part of her residuary gift. She died in 1947. The question which now is before this court and which came before VAISEY, J., is a question (not altogether uncommon in these courts) between two well-established charitable associations; first, an incorporated body now known as the Forces Help Society and Lord Roberts Workshops, and, secondly, an unincorporated society known as the Star and Garter Home for Disabled Sailors Soldiers and Airmen. The question is whether the testatrix, by the form of words which I have read, meant the one or the other of those two bodies. When the matter was before the learned judge, the British Legion had also been made a party, but no argument has been put forward on behalf of that body for this residue.

The matter is clearly one of great difficulty and also of some regret. The description which this lady gave to her intended beneficiary is, on the face of it, inaccurate. There is and was no association in existence having the name " Disabled Soldiers Sailors and Airmen's Association ". On the face of it, the testatrix meant some existing charitable body. Therefore, the court was asked, on that premise, to decide whether she meant the first defendant, the Forces Help Society, or the third defendant, the Star and Garter Home, they being the only two effective competitors for the gift. VAISEY, J., concluded that by the phrase which I have read, she meant and intended the first of those two bodies. Counsel for the third defendant put forward forcible arguments for the contrary view, that she meant in truth his clients, the second of the bodies I have mentioned, the Star and Garter Home; and, as I ventured to observe during the argument, it is indeed much easier to criticise the arguments put forward on one side or the other than to formulate a convincing reason for a preference in either direction. It must, however, first be pointed out that at the date when this lady made her will (and, indeed, at the date when she died) the name of the first defendant was not the Forces Help Society and Lord Roberts Workshops, but was the Incorporated Soldiers, Sailors and Airmen's Help Society. Counsel for the first defendant argued with force that the description given by the testatrix, " Disabled Soldiers Sailors and Airmen's Association ", at any rate bears a marked affinity to the formula " Incorporated Soldiers, Sailors and Airmen's Help Society ", and he includes the small, but not wholly insignificant point that the word " Soldiers " precedes " Sailors " in that collocation. He says by way of criticism of the claim by counsel for the third defendant, that the word " Association " is in any case inept to describe the body he represents, the unincorporated body, known properly as the Star and Garter Home for Disabled Sailors, Soldiers and Airmen. He points out that in truth this body which I have just described is an institution; it exists as a hospital, in bricks and mortar, carried on in Richmond, and, save for what appears to be one branch activity in Kent, carries on there and only there in effect a hospital for disabled soldiers, sailors and airmen. He points out, moreover, that although the activities of his clients are not by any means confined to looking after disabled men who have been in the service of the Crown, still that is one of their best-known activities. It is perhaps most famed in connection with the so-called Lord Roberts Workshops, originally a separate organisation, but taken over by the first defendant in about 1904. In connection with the particular collocation, he also points out that in the third defendant's title the Royal Navy does take the usual precedence over the army. He says that if the testatrix really had meant the third defendant, she would have referred to it by its well-known institutional name of the Star and Garter Home. The Forces Help Society has branch organisations in various parts of the country, and they include a branch organisation at or near the place where the testatrix lived; but unhappily the organising secretary of that branch has died and can throw no light on the question whether the testatrix in fact had any knowledge of the society's operations or expressed any interest at any time in it.

So much for the argument on the first defendant's side, which was the argument that appealed to VAISEY, J. Counsel for the third defendant (with no less force, as it seems to me) fastened particularly on the use of the word "Disabled". If one reads the formula—and I will read it once again—"upon trust for the Disabled Soldiers Sailors and Airmen's Association", it is plain (says he) that the real emphasis was on some body which the testatrix had in mind which existed for the exclusive purpose of looking after disabled ex-service men or women. It is quite true (says counsel) that the institution, the Star and Garter Home, would properly be described by a reference to that name. On the other hand, the home, the institution, exists for a specific purpose, viz., the disabled sailors, soldiers and airmen, and it is (says he) no more irrational, if one is not going to refer accurately to the full title, to mention the purposes for which the institution exists than to refer to the place, the building, whereon those purposes are carried out. The emphasis on the word "disabled" was, I think, not very impressive in the mind of VAISEY, J. At any rate, he does not appear to have attached significance to it. For my part, however, I confess that I think it is of real and very appreciable importance.

In the circumstances, what ought the answer of the court to be? Both counsel have asked us to assume that the testatrix had in mind one specific organisation, that she misdescribed it, and that the function of the court, therefore, is to decide as best it can, and in the absence of any relevant evidence, which one of the two competing organisations she intended to benefit. I am not entirely satisfied in my own mind that the premise on which that reasoning rests is necessarily correct. Once it is established (and this much is clear) that a mistake has been made in stating the intention, I am not persuaded that we are bound to assume that the mistake does not extend to the assumption that there was more than one body and that she intended to pick one of the two. In other words, I think it is a possible view that she thought that disabled ex-service men were looked after at Richmond at the Star and Garter and elsewhere in the Lord Roberts Workshops by some body which comprehended the activities of both. At any rate, I think that her intention clearly was to benefit disabled ex-service men.

Once one gets that far, it seems possible then to proceed to say that if her intention is to be carried out, the best way to do it is to put her funds into the hands of those who do primarily look after that particular obligation of our society; and that would not exclude either the one or the other of the two competing claimants. Expressed in another way, after listening to the arguments, I feel that this is a case in which it may be said (and I am citing from 4 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), p. 282, para. 585): ". . . it is impossible to determine which of several charities the testator meant to benefit . . ." If that conclusion is reached, that it really is impossible with sufficient certainty to determine which of the two, what can the court do and what ought the court to do?

We were referred to JARMAN ON WILLS (8th Edn.), vol. 1, p. 267, where this is said:

> "It sometimes happens that a legacy is given to a particular institution by a description equally applicable to more than one. It cannot here be presumed that the testator did not intend to select one in particular; for he may have known, and, considering the terms of the bequest, probably did know, only one answering the description; yet, as it cannot be ascertained which, the particular purpose fails; nevertheless it is clear that the legacy will be applied cy-près, or divided between the two institutions."

The authority for the last sentence is to be found in *Re Alchin's Trusts, Ex p. Furley, Ex p. Earl of Romney* (1) ((1872), L.R. 14 Eq. 230). In that case, a testator had made a gift nominatim to Kent County Hospital, and it was proved that there was no such institution, i.e., no institution called by that name;

but there were two institutions with names like it, namely, first, the Kent and A
Canterbury Hospital and, secondly, the West Kent General Hospital. Sir Richard Malins, V.-C., having rejected the claims of hospitals of a more specific and limited character, such as an ophthalmic hospital (for there was a Kent County Ophthalmic Hospital), decided that he had jurisdiction to divide the legacy equally between the two general hospitals. He said (ibid., at p. 233):

> ". . . I think that the West Kent General is also entitled to share. I am B
> satisfied the testator intended the legacy for one hospital only, but neither of the institutions completely answers the description. It must, therefore, at all events, be divided between the two, as I considered to be the proper course in . . ."

another case*, which he referred to, and in regard to which, as counsel for the
third defendant informed us (though on somewhat different grounds) the learned C
judge's view had afterwards been criticised.

I think that the jurisdiction in such a case as this, assuming it exists, must rest on the jurisdiction which the Chancery Court has, in the case where a clear charitable intention is shown, to make a cy-près application; and the normal method of doing it would be to direct a scheme. In the present case, it seems to
me that that is the right course to follow, though in the circumstances I think it D
proper and possible to simplify the consequence. I have said more than once that, in the circumstances, there are but two possible beneficiaries, and I have also said (and I now assume) that the claims of both of them are nicely and indeed equally balanced. It would therefore, as I think, follow that any cy-près application would inevitably be by way of equal division.

In the course of the argument, I gave an example which I venture to repeat. E
If a testator made a gift to " the Inn of Court known as the Temple "; or again if a testator made a gift to " the Society for the Prevention of Cruelty to Children and Animals "; there being no relevant evidence which would assist the solution in either case, it would appear that the consequence inevitably of a cy-près application would be equal division, in the first case, between the Inner Temple
and the Middle Temple, and, in the second case, between the National Society for F
the Prevention of Cruelty to Children and the Royal Society for the Prevention of Cruelty to Animals. So I think in this case the best answer, and the only way by which we can redeem the mistake that unfortunately was made in the drafting of this will, is by way of scheme to direct that the residue be equally divided between the two institutions, viz., the Forces Help Society and Lord Roberts
Workshops, on the one hand, and the Star and Garter Home for Disabled Sailors, G
Soldiers and Airmen, on the other—that direction being subject to the approval (as I think would be proper, and as Jenkins, L.J., suggested) of the Attorney-General. I should assume, in the circumstances, that the approval would be readily given and that therefore no further application will be necessary in order to give effect to what we suggest.

I would, therefore, set aside the decision of Vaisey, J., exclusively in favour of H
the first defendant, and substitute an order such as I have proposed; and I think, in the circumstances of this case, that we should also direct that all the costs of the parties, as between solicitor and client, should be paid out of the residuary fund.

JENKINS, L.J.: I agree and find nothing I can usefully add.
I
HODSON, L.J.: I also agree.

Appeal allowed.

Solicitors: *Charles Russell & Co.* (for the third defendant); *Cunliffe & Airy* (for the first defendant); *Gordon Gardiner, Carpenter & Co.*, agents for *John R. C. Miller*, Portsmouth (for the plaintiffs).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

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* *Re Kilvert's Trusts* (2) ((1871), 7 Ch. App. 170) where Sir Richard Malins, V.-C., divided the gift between two charities; but his decision was reversed on appeal.

LUIGI MONTA OF GENOA *v.* CECHOFRACHT CO., LTD.

[QUEEN'S BENCH DIVISION (Sellers, J.), May 15, 16, 17, June 14, 1956.]

Shipping—Charterparty—War risks clause—Deviation and discharge of cargo by order of a "government"—Order of authorities not recognised as a government by United Kingdom government.

International Law—Government—Meaning in war risks clause in charterparty—Whether non-recognition by United Kingdom government conclusive that administering authority was not a government.

A vessel, of Italian registry and owned by an Italian subject, was chartered by a Czech company for a voyage from ports in North China to European ports. The proper law of the charterparty was English. The vessel sailed under the Italian flag. Under a war risks clause in the charterparty the vessel had liberty to comply with directions given "by the government of the nation under whose flag the vessel sails . . . or any other government . . . ", and delivery in accordance with such directions was a fulfilment of the contract voyage and freight was payable accordingly. At the time of the voyage in 1953 hostilities between the Republic of China and Nationalist China were taking place spasmodically. While on her voyage the vessel was intercepted by a warship of the Chinese nationalist forces and under direction of those authorities the vessel's cargo was discharged at a port in Formosa. The shipowner claimed freight calculated at the lowest of several different rates provided by the charterparty for discharge at different European ports. At all material times the Chinese nationalist forces were in control of Formosa. They were recognised by the Italian government as the government of China. At the material time, however, Her Majesty's government (a) had ceased (as was stated by the Foreign Office in answer to inquiries made for the purposes of this case) to recognise the former Nationalist Government of China as being either the de jure or the de facto government of the Republic of China, and (b) did not recognise that any government was located in Formosa. The claim having been referred to arbitration the umpire found that those carrying on the administration of and in fact governing Formosa were a government and that the vessel had complied with the directions of a government within the war risks clause. The charterers contended that it was not permissible to go behind the statement of the Foreign Office, and that accordingly the directions given were not the directions of a government.

Held: in determining the meaning of the words "any other government" in the war risks clause of the charterparty, which was a commercial document, the statement of the Foreign Office was not conclusive as the words were to be interpreted in the sense in which an ordinary commercial man would use them; the words referred to a national government, not a subservient authority (such as a municipal or provincial government), but were not limited to a government recognised to be such by Her Majesty's government, and in the circumstances, the shipowner was entitled to the freight which he claimed.

Dictum of GODDARD, J., in *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham S.S. Co., Ltd.* ([1938] 3 All E.R. at p. 83) applied.

[As to acts of foreign governments, see 7 HALSBURY'S LAWS (3rd Edn.) 282-285, paras. 599-601.]

Cases referred to:

(1) *White, Child & Beney, Ltd.* v. *Simmons, White, Child & Beney, Ltd.* v. *Eagle Star & British Dominions Insurance Co.*, (1922), 127 L.T. 571; Digest Supp.

(2) *Duff Development Co.* v. *Kelantan Government*, [1924] A.C. 797; 93 L.J.Ch. 343; 131 L.T. 676; Digest Supp.

(3) *Yrisarri* v. *Clement*, (1825), 2 C. & P. 223; *subsequent proceedings*, (1826), 3 Bing. 432; 22 Digest (Repl.) 142, *1292*.

(4) *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham S.S. Co., Ltd.* [1938] 3 All E.R. 80; *affd.* C.A., [1939] 1 All E.R. 819; [1939] 2 K.B. 544; 108 L.J.K.B. 709; 161 L.T. 25; Digest Supp.

Special Case.

This was a Special Case stated at the request of the charterers, Cechofracht Co., Ltd., under the Arbitration Act, 1950, s. 21 (1) (b). The dispute arose out of a charterparty dated July 4, 1953, under which the charterers chartered the vessel Marilu belonging to the shipowner, Luigi Monta of Genoa. The charterparty, which was in the Gencon form, contained clauses to the effect, inter alia, that the ship should proceed to ports in North China and there load cargoes of soya beans or iron ore for delivery to specified ports in Europe; that the freight was payable in pounds sterling; that any dispute under the charterparty was to be referred to arbitration: and the following war risks clause:

> " (1) No bills of lading to be signed for any blockaded port and if the port of discharge be declared blockaded after bills of lading had been signed, or if the port to which the ship had been ordered to discharge either on signing bills of lading or thereafter be one to which the ship is or shall be prohibited from going by the government of the nation under whose flag the ship sails or by any other government, the owner shall discharge the cargo at any other port covered by this charterparty as ordered by the charterers (provided such other port is not a blockaded or prohibited port as above mentioned) and shall be entitled to freight as if the ship had discharged at the port or ports of discharge to which she was originally ordered.
>
> " (2) The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery, or otherwise howsoever given by the government of the nation under whose flag the vessel sails or any department thereof, or by any other government or any department thereof, or by any committee or person having, under the terms of the war risks insurance on the ship, the right to give such orders or directions and if by reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation, and delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable accordingly."

Pursuant to the charterparty the ship, which was of Italian registry, proceeded to Tsing Tao in North China and there loaded a cargo of iron ore, and other goods. The charterers then paid to the shipowner £9,325 16s. 9d. being a moiety of the freight calculated on the lowest basis of delivery to the nearest European ports and after deduction of port and brokerage charges and advances to the master. The ship left Tsing Tao on July 27, 1953, bound for Singapore. On July 31, 1953, a warship flying the Chinese nationalist colours intercepted her and forced her to proceed to Keelung, a port in north Formosa. She arrived there on Aug. 5, 1953, and her cargo was forcibly discharged on the orders of the Chinese nationalist authorities. She left Keelung on Aug. 25. The master of the ship had no freedom of choice as to the movements of his ship or the discharge of the cargo from the time of being intercepted up till leaving Keelung.

In the events that had happened the shipowner claimed that under war risks cl. (2) he was entitled to the moiety of the freight then unpaid. This claim was disputed and the matter was referred to arbitration. The charterers counterclaimed in respect of the freight already paid. Before the arbitration took place the solicitors for both parties corresponded with the Foreign Office and received answers. The most relevant facts established by the answers were (i) that Her Majesty's government had at all material times ceased to recognise the former Nationalist Government of China as being either the de jure or de facto government of the Republic of China; and (ii) that Her Majesty's government did not recognise that any government was located in Formosa in July and August, 1953.

At the date of the charterparty hostilities were taking place in Korea and, in a somewhat spasmodic fashion, between the (Communist) government of the Republic of China and those carrying on the administration of Formosa. The crew of the *Marilu* were at all material times entitled to a one hundred per cent. increase of wages whilst in Chinese waters and an increase of two hundred per cent. whilst in Korean waters, these increases being due to the extra risks involved by reason of hostilities. There was not, however, at any material time an effective blockade of any part of the Chinese mainland, nor had those administering Formosa established a contraband control system. Interference with shipping was spasmodic and followed no recognisable pattern or principle.

The shipowner contended, among other things, that (1) the master, in complying with the orders given to him to proceed to and discharge his cargo at Keelung, was complying with an order of a government as to port of destination, delivery or otherwise within the meaning of war risks cl. (2) on its true construction, and that delivery at Keelung was, in consequence, a fulfilment of the contract; (2) that the orders given to the master were orders given by or on behalf of those who were in fact the governors of and were governing Formosa and that such persons came within the meaning of the words " or any other government " in war risks cl. (2); (3) that the answer given by the Foreign Office that Her Majesty's government did not recognise any government as being located in Formosa was either irrelevant to or in no way conclusive of the shipowner's case; (4) that the war risks clause should be construed as part of a commercial document and as referring to commercial realities and should not be construed by reference only to the rights of Sovereign states and the technicalities of the recognition by Her Majesty's government de facto or de jure of states or governments; (5) even if the answer of the Foreign Office as to which government was recognised as the government of Formosa would have been binding and conclusive had it been positive, the fact that the answer was negative rendered it irrelevant to or inconclusive of the claim; (6) if recognition was a material or crucial consideration, then, as the vessel was Italian, the only relevant recognition to be considered and to which the master could be expected to have regard was that of the Italian government and that government recognised the government located in Formosa in July and August, 1953, as the government of the Republic of China; it was not argued that Italian law was the proper law of the charterparty. The charterers contended, inter alia, that (1) the words " any other government " in war risks cl. (2) meant on their true construction any other government of a nation, that this imported the conception of statehood and excluded a de facto body which was merely governing or administering a territory; (2) in an arbitration in England or held under a contract governed by English law, as also in an English action, the statement of the Foreign Office as to recognition by Her Majesty's government was conclusive as to what was the government of or in a particular territory or country; (3) recognition or lack of recognition by the Italian government was irrelevant since the lex fori, or failing that the proper law of the charterparty, and not the law of the flag was relevant on the issue as to recognition; (4) in any event the body governing Formosa in July and August, 1953, was not the government of a nation; (5) alternatively the war risks clause in both its parts must be restricted to orders or directions given (a) to preserve ship or cargo from risks of war or apprehension of the same, or (b) by or on behalf of a government in the exercise of its belligerent rights; (6) if war risks cl. (2) applied to the facts of this case then the result was that freight " shall be payable accordingly " and these words on their true construction meant that the shipowner was only entitled to a reasonable remuneration for carriage from Tsing Tao to Keelung and such remuneration was less than the moiety of the freight the shipowner had already received, that such reasonable remuneration amounted to £4,265 13s. 8d., and since the shipowner had already received £9,325 16s. 9d. the charterers were entitled under their counterclaim to recover £5,060 3s. 1d. under war risks cl. (2) if it applied.

The arbitrators having disagreed an umpire was appointed.

The umpire held, subject to the decision of the court, that (a) those governing Formosa were a government and that the master of the Marilu had been complying with the orders of a government; (b) neither Formosa nor the Formosans could truly be described as a nation and for this reason those governing Formosa were not the government of a nation though they claimed to be the government of a nation, viz., China; (c) the main object of the charterparty, namely, the carriage of goods to ports in Europe was defeated or frustrated by the discharge of the goods at Keelung. He held, subject to the decision of the court, that the shipowner was entitled to recover £13,156 8s. 2d. and that the counterclaim failed.

The parties agreed that the proper law of the charterparty was English law.

Ashton Roskill, Q.C., and *Basil Eckersley* for the charterers.
T. G. Roche, Q.C., and *P. H. R. Bristow* for the shipowner.

Cur. adv. vult.

June 14. **SELLERS, J.**, read the following judgment: In the circumstances which occurred in the course of the performance of the charterparty and which are clearly found in the award, the shipowner claimed the balance of the freight which he alleged to be due under part (2) of the war risks clause. The award of the umpire would allow the claim in full, but, as the parties desired a Case to be stated, the finding is subject to the decision of the court.

By part (2) of the war risks clause, the ship had liberty to comply with any orders or directions as to destination, delivery or otherwise, howsoever given by the government of the nation under whose flag the vessel sailed or by any other government, and if, by reason of or any compliance with any such orders or directions anything was done or was not done, the same was not to be deemed a deviation, and delivery in accordance with such orders or directions was to be a fulfilment of the contract voyage and the freight was to be payable accordingly. Before her arrest in the course of her contractual voyage the Marilu was flying the Italian flag. No orders of the Italian government arose or were relied on by the shipowner, but the award finds that those carrying on the administration of and in fact governing Formosa were a government, and the master, in complying with the orders given him to proceed to and discharge his cargo at Keelung, was complying with the orders of a government. Those findings of fact are conclusive unless they are shown to be based on some error of law or are inconsistent with other findings in the case.

The arguments of the parties before me are, I think, covered in substance by the submissions to the umpire which are set out in the award, and I do not, therefore, summarise them again.

The clause on which the claim is based is a war risks clause, and it was submitted on behalf of the charterers that it must be restricted to orders or directions given (a) to preserve ship or cargo from risks of war or apprehension of the same or (b) by or on behalf of a government in the exercise of its belligerent rights. I see no ground for implying such restrictions. Acts of piracy simply by a government (if such could be postulated) would no doubt be outside the clause, but there is no finding to that effect. On the contrary, the award finds that hostilities were taking place in a somewhat spasmodic fashion between the (Communist) government of the Republic of China and those carrying on the administration of and in fact governing Formosa. Those are symptoms of war, and the risks of such hostilities were apparently sufficient to establish wage increases for the crew whilst the vessel was in Chinese or Korean waters.

The clause then has to be construed and applied. I would read the words " by the government of the nation under whose flag the vessel sails . . . or by any other government " as referring to the same type of government, not to contrasting or different types. The clause refers to national governments, not to a subservient authority such as a municipal or provincial government. The qualities or character required by the body giving the order or on whose behalf it was given or purported to be given must, therefore, include essentially the exercise of full executive and legislative power over an established territory.

The effect of the clause is, in my view, no more than " by the government of the nation under whose flag the vessel sails, or by any government other than the government of the flag of the vessel ", in each case referring to a national government. That is, the provision is not restricted to the orders of the government of the vessel's flag (from whom, in conditions of war, orders or directions might in the first place reasonably be expected to come). The clause, however, applies to an order or direction of a government, and if the umpire's first finding is right, I would regard the second finding as irrelevant, as it matters not that the government in question does not embrace the whole of the Chinese race or the whole of China, as it apparently claimed to do.

There would, therefore, I apprehend, have been little if any controversy on the main issue if the Foreign Office of the British government, from whom evidence was sought, had, at the date of the arrest or deviation, recognised the so-called Nationalist Government of China as being either a de jure or de facto government of the Republic of China, or in fact the government of Formosa as a supreme or sovereign and not subservient government.

In so far as recognition of the Italian government might matter (and on behalf of the shipowner it was argued that the Italian government's view prevailed or was of vital importance as evidence) the Italian government did recognise the government in Formosa at the material time as the government of the Republic of China. On the contrary, however, the British Foreign Office stated that Her Majesty's government did not recognise that any government was located in Formosa in July and August, 1953.

If the view of the Foreign Office is not to be held as conclusive, or as exclusive of all other evidence, it was not submitted by the charterers that there was no evidence to establish or justify the finding in the award. It was, however, strongly submitted that the court could not go behind or beyond the Foreign Office statement.

The contract is a commercial document in common use by traders of many nationalities. It is described as a uniform general charter, apparently prepared, issued and recommended by the Documentary Council of the Baltic and White Sea Conference, and adopted by the Documentary Committee of the Chamber of Shipping of the United Kingdom. Of the parties to this charterparty, the shipowner is an Italian, and the charterers are a Czech company. The charterers had the right to transfer the charterparty to a German party but the original charterers were to remain liable for its right and true fulfilment. The charterparty provided for arbitration in London in the event of any dispute, and that permitted the present application to the court under s. 21 (1) (b) of the Arbitration Act, 1950. The parties were agreed that the proper law of the charterparty was English law.

As a matter of construction of the charterparty, an ordinary trading or commercial contract, there would seem to me to be no ground for saying that the authority giving the orders or directions has to be a government recognised as such by Her Majesty's government here. It does not say so and I see no circumstances which require such a construction or which would give rise to any implication to that effect. The umpire, in my judgment, has not erred in that respect.

Is there a rule of law which restricts the evidence to be considered to that provided by the Foreign Office, or which precludes the tribunal of fact from finding that there was a government in Formosa on all the evidence which was adduced?

It was urged on behalf of the charterers that the umpire erred in not treating the Foreign Office statement as final and conclusive, and reliance was placed on *White, Child & Beney, Ltd.* v. *Simmons* (1) ((1922), 127 L.T. 571), and *Duff Development Co.* v. *Kelantan Government* (2) ([1924] A.C. 797) and other cases. In my judgment, the authorities, as far as they have been cited or are known to me, do not establish the proposition contended for and did not require the umpire to disregard any of the evidence put before him whether or not there was a government in Formosa.

It seems to me to be a very different question from a Sovereign seeking immunity from the jurisdiction of our courts. The principle of *Duff Development Co.* v. *Kelantan Government* (2) was concisely stated by LORD DUNEDIN in these words ([1924] A.C. at p. 820):

> " It seems to me that once you trace the doctrine for the freedom of a foreign Sovereign from interference by the courts of other nations to comity, you necessarily concede that the home Sovereign has in him the only power and right of recognition. If our Sovereign recognises and expresses the recognition through the mouth of his minister that another person is a Sovereign, how could it be right for the courts of our own Sovereign to proceed upon an examination of that person's supposed attributes to examine his claim and, refusing that claim, to deny to him the comity which their own Sovereign had conceded? "

It may well be undesirable that in such a matter a conflict should arise between Her Majesty's government and a British court. Even on such an issue as that, however, LORD SUMNER, after stating (ibid., at p. 824):

> " . . . a foreign ruler, whom the Crown recognises as a Sovereign, is such a Sovereign for the purposes of an English court of law, and the best evidence of such recognition is the statement duly made with regard to it in His Majesty's name. Accordingly where such a statement is forthcoming no other evidence is admissible or needed ",

continued later in his speech to say this (ibid.):

> " There may be occasions, when for reasons of state full, unconditional or permanent recognition has not been accorded by the Crown, and the answer to the question put has to be temporary if not temporising, or even where some vaguer expression has to be used. In such cases not only has the court to collect the true meaning of the communication for itself, but also to consider whether the statements as to sovereignty made in the communication and the expressions ' sovereign ' or ' independent ' sovereign used in the legal rule mean the same thing. BEST, C.J., says in *Yrisarri* v. *Clement* (3) ((1825), 2 C. & P. 223 at p. 225), that recognition is conclusive, but, if there is no recognition yet given, the independence becomes matter of proof. I conceive that, if the Crown declined to answer the inquiry, as in changing and difficult times policy might require it to do, the court might be entitled to accept secondary evidence in default of the best, subject, of course, to the presumption that, in the case of a new organisation, which has de facto broken away from an old state, still existing and still recognised by His Majesty, the dominion of the old state remains unimpaired until His Majesty is pleased to recognise the change."

In *White, Child & Beney, Ltd.* v. *Simmons* (1) ((1922), 127 L.T. 571) on which both parties seemed to rely, a question arose whether a claim for loss of insured property was a loss or confiscation by the government of the country in which the property was situated. The matter arose at the time of the Russian revolution.

A ROCHE, J., had held that the evidence, from all sources, had not established that the Russian Soviet Republic was at the time of the loss recognised as a sovereign government and that the claim succeeded, as the loss was a loss "by rebellion, military or usurped power" within the meaning of the policy. The loss or confiscation by the government would have defeated the claim as outside the policy. Apparently the Soviet authority was not recognised by our government B at the time of the loss, but was recognised at a later date, and the Court of Appeal held in these circumstances that the court could look at all the facts and see whether the government as later recognised as the de facto government of Russia was or was not the de facto government of Russia at the earlier material date. The British Foreign Office had declined to state the precise date at which the existing Soviet authority came into being as a government, and therefore the C Court of Appeal held that it became a question of fact at what time that government first began to exist as a government, and that the court was entitled to give effect to the evidence even if it was inconsistent with the opinion given by the Foreign Office (per ATKIN, L.J. (127 L.T. at p. 584)).

Apparently, the government situated and functioning in Formosa was at one time recognised by this country, and it does not follow that because recognition D has ceased that the government, once recognised, has in any way altered its activities or lost such powers and authority as it had been exercising. Without the recognition of our government, in *White, Child & Beney, Ltd.* v. *Simmons* (1), it might well have been impossible for the court to have found on the evidence that the usurping forces had reached such ascendancy that they had supplanted the existing government. It was held that the usurping forces had supplanted E the existing government at a time when our country had not recognised the substitution, and it does not appear to me to be an authority for the proposition that if there is no recognition there is no government. Nor would it seem that recognition or non-recognition would in any way affect the risk of a vessel being accosted on her voyage.

I would hold that the umpire was entitled to approach the question in the F same manner as GODDARD, J., did in *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham S.S. Co., Ltd.* (4) ([1938] 3 All E.R. 80), approved by the Court of Appeal ([1939] 1 All E.R. 819), and that the reasoning in the judgment of SIR WILFRED GREENE, M.R., is largely applicable to this case. It was held there that the question whether on the true construction of the charterparty war had broken out involving Japan was not conclusively determined by the view of His G Majesty's government. GODDARD, J., said that what he had to determine was what the parties meant by the clause of the charterparty. He thought they were using the word "war" and intended it to be construed as war in the sense in which an ordinary commercial man would use it. He did not think the parties in a case of this sort were going into the niceties of international law (see [1938] 3 All E.R. at p. 83); and, may I add, as applicable to this case, into the niceties H of diplomacy.

Other arguments were advanced on the first issue with which I do not think it necessary to deal, having regard to the conclusions already expressed; but I should record that counsel for the charterers expressly kept open the point, though he could not successfully argue it in this court, that the war risks cl. (2) was unenforceable, being repugnant to the fundamental obligations of the con- I tract.

There remains for consideration the amount of freight which the shipowner is entitled to receive under the clause, which provides that in the circumstances set out, if, in compliance with any such orders or directions

> ". . . anything is done or is not done, the same shall not be deemed to be a deviation and a delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable accordingly."

By cl. 20 of the charterparty a variety of possible voyages were contemplated with freights varying according to the destination ultimately chosen. By cl. 26 a declaration of destination had to be made, " on or before passing Aden if discharging Black Sea, on or before vessel's passing Gibraltar for any other port." A declaration was to be made as to dead-weight capacity under cl. 36; but no declaration was made as to a discharging port, and the shipowner claims on the basis of the lowest rate of freight provided for by cl. 20.

The freight is to be paid on the basis of the fulfilment of the contract voyage. If this had been declared the claim would have been for the freight due for the declared destination and could not have been less than the minimum rate stipulated. The deviation might be of short duration, and the actual voyage might also be short, as here. But, on the other hand, the time of deviation or detention might be long, and the distance much more remote than any of the contemplated voyages. The rough goes with the smooth, and the contractual rate stands as if the contract voyage had been fulfilled.

It was argued that the phraseology of part (1) of the war risks clause was different from part (2) with regard to freight. But, as I read it, it likewise gives the shipowner the freight appropriate to the contractual voyage as originally ordered, notwithstanding that the ship has been diverted to another port covered by the charterparty.

For these reasons I hold that the shipowner is entitled to recover the sum claimed and provisionally awarded to him by the award and that the charterers are not entitled to recover at all on their counterclaim.

Award upheld.

Solicitors: *Constant & Constant* (for the charterers); *Stokes & Mitcalfe* (for the shipowner).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* POLLOCK & PEEL, LTD. (in liquidation).

[CHANCERY DIVISION (Upjohn, J.), May 15, 16, 17, June 14, 1956.]

Profits Tax—Distribution—Gross relevant distribution—" Repayment or return of share capital "—Exclusion of distribution of capital—Company in voluntary liquidation—Transfer of assets to new company—Balance less expenses paid to shareholders—Finance Act, 1947 (10 *&* 11 *Geo.* 6 *c.* 35), *s.* 35 (1)—*Finance Act,* 1951 (14 *&* 15 *Geo.* 6 *c.* 43), *s.* 31 (1), (5).

Company—Winding-up—Distribution of assets—Nature of liquidator's functions.

In November, 1952, a company of which the two directors were the sole shareholders capitalised £28,056 by applying that sum in paying up ordinary shares which were issued as fully paid bonus shares to the shareholders. In October, 1953, it went into voluntary liquidation for reconstruction purposes. All its assets, except a sum in cash, were transferred to a new company in return for an issue of shares. The liquidator discharged the liabilities of the old company and the costs of administration and paid the balance of the sum of cash (viz., £15,030) to the shareholders in proportion to their shareholdings. The company was assessed to profits tax in respect of the £15,030 as being a " repayment or return of share capital " and thus deemed by s. 31 (1) (5) of the Finance Act, 1951, to be a " gross relevant distribution " within the meaning of s. 35 (1) of the Finance Act, 1947.

Held: (i) the company was not liable for the profits tax in respect of the £15,030, since its payment was a distribution of the company's assets in liquidation whereby the shareholders received their proportions of the assets (dictum of ATKIN, L.J., in *Inland Revenue Comrs.* v. *Burrell,* [1924] 2 K.B. at p. 67 applied; *Birch* v. *Cropper, Re Bridgewater Navigation Co.,* A *Ltd.* (1889), 14 App. Cas. 525, considered), and was not a "repayment or return of share capital" within s. 31 (5) of the Finance Act, 1951, and

(ii) if the payment of the £15,030 had been such a repayment or return of share capital and thus a "distribution" for the purposes of s. 35 (1) of the Act of 1947, yet it would not have been a "gross relevant distribution" for the purposes of that section because it was a distribution of capital excluded B by s. 35 (1) (c).

(iii) the case would not be remitted to the commissioners for the liquidator to determine what part of the sum represented capital and what part income, because that was a virtually impossible task which he was under no duty to perform.

Appeal dismissed.

C

[For the Finance Act, 1947, s. 35 (1), see 12 HALSBURY'S STATUTES (2nd Edn.) 779; and for the Finance Act, 1951, s. 31 (1), (5), see 30 HALSBURY'S STATUTES (2nd Edn.) 173-175.]

Cases referred to:

(1) *Birch* v. *Cropper, Re Bridgewater Navigation Co., Ltd.*, (1889), 14 App. Cas. D 525; 59 L.J.Ch. 122; 61 L.T. 621; 10 Digest (Repl.) 1065, *7391*.

(2) *Inland Revenue Comrs.* v. *Burrell*, [1924] 2 K.B. 52; 93 L.J.K.B. 709; 131 L.T. 727; 9 Tax Cas. 27; 28 Digest 108, *665*.

(3) *Inland Revenue Comrs.* v. *Blott*, [1920] 2 K.B. 657; *affd.* H.L. [1921] 2 A.C. 171; 90 L.J.K.B. 1028; 125 L.T. 497; 8 Tax Cas. 101; 28 Digest 107, *663*.

E (4) *Canadian Eagle Oil Co.* v. *R.*, [1945] 2 All E.R. 499; [1946] A.C. 119; 114 L.J.K.B. 451; 173 L.T. 234; 27 Tax Cas. 206; 2nd Digest Supp.

(5) *Re Doughty, Burridge* v. *Doughty*, [1947] 1 All E.R. 207; [1947] Ch. 263; 176 L.T. 173; 2nd Digest Supp.

Case Stated.

F The taxpayer company appealed against an assessment to profits tax for the chargeable accounting period Jan. 1, 1953, to Oct. 31, 1953, of £4,406 14s. 10d. being a distribution charge of £22,033 10s. 2d. at twenty per cent. The matter in dispute was whether £15,030 cash distributed by the liquidator of the company to its members was a "gross relevant distribution" within the meaning of s. 35 (1) of the Finance Act, 1947, having regard to the terms of s. 31 (1) of the G Finance Act, 1951.

The company was incorporated on May 12, 1942, to acquire and carry on an engineering business. Its share capital was £2,500 divided into 2,500 shares of £1 each of which 2,004 were issued. In November, 1952, its issued capital was increased to 30,060 £1 shares under a special resolution for the capitalisation of profits, comprising £28,056 standing to the credit of a capital reserve account H and a profit and loss appropriation account, which was used to pay up as fully paid bonus shares 28,056 ordinary shares of £1 each allotted to the existing shareholders on the basis of fourteen new bonus shares for each ordinary share then held. The only directors and shareholders of the company were Mr. J. C. Pollock (who died on Nov. 8, 1953) and his wife. On Oct. 31, 1953, the company went into voluntary liquidation. As part of a scheme of reconstruction, its business was I transferred on Nov. 6, 1953, to a new company also called Pollock & Peel, Ltd., under an agreement between the liquidator of the taxpayer company and that company. The new company took over all the taxpayer company's assets, except a sum of cash, in consideration of shares in the new company which were received by the executors of Mr. Pollock and by Mrs. Pollock. This distribution of shares did not give rise to any liability for profits tax because of a joint election by the two companies within the terms of s. 36 (4) of the Finance Act, 1947. After this transfer of assets, the payment of all the taxpayer company's debts and liabilities and the costs of winding-up, and the company's cessation of business, £15,030 remained in the hands of the liquidator. This he distributed to the executors of Mr. Pollock and to Mrs. Pollock, the shareholders.

The company contended that: (i) under s. 35 (1) of the Finance Act, 1947, which was not overridden by s. 31 of the Finance Act, 1951, only so much of a distribution, made after the end of its last chargeable accounting period by a body corporate with a share capital, in excess of the nominal amount of the body corporate's paid up share capital could be treated as a gross relevant distribution, and the £15,030, being less than the nominal amount of the paid up share capital of the company (£30,000), was not a gross relevant distribution; (ii) the sum of £15,030 was not a sum applied in "reducing" the taxpayer company's share capital for the purpose of s. 31 of the Act of 1951, and was therefore not a distribution within that provision for profits tax purposes; (iii) alternatively only a rateable part of the £15,030 could be treated as a sum applied in "reducing" the company's share capital.

The Crown contended that: (i) the £15,030 was a sum applied in reducing capital within the meaning of s. 31 of the Act of 1951 and was therefore deemed to be a distribution of a like sum and a gross relevant distribution under s. 35 (1) of the Act of 1947; (ii) the provisions of s. 35 (1), specifying distributions which were to be treated as distributions of capital, had no application to sums deemed to be distributions by virtue of s. 31 (1); (iii) the shares in the new company were not to be taken into account in arriving at the gross relevant distributions, because under s. 36 (4) of the Finance Act, 1947, which applied by virtue of the election of the two companies under that enactment, the distribution of shares was deemed not to be a distribution for the purposes of s. 35.

The commissioners held that s. 31 of the Finance Act, 1951, did not override the requirements of s. 35 (1) of the Finance Act, 1947, and that for the purposes of s. 35 (1) (c) distributions were to be treated as distributions of capital except to the extent to which they exceeded the paid up share capital. As the £15,030 did not exceed the £30,000 paid up share capital it was not a gross relevant distribution to proprietors for the purposes of profits tax. They allowed the appeal and reduced the assessment to £2,042 at twenty per cent., i.e., £408 8s. tax. The Crown appealed.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), *Sir Reginald Hills* and *E. Blanchard Stamp* for the Crown.

Roy Borneman, Q.C., and *H. B. Magnus* for the company.

Cur. adv. vult.

June 14. **UPJOHN, J.**, read the following judgment: This case raises an interesting point on profits tax. Shortly the question is whether for the purposes of the tax a payment made to shareholders in the winding-up of a company after all liabilities have been discharged is to be treated as a "gross relevant distribution" in respect of the last chargeable accounting period in which the trade or business of the company was carried on.

The company was incorporated in 1942 with an issued and fully paid up capital of 2,004 shares of £1 each to acquire and carry on an engineering business. The company prospered and in 1952 its capital was increased to £30,060 and 28,056 new shares were issued to the shareholders as fully paid shares, by applying a sum of £28,056 then standing to the credit of reserve and profit and loss accounts to payment in full of the amount of the shares. Briefly, the company issued new fully paid bonus shares on the basis of fourteen new shares for each old share. Thereafter, the issued capital consisted of 30,060 fully paid shares of £1 each all of one class. There were only two shareholders, Mr. J. C. Pollock until his death on Nov. 8, 1953, and his wife.

On Oct. 31, 1953, the company went into voluntary liquidation for the purposes of reconstruction. A new company was formed which, pursuant to an agreement dated Nov. 6, 1953, took over all the assets of the old company except a sum of cash which was retained by the liquidator. The consideration for the transfer was an issue of shares in the new company which were in due course distributed to Mrs. Pollock and the executors of Mr. Pollock. This gave rise to no claim to profits tax because of a joint election by the old and new companies within s. 36 (4) of the Finance Act, 1947. Whether apart from such election there would have been a valid claim is a matter which has not been argued before me.

Out of the cash retained the liquidator discharged all liabilities of the old company and costs of administration and was left with the sum of £15,030 in hand available for distribution among the shareholders, i.e., of exactly 10s. per share in the old company; as a final step in the liquidation and subsequent to the date on which the company ceased to carry on its trade, the liquidator paid this sum away to the shareholders in proportion to their shareholding. This sum so applied is claimed by the Crown to be a " gross relevant distribution " for the purposes of profits tax in the last chargeable accounting period in which the trade or business was carried on, i.e., the period from Jan. 1, 1953, to Oct. 31, 1953. That is the period and the only period in which the Crown alleges that the payment falls so to be described.

I need not trace the history of profits tax. It is a tax on profits, but the nature of the tax was fundamentally altered by the Finance Act, 1947, in that by s. 30, which was the charging section, the rate of tax was in effect made to depend on the " net relevant distributions " made to proprietors; profit which is not distributed pays tax at a lower rate than profit which is distributed. I am only concerned with the machinery sections numbered s. 34 to s. 36 of that Act, which purport to lay down rules for ascertaining the " net relevant distribution " for the purposes of s. 30.

Section 34 defines the " net relevant distributions " as being a certain proportion of the " gross relevant distributions " to the proprietors.

Section 35 defines " gross relevant distributions ", and I must read sub-s. (1), for the answer to the question I have to determine depends on the true construction of that section.

> " Subject to the provisions of this and the two next succeeding sections, the gross relevant distributions to proprietors for any chargeable accounting period of a body corporate, society or other body, are the total distributions to the members of the body corporate, society or other body, not being distributions allowable as deductions in computing the profits of the trade or business for any period for the purposes of the profits tax, and being either—(a) dividends declared not later than six months after the end of that period which are expressed to be paid in respect of that period or any part thereof; or (b) distributions (other than dividends which, under para. (a) of this sub-section, are to be treated as part of the gross relevant distributions to proprietors for any previous chargeable accounting period) made in the period; or (c) in the case of the last chargeable accounting period in which the trade or business is carried on, so much of any distribution made after the end of that period (not being a distribution to which para. (a) of this sub-section applies) as is not a distribution of capital, and, for the purposes of para. (c) of this sub-section, the distributions which are to be treated as distributions of capital shall not, in the case of distributions made by a body corporate with a share capital, exceed an amount equal to the total nominal amount of the paid-up share capital thereof together, where the body corporate has issued shares at a premium for cash, with the aggregate of the amounts of the premiums."

The section, it is to be observed, deals with dividends and distributions and the purpose of the section is not only to define " gross relevant distributions " but to allocate the dividends and distributions to particular chargeable accounting periods according to the circumstances.

Some further explanation of the word " distribution " was plainly necessary and this is to be found in s. 36. Sub-section (1) is in these terms:

> " Subject to the provisions of the next succeeding sub-section, wherever—(a) any amount is distributed directly or indirectly by way of dividend or cash bonus to any person; or (b) assets are distributed in kind to any person; or (c) where the trade or business is carried on by a body corporate the directors whereof have a controlling interest therein, an amount is applied, whether by way of remuneration, loans or otherwise, for the benefit of any person, there shall be deemed for the purposes of the last preceding section to be a distribution to that person of that amount or, as the case may be, of an amount equal to the value of those assets: Provided that no sum applied in repaying a loan or in reducing the share capital of the person carrying on the trade or business shall be treated as a distribution."

Counsel for the company argued that this section was intended to be an exhaustive definition section and the marginal note lends support to that view, but if the draftsman so intended he used the most inappropriate language for the purpose. " Deeming " sections do not usually define but, on the contrary, expand or sometimes endeavour to clarify, e.g., by making it clear that a distribution in kind is to be treated as a distribution; however, I do not think it is necessary to express a concluded view on the matter. What the sub-section made quite clear was that a sum applied in reducing share capital was not to be treated as a distribution.

Section 31 of the Finance Act, 1951*, however, provided that in certain conditions a return or repayment of capital was to be treated as a distribution. Sub-section (1) is in these terms:

> " Subject to the provisions of this section, where—(a) whether before or after the passing of this Act but after Apr. 6, 1949, a body corporate, unincorporated society or other body capitalises any distributable sum: and (b) then or thereafter, whether before or after the passing of this Act but after Apr. 10, 1951, any sum is applied in reducing its capital, there shall be deemed for the purposes of s. 35 of the Finance Act, 1947 (which defines the expression ' gross relevant distributions to proprietors ' for profits tax purposes), to be a distribution to the members of the body corporate, society or other body of an amount equal to the sum so applied or to the total amount of the distributable sums previously capitalised by it as aforesaid, whichever is the less, taking place when the sum is so applied."

Sub-section (5) defines " distributable sum " and " capitalise " and then states:

> " and references to the reduction of capital shall be deemed to include references to the repayment or return of share capital and the repayment or redemption of loan capital, other than loan capital issued for full consideration paid in cash to the body corporate, society or other body or redeemable preference shares so issued."

The Crown makes two main submissions. The first depends on s. 31 of the Finance Act, 1951. It may be summarised as follows: Section 31 (1) (a) is clearly satisfied in that a distributable sum of £28,056 has been capitalised since Apr. 6, 1949; that is not disputed. Then it is said that a lesser sum of £15,030 has been applied, in the words of sub-s. (5), in " repayment or return of share capital " so that this lesser sum must be deemed for the purposes of s. 35 of the Act of 1947 to be a distribution taking place when the sum is so applied. As the Crown's argument was finally presented, that admittedly does not conclude the case in its favour, for the date of application was after the chargeable accounting period with which I am concerned and it is admitted that reference back to s. 35

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* Section 31 of the Finance Act, 1951, in effect amends s. 36 of the Finance Act, 1947; see p. 783, letter I, post.

of the Finance Act, 1947, is necessary for the purpose of ascertaining to what chargeable accounting period this distribution must be related. To that extent the Crown impliedly accepts the admirable argument of counsel for the company on this part of the case, that s. 31 of the Act of 1951 really amends, in certain conditions, s. 36 of the Act of 1947 and not s. 35.

This part of the argument necessarily proceeds on the footing that there has been a return or repayment of share capital and reference to s. 35 (1) (c), which is the only relevant paragraph, discloses, counsel for the Crown says, an apparent inconsistency, for sub-para. (c) refers to a distribution which is not a distribution of capital. He submits that s. 31 of the Act of 1951 is superimposed on s. 35 of the Act of 1947 and reading them together it is plain that the legislature intended to bring this return of capital into the ambit of a " gross relevant distribution ". That being so plain, the concluding words of sub-para. (c) must be moulded to give effect to that intention by reading into sub-para. (c) of s. 35 (1) words to the following effect, namely, that " provided that any sum deemed to be a distribution by virtue of s. 31 of the Act of 1951 is not for the purposes of s. 35 (1) (c) of the Act of 1947 to be regarded as a distribution of capital ". So construing the section, one finds that for the purposes of tax this return of capital in the liquidation is in reality to be treated as a distribution of income in the last trading period of the company's life.

The Crown's second main point arises on s. 35 without reference to s. 31 of the Act of 1951. It was taken for the first time in this court on notice duly given to the company. The argument is that the liquidator, if necessary with the assistance of expert advice, must find out whether the sum of £15,030 which he distributed was capital or income or partly the one and partly the other. That has not been done, and counsel for the Crown invites me to remit the Case to the Special Commissioners so that this interesting operation may be performed, and when performed, he says one applies sub-s. (1) (c) to that part ascertained to be income.

Both these main points make it necessary to inquire into the nature of a distribution of a company's assets among the shareholders by a liquidator. I was referred to two authorities. The first is *Birch* v. *Cropper, Re Bridgewater Navigation Co., Ltd.* (1) ((1889), 14 App. Cas. 525). LORD MACNAGHTEN said (ibid., at p. 545):

> " In the case of winding-up everything is changed. The assets have to be distributed. The rights arising from unequal contributions on shares of equal amounts must be adjusted, and the property of the company, including its uncalled capital not required to satisfy prior claims, must be applied for that purpose. But when those rights are adjusted, when the capital is equalised, what equity founded on inequality of contribution can possibly remain. The rights and interests of the contributories in the company must then be simply in proportion to their shares."

Later on he continued (ibid., at p. 546):

> " I think it rather leads to confusion to speak of the assets which are the subject of this application as ' surplus assets ' as if they were an accretion or addition to the capital of the company capable of being distinguished from it and open to different considerations. They are part and parcel of the property of the company—part and parcel of the joint stock or common fund—which at the date of the winding-up represented the capital of the company. It is through their shares in the capital, and through their shares alone, that members of a company limited by shares become entitled to participate in the property of the company. The shares in this company were all of the same amount. Every contributory who held a preference share at the date of the winding-up must have taken that share and must have held it on the terms of paying up all calls duly made upon him in

> respect thereof. In paying up his share in full he has done no more than he contracted to do; why should he have more than he bargained for? Every contributory who was the holder of an ordinary share at the date of the winding-up took his share and held it on similar terms. He has done all he contracted to do; why should he have less than his bargain? When the preference shareholders and the ordinary shareholders are once placed on exactly the same footing in regard to the amounts paid up upon their shares, what is there to alter rights which were the subject of express contract?"

The form of the order in that case on which counsel for the Crown relied in support of his argument that the liquidator was making a repayment or return of share capital for the purposes of s. 31 is to be found at p. 548 and is as follows:

> "the balance of the proceeds of sale of the said undertakings to the Manchester Ship Canal Co. remaining after satisfaction of all the debts and liabilities of the Bridgewater Navigation Co., Ltd., and after adjusting the rights of the shareholders inter se (other than their rights in respect of the purchase-money), and after payment of the costs of the liquidation and repayment to the shareholders (both ordinary and preference) of the capital respectively paid on their shares, ought to be divided amongst the holders of all the shares of the Bridgewater Navigation Co., Ltd., in proportion to the shares held by them respectively."

The next case was *Inland Revenue Comrs.* v. *Burrell* (2) ([1924] 2 K.B. 52). ATKIN, L.J., said (ibid., at p. 67):

> "The property of the company remains the property of the company. The liquidator's duty is to realise it, to pay off the liabilities and distribute the remaining assets amongst the shareholders subject to the rights given under the articles. The liquidator cannot declare a dividend or distribute a dividend. He deals with assets. He need not trouble himself with the question whether the assets in the company's books represent capital or uncapitalised profits. He can realise the assets in the most beneficial way and can pay capital liabilities out of the assets that represented profits, or liabilities on revenue account out of the assets that represented capital. Having paid the liabilities and having a lump sum in his hand there appears to me to be no liability in him to reconstruct his capital account or other accounts; and no power in the shareholders either to insist on the liquidator doing so, or themselves so to adventure."

Later on, he continued (ibid., at p. 68):

> "But though the liquidator must honour such obligations he himself has no power to capitalise or decapitalise, to distinguish in his distribution between capital or income; his duty is simply to distribute assets. He may, while carrying on the business of a company, with a view to a beneficial realisation, earn profits. In such a case the company will be assessable to income tax on such profits. But the shareholder will not receive them as profits; for him they are but an accretion to the assets; and if they become surplus assets, it is in that form that the shareholder will receive them. We are thus removed from the sphere of cases such as *Inland Revenue Comrs.* v. *Blott* (3) ([1920] 2 K.B. 657), where there have to be considered the rights produced by the action of a company still carrying on its business and distributing some of its assets in some form of bonus. There the intention of the company is dominant for all purposes. Did the company intend to distribute as profits or as capital? Here the liquidator has no choice, and the question cannot arise in that form. The inquiry takes a different shape; not what does the liquidator intend to give the shareholder, but what does the shareholder in fact receive. In fact he receives his share of the joint

> stock, as SCRUTTON, L.J., said in *Blott's* case (3) ([1920] 2 K.B. at p. 675), not income of the property, but the property itself."

SARGANT, L.J., said (ibid., at p. 73):

> "The character in which any distribution by the company amongst its shareholders reaches their hands depends entirely on the circumstances in which the distribution is made. In the liquidation of a limited company the distribution of the surplus assets of the company is almost necessarily of a final and non-recurrent character, and reaches the hands of the shareholders quite irrespective of the sources from which the assets have accrued to the company. It is true that so far as the assets can be identified, as here, as having arisen from profits, they might while the company was a going concern have been distributed by way of declaration of dividend; but though this power, if exercised, would have removed the assets from the ownership of the company and divided them amongst the shareholders by way of income, the mere existence of the power while unexercised cannot, in my judgment, have any effect of the kind. These assets, though capable of distribution as income, remain, while not so distributed, part of the general mass of the property of the company and are subject to the debts and all the accruing liabilities and possible losses of the company, and the expenses of any liquidation; and I cannot see enough in the mere history of the accruer of the assets to the company to enable a distinction to be made for the present purpose between that part of a final distribution of assets of the company which arises from profits of the company capable of distribution as income, and the other parts of that distribution."

With these authorities to guide me, I return to the Crown's argument on s. 31. The first question is whether this distribution by the liquidator can properly be described as a repayment or return of share capital. In my judgment it cannot be properly so described; all that the liquidator is doing is to distribute the assets or property of the company among the shareholders, after discharging its liabilities and the costs of liquidation, and it is distributed as capital irrespective of its source.

There may be cases where a liquidator makes a return of share capital to shareholders in the course of liquidation; he may have to do so before he makes the distribution of assets among the shareholders to adjust their rights inter se to bring them to equality, as, e.g., when some shares are partly paid and others are fully paid. That is, in my judgment, the explanation of the form of order in *Birch* v. *Cropper* (1). Another example where a liquidator makes a return of capital is when the memorandum of association or terms of issue entitle one class of share capital to a return of capital in priority to some other class. In those cases the liquidator may truly be said to be making pro tanto a return of share capital; but that is not this case. No adjustment among the shareholders is required and all the liquidator is doing is to distribute the assets of the company; he is not making a repayment or return of share capital at all.

That is fatal to the Crown's case under s. 31, but even if the Crown had surmounted that hurdle it would in my judgment have fallen at the next. To examine the next step in the argument, I will assume that, contrary to my own opinion, this payment of £15,030 is a return or repayment of capital within s. 31.

The scheme of the relevant sections seems reasonably plain though the language may be obscure. Section 36 (1) proviso of the Finance Act, 1947, provides that a reduction of capital is not to be treated as a distribution. Section 31 of the Finance Act, 1951, in effect amends that section by providing that, if certain conditions are fulfilled, a reduction of capital is for the purposes of s. 35 "to be a distribution" not, be it noted, "to be a gross relevant distribution". Reference back to s. 35 is then necessary to see whether this distribution is included in the definition of "gross relevant distribution" for the relevant chargeable accounting period, i.e., the period that ended with the commencement of the liquidation. The relevant paragraph is (c), and that does not apply to distributions of “ capital ”. A Thus, this return of capital, though a distribution for the purposes of s. 35, is found not to be a “ gross relevant distribution ” because it is a distribution of capital. If the liquidator had returned, not 10s. in respect of each £1 share, but a sum which exceeded the total allowed as capital by the concluding words of the sub-section, the excess would for the purposes of the tax be treated not as capital but as income and would fall to be included in the gross relevant B distribution for the period. Reading the sections together, that seems to be how the scheme works and I see no conflict real or apparent between the sections and certainly no justification whatever for reading in the words which counsel for the Crown submits ought to be read in. The submission is contrary to the highest and classic authority of VISCOUNT SIMON, L.C., and ROWLATT, J., in *Canadian Eagle Oil Co.* v. *R.* (4) ([1945] 2 All E.R. 499) viz., that nothing is to be C read into a taxing statute, unless, I would myself add, one is compelled to do so by necessary implication. I see no such compelling reason in this case. Section 31 has not misfired; it operates in the case of a company in liquidation when the distribution exceeds a certain total; it has a wide operation when the company is a going concern. If the legislature in and by s. 31 intended to turn a distribution of capital by a liquidator in winding-up into a distribution of income it D should have said so in clear terms.

I come now to the Crown's second main point. While the company is a going concern there is no difficulty in distinguishing between capital and income or more strictly profits; unless a company capitalises its profits by applying them in paying up new shares, all distributions, even those usually referred to as capital distributions, are necessarily made out of profits and as between tenants for E life and remaindermen will normally be income (*Re Doughty, Burridge* v. *Doughty* (5), [1947] 1 All E.R. 207). When the company ceases to trade and goes into liquidation entirely different considerations arise. Speaking for myself, I do not in the least understand how the most expert of accountants can, save in very simple cases, undertake the required dissection of the company's surplus assets into capital and income. As ATKIN, L.J., has said, the liquidator has no power F to do so*; and I doubt its possibility. The liquidator finds that the company has assets, a factory, plant, machinery, tools, stock-in-trade, trade debtors, cash and possibly goodwill. He realises everything except the cash by sale. Except in very simple cases it is impossible to say what represents income and what capital; all one can say is that the assets represent the original capital contributed plus the result of years of trading. The very factory itself may have G been purchased out of the capital originally subscribed but it is equally possible that it has been purchased out of trading profits. Where a company has traded for years no one can say, e.g., what cash represents at any given moment, and it seems to me that its dissection into capital and income would be impossible without a review of the whole trading activities of the company from its incorporation and possible then only by adopting a series of completely artificial H rules to assist the analysis, e.g., that new stock-in-trade is purchased or wages expended in new manufacture out of the cash proceeds of old stock-in-trade, which rules have no necessary relation to truth or reality.

Apart from the practical difficulty in the way of the dissection, there is nothing in s. 35 which compels the liquidator either to perform this operation or permit it to be performed on the assets he has got in. As ATKIN, L.J., pointed out, the I liquidator need not trouble himself with what is income and what is capital. He gets in the property; he discharges the liabilities out of any assets in hand as may be most convenient. He may discharge trade creditors out of the proceeds of sale of a factory or a loan creditor out of stock-in-trade, it matters not; he is left with a net surplus representing the property of the company. His sole duty is to distribute that property and he distributes it as capital and capital it remains for the purposes of s. 35 (1) (c) unless it exceeds the total provided in the concluding words of the sub-section.

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* See p. 782, letter H, ante.

The Crown fails on both points and I dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Frank Simmonds, Parker & Hammond,* agents for *Percy Holt & Nowers,* Croydon (for the company).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

METROPOLITAN POLICE DISTRICT RECEIVER *v.* CROYDON CORPORATION AND ANOTHER.

[QUEEN'S BENCH DIVISION (Slade, J.), June 5, 6, 7, 8, 11, 1956.]

Contract—Quasi-contract—Money paid by one person under compulsion of law—Payment benefiting another by partial discharge of his liability—Whether sum paid recoverable by payor from person benefited.

Police—Metropolitan Police Force—Accident to police officer through negligence of third party—Officer's wages and allowances during illness paid by Receiver—Right of Receiver to recover amount of wages from third party.

A metropolitan police constable was injured, while on duty, by a motor lorry owned by the first defendants and driven negligently by their servant, the second defendant, in the course of his employment. The constable was incapacitated for several months. During the period of his incapacity, the constable was paid his full wages and allowances by the Receiver (the plaintiff), who was bound to do so by virtue of statutes relating to the Metropolitan Police. The constable recovered damages from the first defendants for negligence, but did not include any claim for damages for the loss of wages (£104) which had been paid to him. In an action by the plaintiff to recover the £104,

Held: since the constable would have been entitled to have recovered the amount of the £104 from the defendants as damages for their negligence if the Receiver had not paid (under what the law regarded as compulsion) the constable's wages during his incapacity, and since the defendants had had the benefit of the Receiver's payments by the discharge pro tanto of their liability, the defendants were indebted to the Receiver for £104 which he was entitled to recover from them (see p. 799, letters C to E, post).

Principles stated by COCKBURN, C.J., in *Moule* v. *Garrett* ((1872), L.R. 7 Exch. at p. 104), by LORD WRIGHT, M.R., in *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* ([1936] 3 All E.R. at p. 707), and by VAUGHAN WILLIAMS, L.J., in *Bonner* v. *Tottenham & Edmonton Permanent Investment Building Society* ([1899] 1 Q.B. at p. 176) applied.

Metropolitan Police District Receiver v. *Tatum* ([1948] 1 All E.R. 612) followed.

Observations on the duty of the court in relation to following the decision of another court of co-ordinate jurisdiction (see p. 788, letters A to G, post).

[**Editorial Note.** The following general proposition, submitted by counsel for the plaintiff, was approved (see p. 798, letter G, post)—Where A under what the law regards as compulsion has paid money to C in such circumstances that the law considers that B's failure to recoup A could constitute an unjust benefit to B at the expense of A, A can recover the amount of the payment from B. This formulation is, however, criticised in *Monmouthshire County Council* v. *Smith* (see p. 814, letter I, post) in which case the present decision was not followed. The principle applied by SLADE, J., in the present case can be put both on the ground of the plaintiff's entitlement at law to recover by virtue of an imputed contractual obligation or obligation imposed by operation of law and on the ground of the plaintiff's entitlement in equity for having borne the burden of paying £104 for the benefit of the defendants (see p. 797, letter A, post).

As to the recovery of money paid where payment was compellable by law although the liability ultimately was another's, see 8 Halsbury's Laws (3rd Edn.) 228, para. 393; as to the nature of the action for money had and received, and the doctrine of unjust enrichment, see ibid., 236, para. 409.

As to the powers of the Receiver for the Metropolitan Police District, see 25 Halsbury's Laws (2nd Edn.) 301, para. 490.]

Cases referred to:

(1) *Metropolitan Police District Receiver* v. *Tatum*, [1948] 1 All E.R. 612; [1948] 2 K.B. 68; 112 J.P. 209; sub nom. *Wood* v. *Tatum, Metropolitan Police Receiver* v. *Tatum*, [1948] L.J.R. 1171; 2nd Digest Supp.

(2) *Green* v. *Berliner*, [1936] 1 All E.R. 199; [1936] 2 K.B. 477; 105 L.J.K.B. 662; 155 L.T. 486; Digest Supp.

(3) *Forster* v. *Baker*, [1910] 2 K.B. 636; 79 L.J.K.B. 664; 102 L.T. 29; 30 Digest (Repl.) 232, *793*.

(4) *Huddersfield Police Authority* v. *Watson*, [1947] 2 All E.R. 193; [1947] K.B. 842; [1948] L.J.R. 182; 177 L.T. 114; 111 J.P. 463; 2nd Digest Supp.

(5) *Casson* v. *Churchley*, (1884), 53 L.J.Q.B. 335; 50 L.T. 568; 30 Digest (Repl.) 232, *789*.

(6) *A.-G. for New South Wales* v. *Perpetual Trustee Co. (Ltd.)*, [1955] 1 All E.R. 846; [1955] A.C. 457; 119 J.P. 312.

(7) *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.*, [1936] 3 All E.R. 696; [1937] 1 K.B. 534; 106 L.J.K.B. 437; 156 L.T. 4; Digest Supp.

(8) *Moule* v. *Garrett*, (1872), L.R. 7 Exch. 101; 41 L.J.Ex. 62; 26 L.T. 367; 31 Digest (Repl.) 458, *5846*.

(9) *Bonner* v. *Tottenham & Edmonton Permanent Investment Building Society*, [1899] 1 Q.B. 161; 68 L.J.Q.B. 114; 79 L.T. 611; 31 Digest (Repl.) 459, *5863*.

(10) *Craven-Ellis* v. *Canons, Ltd.*, [1936] 2 All E.R. 1066; [1936] 2 K.B. 403; 105 L.J.K.B. 767; 155 L.T. 376; Digest Supp.

(11) *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; [1943] A.C. 32; 111 L.J.K.B. 433; 167 L.T. 101; 2nd Digest Supp.

(12) *Chandler* v. *Webster*, [1904] 1 K.B. 493; 73 L.J.K.B. 401; 90 L.T. 217; 12 Digest (Repl.) 463, *3461*.

(13) *Jones (R. E.), Ltd.* v. *Waring & Gillow, Ltd.*, [1926] A.C. 670; 95 L.J.K.B. 913; 135 L.T. 548; Digest Supp.

(14) *Kelly* v. *Solari*, (1841), 9 M. & W. 54; 11 L.J.Ex. 10; 152 E.R. 24; 35 Digest 151, *487*.

(15) *Holmes* v. *Hall*, (1704), 6 Mod. Rep. 161; Holt, K.B. 36; 87 E.R. 919; 12 Digest (Repl.) 257, *1989*.

(16) *Moses* v. *Macferlan*, (1760), 2 Burr. 1005; 1 Wm. Bl. 219; 97 E.R. 676; 12 Digest (Repl.) 257, *1987*.

(17) *Sinclair* v. *Brougham*, [1914] A.C. 398; 83 L.J.Ch. 465; 111 L.T. 1; 12 Digest (Repl.) 316, *2436*.

(18) *Hunter* v. *Hunt*, (1845), 1 C.B. 300; 14 L.J.C.P. 113; 4 L.T.O.S. 374; 135 E.R. 555; 30 Digest (Repl.) 522, *1610*.

(19) *Dering* v. *Winchelsea (Earl)*, (1787), 1 Cox, Eq. Cas. 318; 29 E.R. 1184; sub nom. *Deering* v. *Winchelsea (Earl)*, 2 Bos. & P. 270; 20 Digest 249, *136*.

(20) *Reading* v. *A.-G.*, [1951] 1 All E.R. 617; [1951] A.C. 507; 2nd Digest Supp.

(21) *Whitham* v. *Bullock*, [1939] 2 All E.R. 310; [1939] 2 K.B. 81; 108 L.J.K.B. 444; 160 L.T. 377; Digest Supp.

(22) *Edmunds* v. *Wallingford,* (1885), 14 Q.B.D. 811; 54 L.J.Q.B. 305; 52 L.T. 720; 49 J.P. 549; 12 Digest (Repl.) 592, *4587*.

(23) *Bradford Corpn.* v. *Webster,* [1920] 2 K.B. 135; 89 L.J.K.B. 455; 123 L.T. 62; 84 J.P. 137; 34 Digest 183, *1490*.

(24) *Inland Revenue Comrs.* v. *Hambrook,* [1956] 1 All E.R. 807.

Action.

On Jan. 25, 1952, John Edward Bowman, a police constable in the Metropolitan Police, was run down while on duty by a motor lorry owned by the first defendants, Croydon Corporation, and driven by the second defendant, Jesse William Holloway, as their servant or agent. As a result of the accident, Mr. Bowman was incapacitated from performing his duties as a police constable from Jan. 25, 1952, to June 9, 1952, and from Sept. 29, 1952, to Oct. 28, 1952, during which time, the plaintiff, the Receiver for the Metropolitan Police District, paid Mr. Bowman his full wages and allowances as a police constable. The plaintiff brought an action against the defendants to recover the amount of wages which had been paid to Mr. Bowman during his incapacity. At the hearing of the action, the following facts were agreed:

> " (i) That at all material times John Bowman was a police constable in the Metropolitan Police. (ii) That the defendants have paid the sum of £2,513 12s. 6d. in full satisfaction of the claim made by the said Bowman in an action No. 1952 B No. 6002 brought by him in the Queen's Bench Division against the defendants. (iii) That the said Bowman made no claim for loss of wages in his said action. If the said Bowman had been entitled to include and recover his loss of wages as an item of special damage in his said action against the defendants he would have recovered £2,617 12s. 6d. (i.e., £2,513 12s. 6d. plus £104). (iv) That the said Bowman was incapacitated and prevented from carrying out his duties as a police constable for seven months as a result of injuries caused to him by the negligence of the defendants. (v) That during the said period the plaintiff paid to the said Bowman his full wages and allowances as a police constable. (vi) The net sum so paid is £153 13s. 6d. (vii) That the defendants have agreed the said figure subject to liability. (viii) That the defendants admit the allegations of negligence in this action."

The plaintiff claimed that the defendants were liable to Mr. Bowman in damages as a result of the accident, and had benefited to the extent of £104 part of the £153 13s. 6d. paid by the plaintiff, that the defendants' obligation to Mr. Bowman had been reduced pro tanto, and the plaintiff was entitled to recover the £104 from them. The defendants contended that the claim disclosed no cause of action and that the damages claimed were irrecoverable at law.

Gerald Gardiner, Q.C., and *P. M. O'Connor* for the plaintiff.

Montague Berryman, Q.C., and *Humfrey Edmunds* for the defendants.

SLADE, J.: This is a test action brought to decide whether *Metropolitan Police District Receiver* v. *Tatum* (1) ([1948] 1 All E.R. 612) was rightly decided. I regard the point as a difficult one, and I should like at the outset to express my indebtedness to counsel on both sides for the assistance they have been good enough to give me. *Metropolitan Police District Receiver* v. *Tatum* (1) was decided by ATKINSON, J., and it is common ground between the parties to the present action that the facts and the principle involved in this case are indistinguishable from the facts and the principle in that case, where the plaintiff was the same as the plaintiff in this case. I am not bound by the decision of ATKINSON, J., although any judgment of that learned judge would be to me of the highest persuasive authority, and I asked counsel for the plaintiff whether he was able to find any authorities other than those to which I referred in a case* I tried some years ago which establishes the position that a judge is not bound by the decision of a judge of co-ordinate jurisdiction. The case I had in mind was *Green* v. *Berliner* (2) ([1936] 1 All E.R. 199; [1936] 2 K.B. 477), where du Parcq, J., referred to the observations of Bray, J., in *Forster* v. *Baker* (3) ([1910] 2 K.B. 636 at p. 638). I asked counsel whether he could find any authority indicating how far a judge, who has to consider the very point which has already been decided by a court of co-ordinate jurisdiction, should allow the decision to affect his mind, and he has been good enough to give me two references which I have found of great assistance.

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* *Longdon-Griffiths* v. *Smith,* [1950] 2 All E.R. 662 at p. 671.

First he referred me to an article by Sir William Holdsworth at p. 180 of vol. 50 of the Law Quarterly Review where the very learned lawyer, dealing with case law, referred to what he describes as " one of the ablest books on this subject, entitled The Science of Legal Judgment ", published by James Ram in 1834. He referred to a statement by Ram which was in these words:

> " ' a case decided is called a precedent; and is an authority, which, under many circumstances, binds a court to make the same decision in a future similar case '. Sir Frederick Pollock thus states the modern rule*: ' the decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and, though not absolutely binding on courts of co-ordinate authority nor on that court itself, will be followed in the absence of strong reasons to the contrary '."

The other authority to which counsel referred me was a decision of Lord Goddard, C.J., in *Huddersfield Police Authority* v. *Watson* (4) ([1947] 2 All E.R. 193), and the passage from the Lord Chief Justice's judgment is at p. 196. I quote only these words:

> " We are considering a decision of this court. So far as the dictum of Grove, J., [in *Casson* v. *Churchley* (5) ((1884), 53 L.J.Q.B. 335 at p. 336)] is concerned, I can only say for myself that I think the modern practice is that a judge of first instance, although, as a matter of judicial comity, he would usually follow the decision of another judge of first instance unless he was convinced that that judgment was wrong, certainly is not bound to follow the decision of a judge of equal jurisdiction. A judge of first instance is only bound to follow the decisions of the Court of Appeal and the House of Lords and, it may be also, of the Divisional Court."

I am not, of course, relieved by Atkinson, J.'s decision of my duty to bring my own judgment to bear on the point, but when I have done so I should act in accordance with the principles that I have just read; and not only, as I have said, should I regard any judgment of Atkinson, J., as being of high persuasive authority, but I should follow it unless I am convinced that it is wrong. I am, however, entitled to give my own reasons for arriving at the same conclusion, if I do arrive at the same conclusion. [His Lordship stated the facts and continued:] In the course of the argument, counsel for the defendants made an admission in terms which I took down in my notebook in the following words:

> " [Counsel] concedes that the Receiver was compelled to pay Bowman the sum claimed in this action by the statutes relating to the Metropolitan Police and the regulations made thereunder."

Counsel never conceded that Mr. Bowman could have sued the plaintiff for the money which the plaintiff, in fact, paid him. I think the only concession he made was that process would have been available, such as a mandamus, for example, whereby, if the plaintiff did not pay Mr. Bowman, the plaintiff could be compelled to perform his statutory obligations. I hope I have stated the concession correctly. The last thing I desire to do is to put any concession forward which is inconsistent with what counsel intended. The importance of

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* A First Book of Jurisprudence (6th Edn.), p. 321.

A the payment being made under compulsion of law will transpire when I deal with the legal principles involved. It is sufficient for me to say at the moment that, whether it is conceded or not, counsel for the plaintiff took me through the whole of the relevant statutes dealing with the Metropolitan Police and with the formation, if I may so use the word, of the plaintiff as a corporation sole with liability to sue and to be sued, and the regulations made under the various B statutes. They were all gone into in detail by ATKINSON, J., in *Metropolitan Police District Receiver* v. *Tatum* (1), and it is sufficient for me to say on that point that I find that the plaintiff was legally compellable to pay the sum of £104 sued for in this action to Mr. Bowman for the reasons that ATKINSON, J., gave in *Metropolitan Police District Receiver* v. *Tatum* (1). I agree with his judgment on that point and with the reasons he gave for it.

C The next point I desire to emphasise is that this action is based, and based only, on quasi-contract. At the very outset of his argument counsel for the plaintiff, with his usual clarity, and so that I might immediately disembarrass my mind of anything which was irrelevant, mentioned five cases which he said were completely irrelevant. He made it clear to me not only on what cause of action this action was based, namely, quasi-contract, but on what cause of D action it was not based, that is, the action per quod servitium amisit. Therefore, counsel cited as irrelevant all the cases, including the recent decision of the Privy Council in *A.-G. for New South Wales* v. *Perpetual Trustee Co.* (*Ltd.*) (6) ([1955] 1 All E.R. 846), which dealt with the per quod type of action.

I said this is a test case. Counsel for the plaintiff told me that, so far as the Metropolitan Police area is concerned (which, I think he said, covered an area E of about fifteen miles' radius of Charing Cross), there were some seventy claims pending by the plaintiff, who has paid moneys by way of emoluments and, no doubt, by way of hospital expenses, and so on, to police constables in the Metropolitan Police Force who have been injured and whose incapacity has been caused by the alleged negligence of drivers of vehicles. There are probably many others in districts outside the area of the Metropolitan Police. Strangely enough, possibly F wisely enough, the plaintiff has never sought in any case, I was told, to attempt to recover moneys paid by him in such circumstances on the basis of per quod, either because he had the foresight to see the difficulties of the relationship between a police constable and whoever, if anyone, hereafter may be held to employ him, or because he possibly thought that, whoever did employ him, it would not be the plaintiff, who was the corporation sole, so to speak, to administer G the funds of the Metropolitan Police when they are obtained in the usual way by precepts on the ratepayers. All his claims have been based, I am told, as they were in *Metropolitan Police District Receiver* v. *Tatum* (1), on quasi-contract. I mention that merely to show the importance of ascertaining whether the 1948 decision is correct.

In deciding *Metropolitan Police District Receiver* v. *Tatum* (1), ATKINSON, J., H applied the principle enunciated by LORD WRIGHT, M.R., in *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* (7) ([1936] 3 All E.R. 696), where LORD WRIGHT (the other two members of the court, ROMER, L.J., and MACNAGHTEN, J., concurring) applied the principle stated in the edition of LEAKE ON CONTRACTS current in the year 1872, and cited with approval by COCKBURN, C.J., in *Moule* v. *Garrett* (8) ((1872), L.R. 7 Exch. 101 at p. 104). I must start, therefore, by I examining the principle so stated by LEAKE, which appears with only slight verbal alteration in the current edition of LEAKE ON CONTRACTS (8th Edn.), at p. 46. The facts shortly in *Moule* v. *Garrett* (8) were that the plaintiff was the lessee and the defendant was a sub-assignee, that is to say, not a direct assignee, from the lessee of certain premises which contained in the lease a covenant to repair. While the sub-assignee was actually in possession, he failed to comply with the covenant, with the result that the lessor put in a claim for dilapidations, and the amount claimed for putting the premises into conformity with the state of repair required by the covenant was £75. The £75 would be damages for breach of covenant. As the assignee did not keep the premises in repair, the lessor called on the lessee to pay him the £75 damages. The lessee did so. There would have been no shadow of defence to the action. The lessee is liable throughout the term on his covenant contained in the lease. There was no privity of contract between the lessee and the sub-assignee, although the sub-assignee was equally liable to the lessor because a covenant to repair runs with the land, and any assignee, whether immediate or indirect, is liable to the lessor so long as he remains in possession of the demised premises by privity of estate. The lessee, having met the demand of the lessor for payment of the £75 damages for breach of covenant, sought to recover it from the sub-assignee. As I have said, there being no privity of contract there was no contract to sue on. He, therefore, sued him in quasi-contract. In the Court of Exchequer he succeeded, and CHANNELL, B., said in substance, the position being as it was, that the lessee was nothing more than a surety vis-à-vis the lessor for the performance by the sub-assignee of his obligations, and, as he had been called on by the lessor to pay, he was entitled to recover from the sub-assignee in the same way that the surety is entitled to recover from the principal debtor. In the Court of Exchequer Chamber, COCKBURN, C.J., as I read the case, entirely agreed with the ground on which CHANNELL and PIGOTT, BB., in the court below decided the case. He added, however, that there was another principle on which the plaintiff was entitled to succeed. That principle, he said, was accurately stated in the then current edition of LEAKE ON CONTRACTS in words which he cited with approval. It is right, as counsel for the defendants emphasised, that I should read the few words before he cites that principle so that they should not be divorced from their context. COCKBURN, C.J., said this (L.R. 7 Exch. at p. 103):

> " Another ground on which the judgment below may be upheld, and, as I think, a preferable one, is that, the premises which are the subject of the lease being in the possession of the defendants as ultimate assignees, they were the parties whose duty it was to perform the covenants which were to be performed upon and in respect of those premises. It was their immediate duty to keep in repair, and by their default the lessee, though he had parted with the estate, became liable to make good to the lessor the conditions of the lease. The damage therefore arises through their default, and the general proposition applicable to such a case as the present is, that where one person is compelled to pay damages by the legal default of another, he is entitled to recover from the person by whose default the damage was occasioned the sum so paid. This doctrine, as applicable to cases like the present, is well stated by MR. LEAKE in his work on CONTRACTS, p. 41: ' Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount '. Whether the liability is put on the ground of an implied contract, or of an obligation imposed by law, is a matter of indifference: it is such a duty as the law will enforce. The lessee has been compelled to make good an omission to repair, which has arisen entirely from the default of the defendants, and the defendants are therefore liable to reimburse him."

I will refer to that in short as the " Leake " or " Cockburn " principle.

I pass from that case to *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* (7), where the defendants were a firm of furriers who had imported a consignment of squirrel skins from Russia. Out of the consignment they stored ten packages in the bonded warehouse of the plaintiffs. Whilst those ten packages were in that bonded warehouse they were stolen, as the court found as a fact, through no default on the part of the plaintiffs as warehousemen. Under the machinery for the collection of customs dues, the Commissioners of Customs and Excise do not insist on the payment of the dues the moment they become due in law, that is to say, at the moment of importation, but allow payment to be deferred so long as they are retained in what is known as a bonded warehouse, because they may be re-exported or may be used as ship's stores, or possibly in other circumstances in which duty will not ultimately become payable or will be remitted. The goods being stolen could be made available by the thieves on the home market, so the Commissioners of Customs and Excise demanded the amount of the duty on them from the plaintiffs, who were the warehousemen, and the plaintiffs were forced to pay those duties. Of course, the importers (the defendants) were also and, indeed, primarily liable, for the payment of those dues. But the dues had only to be paid once. Therefore, when the warehousemen (the plaintiffs) complied with the demand of the Commissioners of Customs and Excise to pay the dues, they paid them. Having paid them, they thereby relieved the importers of liability to pay the dues. In those circumstances, the plaintiffs asked the importers to repay them the amount they had paid as customs duty. The defendants refused to pay. The action was brought, and Branson, J., held that the plaintiffs were entitled to succeed. The importers appealed to the Court of Appeal. The Court of Appeal agreed with Branson, J., on the first point, namely, that the theft had not been due to the default of the warehousemen as bailees. The action had to be based on quasi-contract because the plaintiffs could derive no support for their claim from the terms of the contract of bailment. Having dealt with the machinery for the collection of dues and emphasising that, under that machinery, the dues originally became payable by the importer at the moment of importation into this country, Lord Wright, M.R., said ([1936] 3 All E.R. at p. 706):

> "Under these circumstances, the plaintiffs claim that they are entitled to recover from the defendants the amount which they have paid to the customs in respect of duties due on the defendants' goods. They make their claim as for money paid to the defendants' use on the principle stated in Leake on Contracts. The passage in question is quoted in the Exchequer Chamber by Cockburn, C.J., in *Moule* v. *Garrett* (8) and is in these terms . . ."

Lord Wright then read the passage which I have already read, and continues:

> "This passage remains, with a slight verbal alteration, in the eighth edition of Leake on Contracts, at p. 46. The principle has been applied in a great variety of circumstances. Its application does not depend on privity of contract."

Then he deals with *Moule* v. *Garrett* (8), with which I have already dealt, and with *Bonner* v. *Tottenham & Edmonton Permanent Investment Building Society* (9) ([1899] 1 Q.B. 161), to which I shall refer later, for what I may call the equitable aspect of the rule. Then Lord Wright says this ([1936] 3 All E.R. at p. 706):

> "The essence of the rule is that there is a liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment, because his debt is discharged either entirely or pro tanto, whereas the defendant is primarily liable to pay as between himself and the plaintiff. The case is analogous to that of a payment by a surety which has the effect of discharging the principal's debt and which, therefore, gives a right of indemnity against the principal."

Lord Wright, after citing what he describes as "two of the numerous cases in which this principle has been applied", then says this (ibid., at p. 707):

> "These statements of the principle do not put the obligation on any ground of implied contract or of constructive or notional contract. The obligation is imposed by the court simply under the circumstances of the case

> and on what the court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law, apart from any consent or intention of the parties or any privity of contract."

In *Moule* v. *Garrett* (8), Cockburn, C.J., left it open whether the liability was to be put on the ground of an implied contract or of an obligation imposed by law. Lord Wright puts it on the ground of an obligation imposed by law in the passage which I have just read. There is a difference of opinion, I gather, amongst distinguished academic lawyers which is the true principle on which it is based. The two schools of thought can be seen by a reference to the Law Quarterly Review, vol. 53, at p. 302, on the one hand, and p. 447 and p. 449 on the other, and also by a reference to an interesting article by Denning, L.J., on *Craven-Ellis* v. *Canons, Ltd.* (10) ([1936] 2 All E.R. 1066), which appears in the Law Quarterly Review, vol. 55, at p. 54. It was difficult to imply a contract in *Craven-Ellis* v. *Canons, Ltd.* (10), because the money was paid under a contract which was held to be void, and it is difficult to imply a contract when there is an express one. It seems to me to matter little in the application of the principle which of the two schools of thought is correct. The question in either case seems to me to be: In what circumstances is a contract to be implied or, as I prefer to say, imputed, or will the law impose the obligation independently of any fictional contract? I think the authorities establish that the answer to that question depends on the answer to a further question: Is it fair and reasonable to imply such a contract or to impose an obligation in law? Does natural justice require it? I have at the moment only dealt, and then only dealt partly, with what I may call the common law application of the case. I shall in due course come to the application of the principle in equity.

Counsel for the defendants submitted that there are five requirements for the application of the Leake principle. First, he said, there must be the same debt; secondly, both plaintiff and defendant must be liable to the same person for that debt; thirdly, the defendant must be primarily liable for that debt, that is to say, as between himself and the plaintiff; fourthly, the plaintiff must have been compelled to pay the debt; and fifthly, the plaintiff's payment must have operated to relieve the defendant of his primary liability. On the common law principle, I think he is right in saying that all those requirements are necessary, provided the words " the same debt " and the words " primarily liable " are properly understood. Counsel said, always assuming, of course, that there was a debt at all in this case (which he strenuously contested all along) that it was not the same debt. He said that the liability, if any, in the sense of a compellable liability of the plaintiff to the policeman was in contract or payable under the requirements of a statute, or possibly on a quantum meruit. In any case, it was either contractual or possibly quasi-contractual. The liability, if any, of the defendants was in tort for negligence. Furthermore, he said on that point that the defendants' liability in tort, if it existed at all, was not to pay wages, which was the quality of the plaintiff's liability, but to pay Mr. Bowman damages for loss of faculty, and that the amount of the wages would merely be evidence which, with other matters, would assist the court to estimate the value of the loss of faculty. He said that this again showed that the two obligations, assuming they both existed, could not be the same debt.

In the first place, I think, that when Lord Wright, having re-enunciated the Leake principle, went on to say what the essence of the rule was, he was merely applying it to one of what he called the large variety of circumstances to which it was applicable, namely, the facts of the case with which he was dealing. I feel sure that by " the same debt ", for example, he did not mean that it must necessarily be the same liquidated sum of money. As I have pointed out, in *Moule* v. *Garrett* (8) it was not money in that sense at all; it was damages for breach of covenant. I understand that, by the words " the same debt ", Lord Wright meant no more than that the third person, the person in the position of a creditor, could have recovered the same sum of money from either of the parties to the action. The cause of action for its recovery need not be the same, and, indeed, it was not the same in *Moule* v. *Garrett* (8). The claim against the lessee, had it been necessary to bring it, would have been for damages for breach of covenant under the lease. The claim against the sub-assignee was, as I have said, based on privity of estate, because there was no privity of contract. Again, as to the words "primarily liable", quite obviously the word "primarily" cannot refer to point of time, because, in *Moule* v. *Garrett* (8), the liability of the lessee arose under the lease, which, ex hypothesi, must have been earlier in time than a sub-assignment. "Primarily liable" means, in my view, liable in the sense that, as between a principal debtor and a surety, both of whom are equally liable to the creditor, the principal debtor is as between themselves primarily and the surety only secondarily liable.

Finally, on the point whether this is a sum of money for which both the defendants and the plaintiff in this action would have been liable to Mr. Bowman, I again refer to No. (iii) of the agreed facts:

> "If the said Bowman had been entitled to include and recover his loss of wages as an item of special damage in his said action against the defendants he would have recovered"

£104 more than he actually did. I must, of course, deal with the words "If the said Bowman had been entitled to include and recover his loss of wages". Counsel for the defendants contends, as I understand it, that, in no circumstances whatever, could Mr. Bowman ever have included this loss of wages in his claim against the defendant tortfeasors. Counsel says, first of all, that the money had already been paid to Mr. Bowman by the plaintiff, and for that reason alone he could not have recovered it from the defendants. Secondly, I understand counsel to say that, if it had not been paid by the plaintiff, Mr. Bowman still could not have recovered it because it would have been a complete defence to a claim for special damage based on that loss to say that, although he had not been paid it by the plaintiff, in fact he had a legal right to recover it from the plaintiff. I do not accept either of those propositions in law. As to the second point, in my view, a person in the position of Mr. Bowman can recover what he has lost in respect of wages, if he has not been paid, either from the plaintiff or from the tortfeasor whose negligence injures him, and is entitled to elect which of the two he will sue. Counsel for the defendants contended that no person injured by a tort is entitled to take any step which would have the effect of inflating his claim against the tortfeasor. It is perfectly true he is not entitled to take any such step which the law would regard as unreasonable, but I am satisfied that the law raises no objection to a man adopting a high moral or high-minded attitude in saying: "It is perfectly true I can sue the plaintiff" (assuming counsel's contention is wrong in saying he can never sue the plaintiff) "and can recover from him or I can recover from the person who has injured me. But I want to be fair. As both courses are open to me, I prefer to sue the man and recover the money from him who has been the cause of my no longer being able to give any consideration to the plaintiff for the wages he undertook to pay me during the time of my incapacity". As I say, I am satisfied that he has a right of election, and, if he had not been paid by the plaintiff, it would be no answer whatever to a claim for loss of wages included in the special damage to say that he could have sued the plaintiff and have recovered them before claiming from the defendant tortfeasor. It is, therefore, unnecessary to consider whether, even if he had been paid, he could still have recovered from the tortfeasor, although, if he did so, he would not be able to retain both sums, but could recover solely as a trustee for the plaintiff.

I, therefore, arrive at the conclusion that Mr. Bowman, if he had not already been paid by the plaintiff, as he was in this case, would have been entitled to include and recover against these defendants his loss of wages which, on that footing, is agreed to be the sum of £104. The question can never arise in an action of this kind where the plaintiff has not, in fact, paid the injured party's wages, because no action based on quasi-contract will lie until the plaintiff has actually paid the sum of money which he seeks to recover from the defendants, and that is why it is agreed that the injured party made no claim for that sum in his action against the two defendants.

Lord Wright in detailing the conditions which he said were the essence of the rule in *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* (7), was, I am satisfied, in no way seeking to narrow its interpretation or to narrow the words used by Leake and by Cockburn, C.J., in *Moule* v. *Garrett* (8). I am fortified in that view by what Lord Wright said only six years later in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.* (11) ([1942] 2 All E.R. 122), the well-known case which overruled *Chandler* v. *Webster* (12) ([1904] 1 K.B. 493) and other "Coronation cases". I read from the opinion of Lord Wright ([1942] 2 All E.R. at p. 135):

> "It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution. The root idea was stated by three Lords of Appeal, Lord Shaw, Lord Sumner and Lord Carson, in *R. E. Jones, Ltd.* v. *Waring & Gillow, Ltd.* (13) ([1926] A.C. 670), which dealt with a particular species of the category, namely, money paid under a mistake of fact. Lord Sumner, at p. 696, referring to *Kelly* v. *Solari* (14) ((1841), 9 M. & W. 54), where money had been paid by an insurance company under the mistaken impression that it was due to an executrix under a policy which had in fact been cancelled, said: 'There was no real intention on the company's part to enrich her'. Payment under a mistake of fact is only one head of this category of the law. Another class is where, as in this case, there is prepayment on account of money to be paid as consideration for the performance of a contract which in the event becomes abortive and is not performed, so that the money never becomes due. There was in such circumstances no intention to enrich the payee. This is the class of claims for the recovery of money paid for a consideration which has failed. Such causes of action have long been familiar and were assumed to be commonplace by Holt, C.J., in *Holmes* v. *Hall* (15) ((1704), 6 Mod. Rep. 161)."

I pass over a few lines, and Lord Wright continues ([1942] 2 All E.R. at p. 136):

> "By 1760 actions for money had and received had increased in number and variety. Lord Mansfield, in a familiar passage in *Moses* v. *Macferlan* (16) ((1760), 2 Burr. 1005), sought to rationalise the action for money had and received, and illustrates it by some typical instances. He said (ibid., at p. 1012): 'It lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express, or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money'. Lord Mansfield prefaced this pronouncement by observations, at p. 1008, which are to be noted: 'If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action [sc. indebitatus assumpsit] founded in the equity of the plaintiff's case, as it were, upon

> A a contract ("quasi ex contractu" as the Roman law expresses it)'. LORD MANSFIELD does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact he denies that there is a contract. The obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or B tort, though it resembles contract rather than tort. This statement of LORD MANSFIELD has been the basis of the modern law of quasi-contract, notwithstanding the criticisms which have been launched against it. Like all large generalisations, it has needed and received qualifications in practice. There is, for instance, the qualification that an action for money had and received does not lie for money paid under an erroneous judgment or for C moneys paid under an illegal or excessive distress. The law has provided other remedies as being more convenient. The standard of what is against conscience in this context has become more or less canalised or defined; but in substance the juristic concept remains as LORD MANSFIELD left it. The gist of the action is a debt or obligation implied or more accurately imposed by law, in much the same way as the law enforces as a debt the obligation to D pay a statutory or customary impost."

I will refer to one more short passage, where LORD WRIGHT says ([1942] 2 All E.R. at p. 137):

> "In fact the common law still employs the action for money had and received as a practical and useful, if not complete or ideally perfect, instrument to prevent unjust enrichment, aided by the various methods of technical E equity which are also available, as they were found to be in *Sinclair* v. *Brougham* (17) ([1914] A.C. 398)."

So much for the common law application of the principle.

I now come to the equitable application of the principle, which is to broaden the rule, or, at any rate, to render it more flexible where necessary to meet the F requirements of justice. In this connection, I refer to the judgment of VAUGHAN WILLIAMS, L.J., in *Bonner* v. *Tottenham & Edmonton Permanent Investment Building Society* (9). The question raised in that case, as appears from an earlier passage of VAUGHAN WILLIAMS, L.J.'s judgment, was whether an underlessee, who was a mortgagee by sub-demise from an assignee of the lessee and who was in possession of the demised lands, could be sued for money paid by the lessee G who had been compelled, according to his covenant, to pay the rent reserved by the principal lease. The demise contained an express covenant by the mortgagee, if he entered into possession, to keep down the rent. The mortgagee did enter into possession, and he did not pay the rent. Consequently the lessee was forced to pay it, and the lessee sought to recover it from the mortgagee. Unlike *Moule* v. *Garrett* (8), there was not only no privity of contract between H the mortgagee and the lessor, but there was no privity of estate, since there is no privity of estate between a mortgagee by sub-demise (who is an underlessee) and the lessor. In *Bonner* v. *Tottenham & Edmonton Permanent Investment Building Society* (9) it was held that the lessee could not recover because there never was a liability on the part of the mortgagee towards the lessor. VAUGHAN WILLIAMS, L.J., said ([1899] 1 Q.B. at p. 173):

> I "These being the conditions upon which the defendants in *Moule* v. *Garrett* (8), the sub-assignees of the lease, were held liable, it is necessary to consider whether one finds these conditions in principle present in a case in which lessees, who have been compelled to pay the rent reserved by the lease, are seeking to get recoupment from underlessees of an assignee of the lease, who are in possession as mortgagees."

Then later on VAUGHAN WILLIAMS, L.J., says (ibid., at p. 174):

> "I am now dealing only with the principle upon which the common

> law liability is based. There is a common law principle of liability, and also a principle of liability in equity, and these two principles differ. The common law principle requires a common liability to be sued for that which the plaintiff had to pay, and an interest of the defendant in the payment in the sense that he gets the benefit of the payment, either entirely, as in the case of the assignee of a lease, or pro tanto, as in the case of a surety who has paid, and has his action for contribution against his co-surety. The principle in equity seems wide enough to include cases in which there is community of interest in the subject-matter to which the burden is attached, which has been enforced against the plaintiff alone, coupled with benefit to the defendant, even though there is no common liability to be sued. In such a case it seems to me a plaintiff may recover in equity, although there is no common liability to be sued. The two principles are well illustrated by the case of *Hunter* v. *Hunt* (18) ((1845), 1 C.B. 300) and the observations of EYRE, C.B., in *Dering* v. *Earl of Winchelsea* (19) ((1787), 2 Bos. & P. 270). The former was a case in which one underlessee of a separate portion of premises, the whole of which were held under one original lease at an entire rent, who had paid the whole rent under threat of distress, brought an action against an underlessee to recover from him a proportion of the money which he had so paid as money paid to his use, and it was held that at law he had no right of action. In the latter case, the lord chief baron, in dealing with the principle in equity, takes as an illustration of the equitable principle a series of cases, in some of which the defendant seems to have been under no liability to be sued, but in which the goods of one had been legally taken or sacrificed for the benefit, not of himself alone, but of himself and others, and says, that ' the reason is that they are all in aequali jure, and, as the law requires equality, they shall equally bear the burden. This is considered as founded in equity. The principle operates more clearly in a court of equity than at law. At law the party is driven to an audita querela or scire facias to defeat the execution and compel execution to be taken against all. There are more cases of contribution in equity than at law '."

VAUGHAN WILLIAMS, L.J., further says ([1899] 1 Q.B. at p. 176):

> " For these reasons I think that the right of the lessor to distrain or re-enter does not constitute a liability in the underlessee to the lessor within the meaning of the condition of the common law principle. But the plaintiff may be entitled to recover within the equitable principle, if he has been compelled to pay or bear the burden, and can establish that the defendant has such an interest or benefit as to make the maxim apply ' Qui sentit commodum sentire debet et onus '; but in my judgment an underlessee has no such interest in the lease or benefit from the payment of the rent as to make that maxim apply or to bring him within the equitable principle. The equitable principle seems to me based upon natural justice requiring that equity should neutralise ' inter se ' the accident that the burden has been borne by one for the benefit of others associated with him in interest, whether such incidence of burden is the result of election of a plaintiff who might have sued all those interested, or whether it is the result of the requirements of the law as to the parties to actions, or whether it is the result of what may be more properly called ' accident ' like the ' jettison ' of a part of a cargo severally owned, or the seizure of wines on behalf of the Crown in right of prisage. In each of these cases the application of the equitable principle depends on community of interest in something in respect of which one has borne a burden for the benefit of another or others."

I remind myself that the corresponding words used by LORD WRIGHT, M.R., in *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros,* (7) were ([1936] 3 All E.R. at p. 707):

> " The obligation is imposed by the court simply under the circumstances of the case and on what the court decides is just and reasonable, having regard to the relationship of the parties."

"Just and reasonable, having regard to the relationship of the parties " is the way it is put by Lord Wright. " Community of interest in something in respect of which one has borne a burden for the benefit of another or others " is the way the equitable principle is formulated by Vaughan Williams, L.J.

Counsel for the defendants submitted that if the plaintiff was under any duty to pay Mr. Bowman, that duty continued and was not affected by the negligence of the defendants. That is incontrovertible. Therefore, he says that the plaintiff had lost nothing by way of the negligence save the loss of service. He said, moreover, that the loss of service was not a loss to the plaintiff but, I gather, a loss to the Crown. That would have been a cogent argument had this case been based on per quod. I think counsel for the plaintiff was right in saying that what that argument really amounts to is this: " If you had sued me per quod servitium amisit, I should have had two answers: first, there is no relationship of master and servant properly so called between the plaintiff and the metropolitan policeman; secondly, in any case it is not you who have lost the services of the police officer, it is someone else. You are merely the trustee for the administration of the police funds." In most cases of quasi-contract the plaintiff does sustain a loss because he is called on to pay a debt for which the defendant is primarily liable. It is not essential, however, to a cause of action based on quasi-contract that the plaintiff should sustain a loss at all. It is sufficient in another type of case that the defendant should have come into possession of moneys which it would be unconscionable for him to retain, as, for example, the receipt of bribes: see *Reading* v. *A.-G.* (20) ([1951] 1 All E.R. 617).

I was referred by counsel for the defendants to Professor Winfield's statement of the principle and its extent in his book, the Law of Quasi-Contracts. The book is dated 1952. Sir Percy Winfield deals (at p. 62) with the form of quasi-contract arising from compulsory discharge of the liability of another person. He says (at p. 63):

> " In spite of our endeavour to extract from the decided cases some broad general principle underlying the law as to compulsion in quasi-contract, the utmost we can do is to enlarge our conclusion that, where A, under what the law regards as compulsion, has paid money to B or to C in such circumstances that the law considers that its retention by B (where the payment was to B), or B's failure to recoup A (where the payment was to C) would constitute an unjust benefit to B at the expense of A, A can recover the amount of payment from B. Vague as this statement is, it is impossible to make it more exact, for (i) what the law regards as ' compulsion ' does not tally with the layman's idea of it; a striking illustration of this is the limited interpretation attached by the courts to the phrase ' voluntary payment '; the cases, as a whole, do not warrant any hard and fast definition of ' unjust benefit '; most of them can be grouped under one or other of the first four classes mentioned below, but, as is shown under the fifth class, the preceding four classes are not exhaustive."

He gives the first class: Payment, under the application of legal process, of money not in fact due. The second class with which I am primarily concerned is on p. 73: Payment, under a legal obligation, to a third party, of money which the defendant was also liable to pay to the third party. Sir Percy Winfield then deals with Lord Wright's judgment in *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* (7), and (at p. 74) cited the following passage from Rowlatt on Principal and Surety (3rd Edn.), p. 173:

> " Quite apart from suretyship, there is a broad rule in equity that ' if, as between several persons or properties all equally liable at law to the same

> demand, it would be equitable that the burden should fall in a certain way, A
> the court will so far as possible, having regard to the solvency of the different parties, see that, if that burden is placed inequitably by the exercise of the legal right, its incidence should afterwards be readjusted '."

That passage was also cited with approval by CLAUSON, L.J., in delivering the judgment of the court in *Whitham* v. *Bullock* (21) ([1939] 2 All E.R. 310). It B
was in this case that the court also said (ibid., at p. 316) that the principle had been authoritatively expounded by VAUGHAN WILLIAMS, L.J., in *Bonner* v. *Tottenham & Edmonton Permanent Investment Building Society* (9), which I have already read, and by LINDLEY, L.J., in *Edmunds* v. *Wallingford* (22) ((1885), 14 Q.B.D. 811 at p. 814). Moreover, in *Whitham* v. *Bullock* (21), the principle was held to apply in equity where the plaintiffs in the quasi-contract action would not C
have been liable for the debt they paid in an action in law. It was, nevertheless, held by the Court of Appeal that inasmuch as the plaintiffs had paid the whole of the sum claimed by the landlord under the threat of a distress, though they were not liable to be directly sued for that amount, they were entitled to sue the defendant for reimbursement by her of the defendant's proportion of the rent so paid by the plaintiffs. The equitable principle recognises that the requirements of D
justice may necessitate the relaxation of the rule that both should be liable for the same debt in the sense of being legally compellable to pay it.

Finally, I quote the fifth class referred to by SIR PERCY WINFIELD because he says that the fifth class shows that the classes are not exhaustive, and because he refers to what I may call the " progressive ", as opposed to the " static ", attitude of the law where the requirements of justice demand some elasticity in E
the application of the principle. He says (WINFIELD'S LAW OF QUASI-CONTRACTS at p. 80):

> " Compulsion arising from other circumstances. Cases have arisen that cannot very well be affiliated to any of the preceding classes, and that depend so much on their own peculiar facts that it would be difficult to mark them as additional classes. Moreover, it is probable that new cases will F
> similarly arise in the future, for this branch of the law is elastic, and rightly so, for the needs of the community make it progressive."

In other words, the circumstances in which the principle is to be applied can never be catalogued or rendered precise.

Counsel for the plaintiff, basing himself on the authorities, and on PROFESSOR G
WINFIELD's book on quasi-contract, submitted three propositions of law to me: (i) Where A under what the law regards as compulsion has paid money to C in such circumstances that the law considers that B's failure to recoup A would constitute an unjust benefit to B at the expense of A, A can recover the amount of the payment from B. (ii) If C is injured by the negligence of B, B is liable in damages to C. (No one disputes that.) (iii) If in relation to a particular sum H
of £X, in this case £104, the sole reason why it cannot be recovered by C as part of such damages is that it has already been paid to him by A who was legally obliged to pay him, B's failure to recoup A would constitute an unjust benefit to B at the expense of A. Those propositions are based both on the common law and the equitable application of the rule. In my judgment, they are sound and are supported by the authorities. It is true, as SIR PERCY I
WINFIELD pointed out, that it is not always easy to decide what constitutes an unjust benefit. But I feel little difficulty in reaching a conclusion on this point on the facts of the present case. If counsel's third proposition is not correct, that is to say, if the failure of the defendants in this case to recoup the plaintiff does not mean that they have secured an unjust benefit at the expense of the plaintiff, and if the present form of action does not lie to compel such recoupment, then it would seem that the Receiver for the Metropolitan Police, and other legal entities occupying similar positions, have no legal redress against persons who

by their negligence injure members of the police force, and so deprive the Receiver of their services; that is to say of the consideration for the wages that he is compelled to pay to them; whilst the negligent parties (or their insurers) will continue to reap the benefit of the Receiver's payments in that such payments will serve to exonerate them from liability pro tanto. I am not in this connection confusing quasi-contract with " per quod ". On the contrary I say " no legal redress ", because so far as the latter cause of action is concerned it would no longer be safe to place too much reliance on the decision of A. T. LAWRENCE, J., in *Bradford* v. *Webster* (23) ([1920] 2 K.B. 135), since the recent judgment of the Privy Council in *A.-G. for New South Wales* v. *Perpetual Trustee Co.* (*Ltd.*) (6), and the even more recent decision of the present Lord Chief Justice in *Inland Revenue Comrs.* v. *Hambrook* (24) ([1956] 1 All E.R. 807).

Before finally coming to ATKINSON, J.'s judgment in *Metropolitan Police District Receiver* v. *Tatum* (1), I again take the requirements of the Leake principle*: The first is that A has been compelled by law to pay, or being compellable by law has paid, money—as regards this I have already held that the plaintiff, being compellable by law, has paid to Mr. Bowman the money which he seeks to recover. The second requirement is that the payments should be a sum which B was ultimately liable to pay—as to this I have already held that, if Mr. Bowman had not received his wages from the plaintiff, he could and would have recovered them from the defendants in the action which he brought in the Queen's Bench Division and he would have had his damages in that action increased by precisely £104. Then as to the requirement that the defendants must be primarily liable to pay, I am satisfied that in the present case the defendants are primarily liable to pay because it is their negligence which has deprived the plaintiff of the whole of the consideration for this payment. Applying the Leake principle, I hold, therefore, that B (that is to say the defendants to this action) is indebted to A (that is to say the plaintiff) in the amount claimed.

In *Metropolitan Police District Receiver* v. *Tatum* (1), ATKINSON, J., made it clear ([1948] 1 All E.R. at p. 614) that the action before him was not based on loss of service but was, as this action is, based purely on quasi-contract. Counsel for the defendants criticised a passage in the learned judge's judgment, where he said (ibid.):

> " In this case, I hold that it was through the sole negligence of the defendant that the Receiver has incurred the expenses which he is claiming to recover from the defendant."

In that passage, I think that ATKINSON, J., was referring merely to the incurring of the hospital expenses, and the passage may be accurate on that ground, but he does repeat it (ibid., at p. 615), when he is clearly dealing with pay and allowances, and, in that context, there does seem to be some ground for the criticism, since it was not the negligence of the defendants which caused or compelled the plaintiff to pay the wages and allowances. The negligence of the defendants had nothing to do with that. The liability to pay the wages and allowances arose on the acceptance of the police constable as a member of the Metropolitan Police Force and arose either by statute or under contract. The default of the defendants was in rendering the police constable incapable of giving any return for the wages and allowances in this case for a period of seven months. The present action succeeds not because the plaintiff thereby lost those services but on the application of the principles to which I have already referred.

In the result, therefore, I agree with the conclusion at which ATKINSON, J., arrived in *Metropolitan Police District Receiver* v. *Tatum* (1), though I have preferred to express in my own words my reason for arriving at the same conclusion. Had I taken the contrary view, I should have done so with such doubt and hesitation that I should have followed the decision of ATKINSON, J., for the

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*** Stated at p. 790, letters E to H, ante.**

reasons which I gave at the outset of my judgment. Indeed I have found the point of law which arises in this case so difficult to decide that if I felt any conviction on the matter at all I should be more likely to feel convinced that it was I, and not Atkinson, J., who was wrong. Therefore, this action succeeds and there must be judgment for the plaintiff for the sum of £104.

Judgment for the plaintiff.

Solicitors: *Ponsford & Devenish, Tivendale & Munday* (for the plaintiff); *Herbert Smith & Co.* (for the defendants).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

MONMOUTHSHIRE COUNTY COUNCIL *v.* SMITH.

[Monmouthshire Assizes (Lynskey, J.), June 12, 13, 14, 15, 1956.]

Police—County police force—Police expenses paid out of county fund—Accident to police officer through negligence of third party—Officer's wages and allowances during illness paid by county council—Right of county council to recover expenses from third party—Local Government Act, 1888 (51 *&* 52 *Vict. c.* 41), *s.* 30 (3).

Contract—Quasi-contract—Right of county council to recover from third party wages and allowances paid, under statutory obligation, to police officer during illness caused by third party's negligence—Sums not recoverable by officer from third party.

On Nov. 7, 1952, N., a police constable serving in a county constabulary, was seriously injured owing to the negligence of the defendant. On Dec. 21, 1952, he was certified as unfit for duty by the police surgeon and was away on sick leave until Feb. 21, 1953, when he returned to work but was able to undertake only light duties. On July 3, 1954, he became totally unfit again, and as from Dec. 31, 1954, he was compulsorily retired. N. received his full salary and allowances (including a house allowance in respect of the rent of his house) from Dec. 21, 1952, until Dec. 31, 1954, and after that date received a pension, to all of which he was entitled by virtue of statute. By virtue of the Local Government Act, 1888, s. 30 (3) and the Police Act, 1890, s. 33 and Sch. 3, the plaintiffs were legally bound to make and did make these payments. On Feb. 16, 1956, N. recovered damages from the defendant for negligence. The damages did not include any sum in respect of loss of wages, as he had lost none, and in assessing the damages his right to a pension was taken into account. The plaintiffs sued the defendant for £751 18s., made up as follows: (i) the full pay and allowances (other than house allowance) paid to N. from Dec. 21, 1952, to Feb. 20, 1953, and from July 3, 1954, to Dec. 31, 1954; (ii) half of the full pay received by N. between Feb. 21, 1953, and July 3, 1954, when he was on light duties; (iii) house allowance for the periods when N. was on sick leave; (iv) half of the house allowance for the period when N. was on light duties; (v) the pension paid to N. from Jan. 1, 1955, to Feb. 16, 1956, the date on which N. obtained judgment against the defendant; and (vi) fees paid to the police surgeon in connection with N.'s disability.

Held: the plaintiffs were not entitled to recover the £751 18s. from the defendant because

(a) (as regards items (i) and (iii)[*]) although there was a principle of law that where liability to pay the same sum rested on two persons one of whom was ultimately liable and the other of whom was legally compelled to pay the latter could recover the sum so paid from the person ultimately liable, yet in the present case the defendant had never been liable to pay N. these sums by way of damages for negligence so that the principle had no application.

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[*] See p. 815, letter D, post, where the decision on this ground is confined to these items.

Brook's Wharf & Bull Wharf, Ltd. v. *Goodman Bros.* ([1936] 3 All E.R. 696) considered, and dicta of Lord Wright, M.R. (ibid., at p. 706) applied.

Metropolitan Police District Receiver v. *Tatum* ([1948] 1 All E.R. 612) and *Metropolitan Police District Receiver* v. *Croydon Corpn.* (ante, p. 785) not followed.

(b) (as regards items (ii) (iv) and (v)) even if the principle had applied these items could not have been recoverable since the plaintiffs were not suing and were not entitled to sue (see p. 815, letters E to I, post) in respect of loss of N.'s services and the defendant could not have been liable to N. for these amounts by way of damages for negligence; and (as regards item (vi)) the defendant had never been liable for these fees (see p. 816, letters C to E, post).

[**Editorial Note.** In the present case, as also in *Metropolitan Police District Receiver* v. *Croydon Corpn.* (ante, p. 785), an action based on loss of services would not have lain, since the injured police constable was, as a constable, the holder of a public office and in the position of a servant of the Crown (see 25 Halsbury's Laws (2nd Edn.) 322, para. 530 ; *A.-G. for New South Wales* v. *Perpetual Trustee Co.* (*Ltd.*), [1955] 1 All E.R. 846).

As to payment under compulsion, see 8 Halsbury's Laws (3rd Edn.) 227-229, paras. 393, 394; and for cases on the subject, see 12 Digest (Repl.) 591-594, *4579-4601*.

For the Local Government Act, 1888, s. 30 (3), see 14 Halsbury's Statutes (2nd Edn.) 184.

For the Police Act, 1890, s. 33, and Sch. 3, see 18 Halsbury's Statutes (2nd Edn.) 106, 108.]

Cases referred to:

(1) *A.-G. for New South Wales* v. *Perpetual Trustee Co.* (*Ltd.*), (1952), 85 C.L.R. 237; *affd.* P.C., [1955] 1 All E.R. 846; [1955] A.C. 457; 119 J.P. 312; 3rd Digest Supp.

(2) *Moule* v. *Garrett*, (1872), L.R. 7 Exch. 101; 41 L.J.Ex. 62; 26 L.T. 367; 31 Digest (Repl.) 458, *5846*.

(3) *Bonner* v. *Tottenham & Edmonton Permanent Investment Building Society*, [1899] 1 Q.B. 161; 68 L.J.Q.B. 114; 79 L.T. 611; 31 Digest (Repl.) 459, *5863*.

(4) *Lampleigh* v. *Brathwait*, (1615), Hob. 105; 1 Brownl. 7; Moore, K.B. 866; 80 E.R. 255; 12 Digest (Repl.) 243, *1837*.

(5) *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.*, [1936] 3 All E.R. 696; [1937] 1 K.B. 534; 106 L.J.K.B. 437; 156 L.T. 4; Digest Supp.

(6) *Metropolitan Police District Receiver* v. *Tatum*, [1948] 1 All E.R. 612; [1948] 2 K.B. 68; 112 J.P. 209; sub nom. *Wood* v. *Tatum, Metropolitan Police Receiver* v. *Tatum*, [1948] L.J.R. 1171; 2nd Digest Supp.

(7) *Metropolitan Police District Receiver* v. *Croydon Corpn.*, ante, p. 785.

(8) *Fisher* v. *Oldham Corpn.*, [1930] 2 K.B. 364; 99 L.J.K.B. 569; 143 L.T. 281; 94 J.P. 132; Digest Supp.

Action.

The plaintiffs, Monmouthshire County Council, claimed from the defendant, Eric George Smith, six sums, amounting in all to £751 18s., as money which, by reason of the defendant's negligence causing personal injury to a police constable, William Frank Nash, the defendant was ultimately liable to pay by way of damages, and which, by reason of their statutory obligations, the plaintiffs had paid to or on behalf of Mr. Nash.

The facts appear in the judgment.

J. Bussé, Q.C., and *R. C. Hutton* for the plaintiffs.

R. G. Micklethwait, Q.C., and *C. N. Pitchford* for the defendant.

LYNSKEY, J.: In this case the plaintiffs are claiming from the defendant six sums totalling in all £751 18s., as money which, by reason of the defendant's negligence causing personal injury to a police constable, William Frank Nash, the defendant was ultimately liable to pay by way of damages, and which by reason of their statutory obligations the plaintiffs have paid to or on behalf of the said William Frank Nash. The defendant, by his defence, denies that he was liable to pay any one of the said six sums to William Frank Nash either ultimately or at all by reason of his admitted negligence.

The facts of the case, which, although not admitted, are not really in dispute, are that the Monmouthshire Standing Joint Committee are the police authority for the County of Monmouth. The police fund for that area is the county fund of Monmouthshire County Council, under the provisions of the Police Act, 1890, s. 33, and Sch. 3 thereto. By s. 30 (3) of the Local Government Act, 1888:

> ". . . all such expenditure as the said joint committee determine to be required for the purposes of the matters above in this section mentioned [that is to say, inter alia, police purposes and buildings] shall be paid out of the county fund, and the council of the county shall provide for such payment accordingly."

The effect of this section is that the county council must pay or provide out of the county fund all sums required of them by the standing joint committee, and they have no discretion in the matter.

On Mar. 11, 1947, William Frank Nash, who was then aged twenty-five years and was a married man, was admitted to the Monmouthshire Constabulary as a constable, and continued to serve in the force as a constable until 1952. In November, 1952, he was selected by the chief constable to attend a detective training course at the police college near Preston in Lancashire. He attended the course, living in a hut in the police college grounds, attending lectures in the college building and feeding there, and using the common room there. On Nov. 7, 1952, one of the lecturers told him that he would have to deliver a lecture on the following day to his fellow students. The set lectures finished at 5.30 p.m., but thereafter he was preparing his lecture for the next day and was asking certain questions of his instructor, Detective Sergeant Prescott, who advised him to go for a breath of air, and, if he was still worried about his lecture on his return, to see the instructor in the common room. Mr. Nash went out with another student, from the Essex Constabulary, and whilst out they had a drink at a licensed house. Mr. Nash and his companion were then returning to the police college, for the purpose of Mr. Nash continuing his preparation of his lecture and later to have supper, and he was on the footwalk in Gib Lane, Hoghton, near Preston, when the defendant, a member of the Derbyshire Constabulary, came along driving his Ford 8 h.p. saloon motor car in the same direction as Mr. Nash. The motor car came into collision with Mr. Nash, who was on the footwalk, and as a result Mr. Nash sustained a severe injury to the ulnar nerve of his right elbow. Although severely hurt, Mr. Nash continued with his course and passed the examination at the end of the course. He returned to Monmouth on Dec. 20, 1952, and reported sick on Dec. 21, 1952, and was certified as unfit for duty by the police surgeon, Dr. Jordan. He remained off work until Feb. 21, 1953, when he asked to be given some work and returned to light duties, such as attending the telephone, running messages and serving summonses, which he did for some seventy-one weeks. On July 3, 1954, he became totally unfit again and was off police work thereafter. On Oct. 4, 1954, Dr. Jordan certified that he was disabled from performing his duty as a police constable, and that the disablement was likely to be permanent, and assessed the disablement as seventy per cent., and further certified for the purpose of the supplemental pension that his injuries were sustained in the execution of his duty. On the report of the chief constable, the standing joint committee recommended Mr. Nash's compulsory retirement and payment of the statutory pension and a supplemental pension, totalling in all £270 1s. 3d. per annum, as from Dec. 31, 1954, which was duly paid and is still being paid.

The pay of the police is provided for by the Police Act, 1919, s. 4 (1), which, as amended by the Police Pensions Act, 1948, s. 3 and Sch. 1*, reads:

> " It shall be lawful for the Secretary of State to make regulations as to the government, mutual aid, pay, allowances, clothing, expenses and conditions of service of the members of all police forces within England and Wales, and every police authority shall comply with the regulations so made."

The police authority are the standing joint committee†. In pursuance of the powers conferred on him by s. 4 (1), the Home Secretary has issued several statutory instruments. The Police Regulations, 1952 (S.I. 1952 No. 1704) deal, inter alia, with pay. Regulation 23 deals with the rate of pay of male constables and others by reference to Sch. 1, Part 1. Regulation 28 deals with rent allowances and reg. 33 with boot allowances. I need not deal with the payments and allowances in detail, as it was admitted before me that the sums stated in the amended statement of claim had been paid to Mr. Nash and that such payments were in accordance with the scales set out in the Regulations of 1952, as substituted by the Police Regulations, 1954 (S.I. 1954 No. 27).

It appears from the terms of the regulations that police officers are entitled to these rates of pay and allowances so long as they remain members of the police force, and even although unfit for duty as a result of illness or injury. Regulation 49 of the Regulations of 1952 reads:

> " A member of a police force shall not be entitled to be absent from duty on account of injury or illness unless a registered medical practitioner has certified him to be unfit for duty or in quarantine."

Regulation 50 of the same regulations provides:

> " There shall be deducted from the pay of a member of a police force the amount of any sickness benefit under the National Insurance Acts, 1946 to 1952, or injury benefit under the National Insurance (Industrial Injuries) Acts, 1946 to 1952, to which he may be entitled."

The effect of these regulations and the provisions of the Police Act, 1919, is that, even although a police officer is totally incapacitated as a result of an injury received in an accident, he is still entitled to full pay and allowances, so long as he remains a member of the force and until he resigns or is compulsorily retired.

The Police Pensions Regulations, 1949 (S.I. 1949 No. 1241‡) contain the regulations issued by the Home Secretary dealing with the question of pensions. Regulation 1 provides that:

> " (1) Subject to the provision of these regulations, every man or woman who is a regular policeman, that is to say, a member of a home police force who is not an auxiliary policeman and a member of an overseas corps who is a reversionary member of a home police force, shall, on retiring from

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* In s. 4 (1) of the Act of 1919, as originally enacted, the word " pensions " appears after " allowances ".

† By virtue of the Police Act, 1919, s. 12, and the Police Act, 1890, s. 33 and Sch. 3.

‡ These regulations, which were made under the Police Pensions Act, 1948, and the amendments to the regulations, were revoked and replaced as from Apr. 25, 1955, by the Police Pensions Regulations, 1955 (S.I. 1955 No. 480), except in relation to deaths and retirements before that date.

> the force of which he is a member, be entitled to an award under these regulations. (2) Subject to the provisions of these regulations, every man or woman who is permanently disabled as the result of any injury or disease whether of body or mind (hereafter in these regulations referred to as 'an injury') received without his own default in the execution of his duty as a member of a police force shall be entitled to an award under these regulations on retiring from the police force or, where he has retired before becoming disabled, on the date when he becomes so disabled which, if it cannot be ascertained, shall be taken to be the date when the claim that he is disabled is first made known to the police authority." A B

Regulation 2 (1) provides:

> "An award which is payable on retirement shall be payable by the police authority of the force of which the person in question was a member at the time of his retirement." C

Regulation 3 provides:

> "(1) A pension shall be for life unless it is forfeited under the Act [i.e., the Police Pensions Act, 1948] or varied, suspended or terminated under these regulations. (2) The amount of a pension payable to a person who has been a member of a police force shall, in the manner hereafter provided, be calculated with reference to his average pensionable pay and shall be payable in respect of each year after his retirement." D

Regulation 5 (1) provides: E

> "Where a regular policeman retires from a police force on the ground that he is permanently disabled, the award shall be an ill-health award which—(a) if at the time when he so retires either—(i) he is entitled to reckon ten years' pensionable service, or (ii) his disablement is the result of an injury received in the execution of his duty, shall be a pension (hereafter in these regulations referred to as an 'ill-health pension'), and (b) in other cases, shall be a gratuity." F

Mr. Nash had served some six years before he met with this injury. He had served seven years, not ten years, at the time of his compulsory retirement, but the police surgeon had certified that his disablement was the result of an injury received in the execution of his duty. That certificate was given under reg. 43 of the Regulations of 1949 which reads: G

> "(1) Subject as hereinafter provided, the question whether a person is entitled to any and, if so, what awards under these regulations shall be determined in the first instance by the police authority. (2) Where the police authority are considering whether a person is disabled they shall refer for decision to a duly qualified medical practitioner selected by them the following questions: (a) whether the person concerned is disabled, (b) whether the disablement is likely to be permanent, and, if they are further considering whether to grant a supplemental pension, shall so refer the following questions: (c) whether the disablement is the result of an injury received in the execution of duty, and (d) the degree of the person's disablement, and, if they are considering whether to revise a supplemental pension, shall so refer question (d) above . . . (4) The certificate of the selected medical practitioner on the questions referred to him under the preceding provisions of this regulation shall, subject to the provisions of reg. 44 and reg. 45, be final." H I

I need not deal with reg. 44 and reg. 45, because they do not assist in this case, but they give to the police officer a right of appeal to a medical referee if he objects to the decision of the medical practitioner.

A Regulation 7 provides for a policeman's supplemental pension, and reg. 7 (1) reads:

> "Where a member of a police force or a person who has ceased to be such a member on or after the appointed day is permanently disabled as a result of an injury received without his own default in the execution of B his duty (hereafter in this regulation referred to as the 'relevant injury') the award shall [the word is "shall"] include a supplemental pension in respect of any week in respect of which—(a) none of the payments described in para. (3) is payable to him; or (b) if one or more of the said payments is payable, that payment or the aggregate of those payments, as the case may be, is less than the standard amount appropriate to his case determined C in accordance with Part 4 of Sch. 1 to these regulations."

I need not read the rest of that regulation from the point of view of this case. Regulation 36 deals with pensionable pay:

> "(1) The pensionable pay of a member of a police force shall be his pay at the rate to which he is, from time to time, entitled. (2) The average pensionable pay of a member of a police force shall be the aggregate of his D pensionable pay during the three years immediately preceding the relevant date, ignoring any temporary reduction in rate of pay by way of punishment, divided by three . . ."

I read that merely to show that the fixing of the pension seems to have reference to the officer's service with the police force, apart from any question of incapacity E thereafter. Regulation 54 deals with who is responsible for the payment, and reg. 54 (1) reads:

> "Subject to the provisions of this regulation, all payments by or to a police authority under these regulations shall be paid out of or into the police fund."

F As I have already pointed out, the police fund in this case is the county fund of Monmouthshire County Council.

I do not think reg. 77 arises here; a question seemed to be directed in cross-examination to whether it did or not. Regulation 77, however, defines what is the meaning of an injury received in the execution of duty by a member of the police force. The regulation reads:

> G "A reference to an injury received in the execution of duty by a member of a police force—(a) means an injury received in the execution of that person's duty as a constable and, where the person concerned is an auxiliary policeman, during a period of active service as such . . . and includes any injury received while on duty and while on a journey necessary to enable him to report for duty or to return home after duty."

H In this case the doctor has given a certificate that Mr. Nash received these injuries in the execution of his duty. I have set out the facts and circumstances of the accident, and I am satisfied that the doctor's decision is right, even though I have no power to deal with it on the facts which are before me. Mr. Nash was paid in full his salary and allowances from Dec. 21, 1952, the day when he I reported sick, and was first off duty, until Dec. 31, 1954, and thereafter he was paid the pension to which he was entitled under the Police Pensions Regulations, 1949. The figures are set out in the amended statement of claim and are admitted by the defendant as having been paid.

On Nov. 4, 1953, proceedings were commenced by Mr. Nash jointly with the Monmouthshire Standing Joint Committee, as plaintiffs, against the present defendant. Mr. Nash claimed damages for his personal injuries and losses, but made no claim by way of special damage, or otherwise, for any loss of wages. Obviously he could not, because no such loss had been sustained. The standing joint committee, as second plaintiffs, claimed the salary and allowances which they had paid to Mr. Nash, as damages for loss of his services. After the decision of the Privy Council in *A.-G. for New South Wales* v. *Perpetual Trustee Co.* (*Ltd.*) (1) ([1955] 1 All E.R. 846), the standing joint committee discontinued their action, realising that it was useless to pursue it on the basis of lost services. Mr. Nash, however, continued his action, which was heard by HALLETT, J., at these assizes on Feb. 16, 1956. In that action no claim was put forward, as I have already indicated, for loss of salary or earnings, notwithstanding the discontinuance by the standing joint committee of the county of their claim for the earnings which they had paid to Mr. Nash. There was, however, an agreement as to special damage as from Dec. 31, 1954, that is, for the period after the county council had ceased to pay him his full pay and allowances and had paid him a pension. The special damage, taking Mr. Nash's present earnings plus his pension, as against his house allowance and his police pay, was agreed at a sum of £51 5s. 11d. He was entitled to his pension. He had not lost it as a result of the injury caused by the defendant's negligence, and, being entitled to it by Act of Parliament and the regulations, it was obvious that he had to set off what he had received against what he had lost as a result of the injuries caused by the defendant's negligence. The pension was also taken into account in assessing, by agreement, Mr. Nash's continuing loss for the future. This was agreed at 16s. 4d. a week, on the basis that he was entitled to receive his pension of £5 3s. 10d. a week, which, added to his earnings as an insurance collector, amounted to £13 3s. 10d., as against what would have been his police pay of £12 16s. 5d. and the value of a rent free house, £1 3s. 9d., which equals £14 0s. 2d., giving a net loss of income of 16s. 4d.

In this case the plaintiffs, Monmouthshire County Council, are claiming £751 18s., made up of six items. Item 1 is £273 17s. 2d., being reimbursement of full pay and allowances (other than house allowance) for thirty-five weeks. That is the full pay and allowances which Mr. Nash was paid as from the date when he reported sick, Dec. 21, 1952, to the time when he started work in February, 1953, and, again, as from the time when he ceased work in July, 1954, to December, 1954. Item 3, which I can deal with on the same basis as item 1, is for the rent of his house, in respect of which he was entitled to an allowance under the Police Act, 1919, and the Police Regulations, 1952, and which he received in full during the time when he had really ceased to belong to the force. Those items have to be considered, I think, first of all separately.

The other items are quite different from the point of view of a claim of this character, because item 2 is a claim for reimbursement of half pay during seventy-one weeks when Mr. Nash was on light duties, and item 4, which can be taken with item 2, is a claim for reimbursement of half the rent of the house for the same number of weeks; it is on two different bases because, apparently, the rent changed. In regard to these items, the plaintiffs are not asking for payment of what they paid to Mr. Nash. They are asking for payment of half of what they paid him, apparently on the basis that Mr. Nash's services were worth only half as much to them when he was doing the light duty as when he was doing full duty. Item 5 is a claim for the reimbursement of pension paid by the plaintiffs to Mr. Nash after he ceased to be a police constable. The plaintiffs do not claim the value of the pension for the rest of Mr. Nash's life; they claim it only, apparently, from Jan. 1, 1955, the day after he had ceased to belong to the force, until Feb. 16, 1956, which was the date when HALLETT, J., heard the proceedings brought by Mr. Nash and gave judgment for him.

Item 6 of the plaintiffs' claim is for the reimbursement of doctor's fees paid by the plaintiffs in connection with Mr. Nash's disability. That is rather a misleading statement as to what it was paid for. There were eight sums of one guinea each which were paid to Dr. Jordan, who acts as a police doctor, for services given by him in examining Mr. Nash for the purpose, first, of allowing

Mr. Nash to be absent from duty by being sick; later, to assess his disability; later, to say whether it was permanent or not, and later, for the purposes of the supplemental pension.

It probably would be right to say that, if it were open to the plaintiffs to claim damages on the basis of lost services, or on the basis of per quod servitium amisit, as is the technical phrase, each of these heads of damage might have been recoverable from the defendant. No doubt, that is how these items originally came to be put forward, because this claim was originally put forward on that basis, but it is obvious now that that cause of action is not open to the plaintiffs. I do not think that it ever was, but it is quite clear since the decision in *A.-G. for New South Wales* v. *Perpetual Trustee Co.* (*Ltd*). (1) in the Privy Council, which, although it is not binding in the courts of this country, obviously would be followed in regard to other cases, that the plaintiffs cannot avail themselves of that cause of action, and that is why they discontinued their original proceedings on that basis.

The cause of action which is relied on in this case by the plaintiffs—and I have set it out at the beginning of my judgment almost verbatim—is the statement as set out in para. 8 of the statement of claim, that is, a claim for money

> " . . . which by reason of the defendant's aforesaid negligence the defendant was ultimately liable to pay by way of damages to the said William Frank Nash and which by reason of their statutory obligation as aforesaid the plaintiffs have paid to or on behalf of the said William Frank Nash."

That refers primarily to pay during the time when Mr. Nash was rendering no services at all. Before the plaintiffs could succeed on their claim as pleaded, they would have to show that the defendant was liable, whether ultimately or not, to pay to Mr. Nash each of the items of money claimed by the plaintiffs. An action for negligence is an action on the case and the plaintiff in such an action can recover only such damages as flow from the injuries or damage caused to him by the defendant's negligence. A plaintiff in such an action can only claim for loss of earnings or wages if he can prove (i) that he has lost such earnings or wages, and (ii) that such loss was the result of the defendant's negligence or the personal injuries caused thereby. If, as in this case, he has not lost any wages and is entitled to be paid his wages notwithstanding the injuries received as a result of the defendant's negligence, there is no liability on the defendant to compensate him for a loss which he has not sustained, and unless the plaintiffs can establish here that there was that ultimate liability on the defendant, it is obvious that they cannot succeed on their claim as pleaded.

The bases of claims of this character are, at any rate, exemplified, I think, if not originated, in *Moule* v. *Garrett* (2) ((1872), L.R. 7 Exch. 101). The authority on which, apparently, the plaintiffs' case is pleaded is based on what Cockburn, C.J., in that case, said in his judgment (ibid., at p. 104):

> " This doctrine, as applicable to cases like the present, is well stated by Mr. Leake in his work on Contracts, p. 41: ' Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount."

From this statement of the law it seems clear that it can be applied only where the defendant is liable to pay the amount paid by the plaintiff to the person to whom the plaintiff had paid it.

In *Bonner* v. *Tottenham & Edmonton Permanent Investment Building Society* (3) ([1899] 1 Q.B. 161), there was a lease of certain premises and the lessees assigned them to an assignee, who mortgaged the premises by way of sub-demise. The mortgage provided that, upon default by the mortgagor, the mortgagees might enter into possession, or receipt of the rents and profits of the premises, and demise or sell the same, and out of moneys so received by them, whether as rents and profits or purchase money, should in the first place pay the rent reserved by the original lease. The mortgagees, having entered into possession, did not pay rent which accrued due under the lease while they were in possession. The lessees, having been compelled to pay it, sued the mortgagees to recover the amount so paid by them. That is rather a strong case from the point of view of what has been called in argument "unjust enrichment", because in that case the mortgagees were under a covenant to the mortgagor to pay the rent under the head lease, and they did not do so. They were liable to pay the rent under that covenant to the mortgagor, not to the landlord of the head lease. In fact, they gained by the payment made by the lessees, merely because it kept the lease in existence, and so protected their sub-demise, which was carved out of the lease, but, notwithstanding that, the Court of Appeal, which was a strong court presided over by A. L. Smith, L.J., held that the lessees who had paid the rent could not recover it from the defendants, the mortgagees, because the money was not payable by the same person as the money which was payable by the mortgagees on the sub-demise. I do not want to call the rent "debt" because I think that this doctrine covers any payment of money by reason of contract.

In dealing with the matter A. L. Smith, L.J., said ([1899] 1 Q.B. at p. 167):

> "The ratio decidendi of *Moule* v. *Garrett* (2) is this: If A is compellable to pay B damages which C is also compellable to pay B, then A, having been compelled to pay B, can maintain an action against C for money so paid, for the circumstances raise an implied request by C to A to make such payment in his case. In other words, A can call upon C to indemnify him. See the notes to *Lampleigh* v. *Brathwait* (4) ((1615), Hob. 105), and cases there cited. To raise this implied request, both A and C must, in my judgment, be compellable to pay B; otherwise, as it seems to me, the payment by A to B so far as regards C is a voluntary payment, which raises no implication of a request by C to A to pay."

That view of A. L. Smith, L.J., prevailed and Rigby and Vaughan Williams, L.JJ., agreed that, although money had been paid by the lessees and it had inured to the advantage of the mortgagees, nevertheless it could not be recovered because it was not money payable to the same person to whom the money which would be payable by the mortgagees under the sub-demise would be payable. Therefore, it was held that the doctrine—if I may so call it—of *Moule* v. *Garrett* (2) did not apply.

The doctrine was considered in more recent times in *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* (5) ([1936] 3 All E.R. 696). In that case the defendants, a firm of furriers, had imported from Russia into this country a consignment of squirrel skins in August, 1934. Out of the consignment ten packages were stored by the defendants in the bonded warehouse of the plaintiffs. Whilst in the warehouse they were stolen. Under the Import Duties Act, 1932, and the Customs Consolidation Act, 1876, the liability to pay duty on the importation of those furs fell on the defendants, as the owners and importers of the goods, but, under s. 13 of the Act of 1876, when goods were stored in a bonded warehouse belonging to a warehouseman, the warehouseman was under a heavy bond to the Customs for the pleasure of having all the business and of having a bonded warehouse, and under s. 85 of the Act of 1876, if goods were removed from the warehouse, whether by theft or otherwise, an obligation was imposed on the bonded warehouseman to pay the duties due on the goods. It was in those circumstances that the plaintiffs were called on by the Customs to pay a claim of £823 17s. 10d. for customs duty in respect of those goods, and they brought their action against the importers and owners for recoupment of that amount from them, on the ground that the importers were the persons who ought to pay. Lord Wright, M.R., delivering the judgment of the Court of Appeal, on an appeal from Branson, J., who had found that the plaintiffs were

A entitled to recover against the defendants, dealt with the doctrine set out in *Moule* v. *Garrett* (2) and said ([1936] 3 All E.R. at p. 706):

> " The principle has been applied in a great variety of circumstances. Its application does not depend on privity of contract. Thus, in *Moule* v. *Garrett* (2), it was held that the original lessee who had been compelled to pay B for breach of a repairing covenant was entitled to recover the amount he had so paid from a subsequent assignee of the lease, notwithstanding that there had been intermediate assignees. In that case the liability of the lessee depended on the terms of his covenant, but the breach of covenant was due to the default of the assignee and the payment by the lessee under legal compulsion relieved the assignee of his liability. That class of case was discussed C by VAUGHAN WILLIAMS, L.J., in *Bonner* v. *Tottenham & Edmonton Permanent Investment Building Society* (3), where *Moule* v. *Garrett* (2) was distinguished. The essence of the rule is that there is a liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment, because his debt is discharged either entirely or pro tanto, whereas the defendant is primarily D liable to pay as between himself and the plaintiff. The case is analogous to that of a payment by a surety which has the effect of discharging the principal's debt and which, therefore, gives a right of indemnity against the principal."

It is clear that LORD WRIGHT, M.R., was there saying, in effect: " What is the essence of the rule ? The essence of the rule clearly is that there must be a E common liability to pay money to a particular person; that the plaintiff has been compelled to pay it by law; that the defendant is liable to pay that money, and the defendant's debt or liability has been discharged by the plaintiff's payment." That is the whole basis, as I see it, of that particular rule.

After citing a passage from a judgment of ABBOTT, C.J.,* LORD WRIGHT, M.R., said ([1936] 3 All E.R. at p. 707):

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> " These statements of the principle do not put the obligation on any ground of implied contract or of constructive or notional contract. The obligation is imposed by the court simply under the circumstances of the case and on what the court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law, apart from any consent or intention of the parties or any G privity of contract."

In other words, LORD WRIGHT was there discussing what was the basis of the reason why the law allowed the claim. He was not altering what he had said earlier, that the essence of the rule was that there was a liability for the same debt resting on the plaintiff and the defendant, and, as he said:

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> " it is a debt or obligation constituted by the act of the law, apart from any consent or intention of the parties or any privity of contract."

The relationship of the parties in that case was that both parties were under an obligation to pay the same sum of money to the same person.

The passage from LORD WRIGHT'S judgment which I have just cited was quoted I by ATKINSON, J., in *Metropolitan Police District Receiver* v. *Tatum* (6) ([1948] 1 All E.R. 612). LORD WRIGHT went on to say ([1936] 3 All E.R. at p. 707):

> " It is true that in the present case there was a contract of bailment between the plaintiffs and the defendants, but there is no suggestion that the obligation in question had ever been contemplated as between them or that they had ever thought about it. The court cannot say what they would have agreed if they had considered the matter when the goods were

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* In *Dawson* v. *Linton*, (1822), 5. B & Ald. 521 at p. 523.

> warehoused. All the court can say is what they ought as just and reasonable men to have decided as between themselves. The defendants would be unjustly benefited at the cost of the plaintiffs if the latter, who had received no extra consideration and made no express bargain, should be left out of pocket by having to discharge what was the defendants' debt."

In other words, all through his judgment LORD WRIGHT, M.R., remembered the fact that there must be a debt due from the defendant which had been either discharged fully or pro tanto as the result of the payment made by the plaintiff. LORD WRIGHT then said (ibid.) that he agreed with the learned judge in holding that that principle applied to that case. He explained that the duties were due from the importers, and said (ibid.):

> " The plaintiffs were no doubt liable to pay the customs, but, as between themselves and the defendants, the primary liability rested on the defendants. The liability of the plaintiffs as warehousemen was analogous to that of a surety. It was imposed in order to facilitate the collection of duties in a case like the present, where there might always be a question as to who stood in the position of importer. The defendants as actual importers have obtained the benefit of the payment made by the plaintiffs and they are thus discharged from the duties which otherwise would have been payable by them."

That case settled the law at that date, and settled it by the Court of Appeal.

There was cited to me, by way of argument, passages from WINFIELD on THE LAW OF QUASI-CONTRACTS (1952), although it is not binding as an authority. PROFESSOR WINFIELD deals with this matter (at p. 73) under the heading " Payment, under a legal obligation, to a third party, of money which the defendant was also liable to pay to the third party ", and says:

> " The principle underlying the rule relating to this was stated as follows by LORD WRIGHT, M.R., in *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* (5) in a judgment in which his brethren concurred : ' Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount . . . The essence of the rule is that there is a liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment, because his debt is discharged either entirely or pro tanto, whereas the defendant is primarily liable to pay as between himself and the plaintiff."

That, in my view, correctly states the law, certainly as it existed immediately after the decision in *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* (5). That is a decision of the Court of Appeal and, of course, is binding on all courts of first instance, so that in applying that principle one is bound to apply the test which the Court of Appeal have laid down, that the essence of the application of this doctrine, before it can come into play, is that there must be a liability, either primarily or ultimately—I do not think it matters which—on the part of the defendant to pay the money which the plaintiff has in fact paid. That, in my view, is the law as laid down by the Court of Appeal.

This case has really been brought forward because of the decision of ATKINSON, J., in *Metropolitan Police District Receiver* v. *Tatum* (6). The plaintiffs in the present case rely on that decision and also on the recent decision of SLADE, J., in *Metropolitan Police District Receiver* v. *Croydon Corpn.* (7) (ante, p. 785), in which the decision of ATKINSON, J., was followed. Under s. 10 and s. 12 of the Metropolitan Police Act, 1829, the Receiver for the Metropolitan Police District is appointed by the Crown as custodian of a fund for the purposes of the police, A and is charged with the duty of paying the wages and allowances of members of the force and " all other charges and expenses " which a Secretary of State shall direct to be paid for carrying the Act into execution. Under s. 1 of the Metropolitan Police (Receiver) Act, 1861, the Receiver is a corporation sole, with capacity to sue and be sued and to " do all other acts necessary or expedient to be done in the execution of the duties of his office." In *Metropolitan Police* B *District Receiver* v. *Tatum* (6), the Receiver, having paid hospital charges and pay and allowances during disablement of a police officer injured through the negligence of the defendant, brought an action to recover from the defendant the sums so paid. The defendant contested the Receiver's right to sue, on the grounds that the claim for hospital charges should have been brought by the Attorney-General on behalf of the Crown, and that, as a claim for pay and C allowances must be based on loss of services, and police officers were servants of the Crown and not of the Receiver, the Crown alone could bring such a claim. It was held that, the hospital charges being an expense which the Receiver, as a result of the defendant's negligence, was legally bound to incur, the Receiver was entitled to recover them from the defendant; that, as those charges had been paid out of a public fund of which the Receiver was the custodian on D behalf of the Crown, he alone could bring the action; and that, as the claim for pay and allowances was based, not on loss of service, but on the fact that the Receiver, acting under statutory regulations, had been compelled by the defendant's negligence to pay the sums in question and thus deplete the public fund of which he was custodian, he was entitled to be indemnified by the defendant.

E That is a new statement of the principle of law which the learned judge decided, because I know of no principle of law which renders a person who has been guilty of negligence in injuring a police officer liable to refund, or which enables the custodian of a public fund to claim for, moneys which the custodian has paid, unless he has a legal right to claim them, and I know of no principle of law, apart from the decision in that case, which would, in the absence of a F liability in the defendant to pay that sum to a plaintiff which the Receiver was compelled to pay, enable a Receiver to bring such an action.

The reasons for the decision of ATKINSON, J., seem to be given in a passage of his judgment where he said ([1948] 1 All E.R. at p. 614):

> " Is there any real difference between the claim for the hospital charges and the claim to recover the pay and allowances ? Counsel for the defence G says that the latter claim must be based on loss of services, and, if a servant has been injured through someone else's negligence, the claim can only be made by a person who had been deprived of the loss of the servant's services. That is perfectly true. It was held by McCARDIE, J., in *Fisher* v. *Oldham Corpn.* (8) ([1930] 2 K.B. 364) that police officers were servants of the Crown, and it is, therefore, said that the Receiver has not lost any services, because H the services were rendered, not to him, but to the Crown. That also is true, but here the claim is not based on loss of services."

The learned judge then said ([1948 1 All E.R. at pp. 614, 615; [1948] 2 K.B. at pp. 72, 73):

> " The Receiver is saying that, acting under statutory regulations, he has I been compelled to cause this fund of the Crown to be depleted by a sum of £336 17s. 6d., money which the defendant, by his negligence, has compelled him to pay for no return."

If that means that the negligence compelled the Receiver to pay, that is not so. He paid because he was under a legal obligation to pay under the Metropolitan Police Act. If it means that the Receiver has been compelled to pay and in respect of that payment has received no return of service, then that is a claim for loss of service; it is not a claim for anything else, and, although the learned judge had said that this was not a claim for loss of service, it seems to me from the passage which I have just cited—

> " . . . he has been compelled to cause this fund of the Crown to be depleted by a sum of £336 17s. 6d., money which the defendant, by his negligence, has compelled him to pay for no return "

—that it means nothing else but a claim for loss of service, and, in fact, there was no service lost to the Receiver at all. ATKINSON, J., then said ([1948] 1 All E.R. at p. 615):

> " That being so, he is entitled (he says) to be indemnified by the defendant and he relies on the words of the Act [the Metropolitan Police (Receiver) Act, 1861, s. 1] that it is his duty to sue and to do all acts necessary or expedient to be done in the execution of his office. He contends that to maintain this fund and recover moneys which he has been forced to pay out under the regulations to no purpose are certainly acts which are expedient to be done in the execution of his office."

That may be, but those words in the section do not give him any rights which he has not already got against third parties. He can only do those things which that section enables him to do. It seems to me that in that case the Receiver had no ground at all for saying " I have got a cause of action against a third party ". ATKINSON, J., continued (ibid.):

> " It seems to me that this argument is sound. I think the matter comes within the principle enunciated by LORD WRIGHT in *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* (5), which is, shortly, that where one man is compelled to pay money which another is legally liable to pay, the person paying it can recover from the person on whom the real liability rests."

That, if I may say so with great respect, is a correct statement of what was decided, but the facts do not fall within that. There is no liability here on the defendant to pay any wages because the person who is entitled to claim against him has not lost them.

ATKINSON, J., then said (ibid.):

> " In the present case there is no doubt that the real legal liability for the payment of this money rests on the defendant because the Receiver was compelled to pay it as a result of the defendant's negligence."

If that were so, it would mean that an action for lost services would still exist. That is a great deal more than was meant by the Court of Appeal, and I can find no legal liability resting on the defendant to pay any money to the Receiver.

ATKINSON, J., continued (ibid.):

> " As LORD WRIGHT, M.R., said ([1936] 3 All E.R. at p. 707) in *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* (5): ' The obligation is imposed by the court simply under the circumstances of the case and on what the court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law, apart from any consent or intention of the parties or any privity of contract '."

LORD WRIGHT did say that, and he said it in relation to a claim where it was essential to the making of the claim that there should be a liability on the part of the defendant to pay to the third party money which the plaintiff had paid, and in my view—although I do not like to disagree with the decisions of my brother judges, because it is natural that I should desire to follow them—this decision of ATKINSON, J., was not correct. It seems to me that this decision ignores the law as laid down in the Court of Appeal in *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* (5). The curious thing is that, although it is not in any way a cogent argument, the decision of ATKINSON, J., is treated by the learned editors both of SALMOND ON TORTS (11th Edn.) (1953), in a note at p. 406, A and POLLOCK ON TORTS (15th Edn.) (1951), in a note at p. 54, as dealing with the question of recovery of moneys by reason of lost services.

Metropolitan Police District Receiver v. *Tatum* (6) was considered by the High Court of Australia in *A.-G. for New South Wales* v. *Perpetual Trustee Co.* (*Ltd.*) (1) ((1952), 85 C.L.R. 237). In his judgment KITTO, J., said (ibid., at p. 305):

B

> "The court was referred to the case of *Metropolitan Police District Receiver* v. *Tatum* (6), but no separate argument was based upon it. The case has no bearing upon the matter I have been discussing [a claim for lost services], but, if correctly decided, it might provide support for an alternative argument in favour of the appellant."

That is just what has been done in the present case. It has been sought to use C the case as an alternative argument to claim moneys which were sought originally to be claimed in an action for lost services. KITTO, J., went on to say (ibid., at p. 305):

> "With great respect to the learned judge who decided it, I find myself unable to regard his decision as a correct application of the principles to D which he referred, and in my opinion the case affords no assistance to the appellant here."

It seems to me that it is difficult to reconcile the decision of ATKINSON, J., with the law as laid down by the Court of Appeal in *Brook's Wharf & Bull Wharf Ltd.* v. *Goodman Bros.* (5). The decision of ATKINSON, J., has been followed in *Metropolitan Police District Receiver* v. *Croydon Corpn.* (7) (ante p. 785), which E was heard by SLADE, J., and in which judgment was given on June 11, 1956. That was a similar case to *Metropolitan Police District Receiver* v. *Tatum* (6) and the facts were indistinguishable. Apparently, it was brought with the idea of testing whether *Metropolitan Police District Receiver* v. *Tatum* (6) could be supported. The facts, which were agreed, were as follows: John Bowman was a police constable in the Metropolitan Police. The defendants had paid the sum F of £2,513 12s. 6d. in full satisfaction of a claim brought by him in the Queen's Bench Division against the defendants. Mr. Bowman made no claim for loss of wages in his action. If he had been entitled to include and recover his loss of wages as an item of special damage in his action against the defendants, he would have recovered an additional £104. Mr. Bowman was incapacitated and prevented from carrying out his duties as a police constable for seven months as a result of G injuries caused to him by the negligence of the defendants; and during that period the plaintiff paid Mr. Bowman his full wages and allowances as a police constable. The defendants agreed the figures subject to the question of liability, and they also admitted the allegations of negligence in the action.

SLADE, J., said (ante, p. 787) that the action was a test action brought to decide whether or not the decision of ATKINSON, J., in *Metropolitan Police* H *District Receiver* v. *Tatum* (6) was right. He took the view that it was, and, apparently, he took that view based on the acceptance of certain contentions, with qualifications in one case and absolutely in the other. The contentions which he accepted with qualifications were those of counsel for the defendants in that case, who submitted that there were five requisites for the application of the principle in *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* (5): I (i) there must be the same debt; (ii) both plaintiff and defendant must be liable to the same person for that debt; (iii) the defendant must be primarily liable for that debt; (iv) the plaintiff must have been compelled to pay the debt; (v) the plaintiff's payment must have operated to relieve the defendant of his primary liability. SLADE, J., said (ante at p. 792, letter F):

> "On the common law principle, I think [counsel] is right in saying that all those requirements are necessary, provided the words 'the same debt' and the words 'primarily liable' are properly understood."

In other words, SLADE, J., is, apparently, accepting the submissions of counsel A
for the defendants and, subject to the qualification that, instead of using the word 'debt', one should use the word 'money.' I think that this doctrine can operate where the money is payable, as it was in *Moule* v. *Garrett* (2), for breach of contract.

SLADE, J., in the course of his judgment said (ante at p. 792, letter G, to
p. 793, letter C): B

> "Counsel said, always assuming, of course, that there was a debt at all in this case . . . that it was not the same debt. He said that the liability . . . of the plaintiff to the policeman was in contract or payable under the requirements of a statute, or possibly on a quantum meruit . . . The liability, if any, of the defendants was in tort for negligence. Furthermore, he said . . . that
> the defendants' liability in tort, if it existed at all, was not to pay wages . . . C
> but to pay Mr. Bowman damages for loss of faculty, and that the amount of the wages would merely be evidence which, with other matters, would assist the court to estimate the value of the loss of faculty . . . I understand that, by the words 'the same debt', LORD WRIGHT meant no more than that the third person . . . could have recovered the same sum of money from either of
> the parties to the action. The cause of action . . . need not be the same . . . D
> 'Primarily liable' means, in my view, liable in the sense that, as between a principal debtor and a surety, both of whom are equally liable to the creditor, the principal debtor is as between themselves primarily and the surety only secondarily liable."

I entirely agree that that is a correct statement of the principle; but, with great
respect to SLADE, J., the defendants, however, were not liable to the third party, E
the policeman, for this loss of wages. A policeman cannot claim for a loss which he has not sustained. He can claim for damages for personal injuries and for loss of faculty, but he cannot claim for loss of wages when he has had no loss. Where, although he has been incapacitated, he has not lost any earnings as a result of his injuries, a claim for damages under that head cannot
be included in a claim for negligence. F

The point which the learned judge takes is, apparently*, that there was a liability on the defendant to pay this sum and that he was not discharged from that liability by the fact that the Receiver had paid the sum. It seems to me, with respect to my learned brother, that he has accepted the fact that in other circumstances, with another plaintiff, who was not a police officer, there might
be a liability on the defendant to pay to the injured plaintiff damages under the G
head of loss of earnings, if, in fact, they had been lost. If, however, the plaintiff has not suffered any loss of earnings, there is no liability on a tortfeasor to pay damages of that sort.

The learned judge says (ante at p. 798, letter G):

> "Counsel for the plaintiff . . . submitted three propositions of law to
> me: (i) Where A under what the law regards as compulsion has paid money H
> to C in such circumstances that the law considers that B's failure to recoup A would constitute an unjust benefit to B at the expense of A, A can recover the amount of the payment from B."

That submission is taken from WINFIELD on THE LAW OF QUASI-CONTRACTS,
but counsel omits one thing, that there must be a liability on the part of B to I
the person to whom A has paid the money, and, in my view, that liability does not exist. At least, I know of no authority to show that it does. The practice has been, for years, and still is, that a plaintiff cannot recover, in an action for personal injuries, damages for a loss which he has not sustained.

SLADE, J., setting out the propositions submitted by counsel for the defendants continued (ante at p. 798): "(ii) If C is injured by the negligence of B, B is liable in damages to C." Of course he is. He is liable in damages to C, but he

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* Compare p. 793, letters D to I, ante.

A is not liable in damages to C for an item of damage which the plaintiff has not suffered.

> "(iii) If in relation to a particular sum . . . the sole reason why it cannot be recovered by C as part of such damages is that it has already been paid to him by A who was legally obliged to pay him, B's failure to
> B recoup A would constitute an unjust benefit to B at the expense of A."

I do not know where that submission comes from, and, unless there is a legal liability on B to pay to C, then it seems to me that that submission is not one which would find favour with me.

Naturally, I regret very much the fact that I have to differ from ATKINSON, J. and from SLADE, J., and I would not do so unless I felt compelled to. One always, C desires to follow the decisions of one's brother judges, but in this case I feel that I am bound by the Court of Appeal's decision and the essential requirements that the Court of Appeal have fixed before this type of action can succeed. Accordingly, it seems to me that there can be no legal liability on the defendant in the present case to pay to Mr. Nash any sum for loss of wages, and that, in those circumstances, the essential element which is necessary to constitute this D cause of action is missing.

So far I have been dealing with items 1 and 3 of the claim, that is to say, the moneys appearing in the claim as having been paid, and which were agreed to have been paid, by the plaintiffs to Mr. Nash during the period when he was not doing any duty. As regards items 2 and 4, namely, half the wages paid and half the rent of the house, I cannot understand how they can be recoverable even if E the decision in *Metropolitan Police District Receiver* v. *Tatum* (6) and in *Metropolitan Police District Receiver* v. *Croydon Corpn.* (7) applied. This is purely a claim for damages for depreciation of the value of Mr. Nash's services, and I know of no authority which would enable the plaintiffs to recover for that, based on this cause of action. If, in fact, they could have sued on the basis of lost services, then, I suppose, they might have recovered in respect of F such a claim, but in this form of action it could not possibly be recovered. The defendant cannot possibly be held liable to pay to the plaintiffs money for depreciation in the value of Mr. Nash's services. To whom would it be payable ? Not to the plaintiffs, because they are not entitled to his services, on any view of the case. In view of the decisions*, such a claim could not be made even by the standing joint committee. I cannot see how, in any circumstances, items 2 G and 4 can be claimed. There never was any personal liability on the defendant to reimburse the plaintiffs the sum which they say they have paid in excess of the value of Mr. Nash's services to someone—I suppose to the standing joint committee? So far as that part of the claim is concerned, it seems to me that it is quite impossible for the plaintiffs to succeed.

The plaintiffs then claim that the defendant should reimburse them the moneys H which they have paid by way of pension to Mr. Nash. Again, if it were open to the plaintiffs to bring an action for loss of services, that claim might have been put forward as a claim for money which they had had to pay by reason of loss of services, although, again, I should find difficulty in even finding that. It seems to me quite impossible to comprehend how it can be said that the defendant in this case was ever liable to pay a pension. This pension was payable, and Mr. I Nash is entitled to it, under the Police Pensions Act, 1948, and under the Police Pensions Regulations, 1949, which have the effect of legislation. Being entitled to it, in no circumstances could Mr. Nash have claimed it from the defendant, so that I cannot see how this form of action could possibly be applied to the question of pension.

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*I.e. the decisions establishing that police officers are in the position of servants of the Crown; see, for example, *Fisher* v. *Oldham Corpn.*, [1930] 2 K.B. 364, and *A.-G. for New South Wales* v. *Perpetual Trustee Co.* (*Ltd.*), [1955] 1 All E.R. 846.

What Mr. Nash could have recovered if he had ceased to get his full pay, was A the loss which he sustained as a result of the injuries which he had received through the negligence of the defendant, that is to say, the difference between what he could earn in a new occupation, having regard to his physical condition and also to the pension which he received in respect of his old occupation, and what he would have earned if he had remained in the police force. He has received that. He claimed it in his action against the defendant and was B awarded it by HALLETT, J. He did not, however, claim for pension; he obviously could not. The whole point here is that Mr. Nash claimed, as far as I can see from the statement of claim in that case, everything to which he was entitled, and he recovered everything to which he was entitled. The plaintiffs now claim that the defendant has to pay something to them. On what basis? The only basis put before me is that the defendant is liable to pay Mr. Nash. C The defendant is not liable, because Mr. Nash has exhausted the defendant's liability to him. The result is, it seems to me, that it is quite impossible for the plaintiffs to succeed on any view of the principles put before me.

Finally, the plaintiffs claim doctor's fees. It is only a small matter but it shows what this action really is. It is an action to try to recover damages for loss of service. The last item (item 6) is a claim for £8 8s. paid to Dr. Jordan, D the police surgeon; not for medical treatment of Mr. Nash but to carry out the machinery of allowing him to be off duty, absent through sickness and certified by the doctor, or else for the plaintiffs' own purposes in fixing the pension. How it can be said that the doctor could have sued the defendant for his fees, when the doctor was acting under the instruction of the plaintiffs, seems to me to pass all comprehension. In order to apply the principle which the plaintiffs are E seeking to apply here, they must show that, as they allege in their statement of claim, the defendant is ultimately liable to pay doctor's fees. I know of no principle which can bring it that far. In fact, again, I do not think that they could have recovered that item even if they had brought an action for loss of service.

That deals with the whole of the case. I shall end by saying again that I regret F very much having to differ from my two brother judges, ATKINSON, J., and SLADE, J. I would not have done so unless I had felt compelled to, by reason of what I regard as the binding authority of the Court of Appeal. The result is that there must be judgment for the defendant.

Judgment for the defendant.

Solicitors: *Vernon Lawrence*, Newport, Mon. (for the plaintiffs); *Myer Cohen & Co.*, Cardiff (for the defendant).

[*Reported by* GWYNEDD LEWIS, *Barrister-at-Law.*]

Re EGERTON'S WILL TRUSTS.
LLOYDS BANK, LTD. *v.* EGERTON AND ANOTHER.

[CHANCERY DIVISION (Roxburgh, J.), June 5, 6, 1956.]

Domicil—Matrimonial domicil—Proprietary rights of husband and wife inter se —Husband's domicil English at time of marriage—Intention of spouses, before marriage, to settle in France as soon as possible after marriage—Intention not carried into effect until some two years later—Death of husband —Whether estate to be administered on footing that community of property, according to French law, applicable.

On May 6, 1932, the testator, who was then an officer in the British army, and whose domicil (i.e., his domicil of origin which, on the evidence, it was found that he had not changed) was then English, married in London a Frenchwoman domiciled in France. Neither before nor at the time of the marriage nor afterwards was there any discussion between the parties to the marriage as to community or separation of property. Before their marriage, however, they agreed that "as soon as possible" after the marriage they would settle in France and establish their permanent and only home there. In the autumn of 1932 the testator went to France on sick leave pending his retirement from the army. He retired in December, 1933, and subsequently settled in France, probably towards the end of 1934. In 1937 and 1938 he purchased property in France and built thereon a house in which he and his wife resided until the invasion of France in 1940. In the documents relating to the purchase of the property, it was stated that the testator and his wife were "subject to the English régime" and that they made the purchase "in the name and for the personal account of [the wife] so that it may remain the separate property of [the wife] in application of the régime and English law". During the occupation of France by the Germans the testator and his wife lived in England. They returned to their house in France in May, 1946, and the testator remained in France until his death on Oct. 16, 1951. On a summons by the trustees of his will, which was executed on July 19, 1946, to determine whether they should administer the testator's estate on the footing that the régime of community of property with the widow, as provided by the law of the Republic of France, applied thereto,

Held: the law of France regarding community of property did not apply in the administration of the testator's estate because

(i) his domicil at the time of his marriage was English and any subsequent acquisition by him of a domicil in France subsisting at the time of his death was immaterial in the present case by reason of French law, and

(ii) no agreement at the time of the marriage that the law of France, as the country in which the parties intended to settle and acquire domicil on marriage, should govern their proprietary rights inter se in substitution for the law of England would be implied on the evidence in the present case having regard particularly (a) to the fact that the parties contemplated that an interval might elapse before their change of domicil (as was shown by the evidence of their agreement to settle in France "as soon as possible"), and (b) to the terms of the documents of house purchase quoted above, which the court was entitled to take into consideration, although if the court were not so entitled, the same conclusion would have been reached without this latter factor.

Per CURIAM: (i) in certain circumstances an agreement between parties to a marriage made before marriage to change their domicil immediately after marriage may be enough to lead the court to infer that the parties intended their proprietary rights to be regulated by the law of the new domicil from the moment of their marriage (see p. 824, letter C, post); (ii)

an agreement excluding the presumption that the law of the husband's A
domicil at the time of marriage must be read into the marriage contract may be inferred from the conduct of the parties to the marriage (see p. 823, letter G, post), and, for the purpose of deciding whether such an inference should be drawn, the court must look at the conduct as a whole and not stop its investigation at a particular date, e.g., the date of agreement (see p. 824, letter B, post). B

Dictum of VAUGHAN WILLIAMS, L.J., in *Re Martin* ([1900] P. at p. 240) considered.

[**Editorial Note.** In the present case the doctrine of " matrimonial domicil " as propounded in DICEY'S CONFLICT OF LAWS (6th Edn.) (1949), at p. 541, is contrasted with the doctrine that the matrimonial domicil should be that of " the country of the intended matrimonial home ", as propounded in CHESHIRE C
ON PRIVATE INTERNATIONAL LAW (4th Edn.) (1952), at p. 491. See particularly p. 821, letter C, to p. 823, letter C, post.

As to the effect of marriage on movable property, see 7 HALSBURY'S LAWS (3rd Edn.) 122, para. 214; and for cases on the subject, see 11 DIGEST (Repl.) 489, 490, *1125-1129*.] D

Case referred to:

(1) *Re Martin*, *Loustalan* v. *Loustalan*, [1900] P. 211; 69 L.J.P. 75; 82 L.T. 806; 11 Digest (Repl.) 348, *170*.

Adjourned Summons.

The plaintiffs, Lloyds Bank, Ltd., as the executors and trustees of the will, dated July 19, 1946, of Charles Hertel Egerton, deceased, applied to the court E
by originating summons for the determination of the following question (among others), under R.S.C., Ord. 55, r. 3: whether the plaintiffs should administer the testator's estate on the footing that the régime of community of property, as provided by the law of the Republic of France, with his widow, the first defendant, Alice Marie Germaine Egerton, applied thereto.

Under the testator's will, which was made in English form and executed in F
France, the ultimate gift of the capital of his residuary estate was, in the events which had happened, to the persons who, at the death of the first defendant, would have been entitled to his personal estate under Part 4 of the Administration of Estates Act, 1925, if the testator had died immediately after the first defendant, domiciled in England, possessed thereof, and intestate. The testator left no issue. G

The facts appear in the judgment.

Raymond Walton for the plaintiffs, the executors and trustees of the will.

R. O. Wilberforce, Q.C., and *E. I. Goulding* for the first defendant, the testator's widow.

E. J. A. Freeman for the second defendant, a cousin of the testator, being one of the persons contingently entitled to the capital of the residuary estate. H

ROXBURGH, J.: On May 6, 1932, the testator, Charles Hertel Egerton, married the first defendant, Alice Marie Germaine Egerton, as his second wife. She was at that time domiciled in France and a Frenchwoman. She survived him and he made provision for her in his will, which, very naturally, I think, she regards as unsatisfactory. The first question which I am asked to determine I
is whether the plaintiffs, Lloyds Bank, Ltd., as the executors of the testator's will, should administer his estate

> " . . . upon the footing that the régime of community of property, as provided by the law of the Republic of France, with his widow, the defendant, Alice Marie Germaine Egerton, applies thereto."

In that question, in my judgment, are wrapped up at least two different questions. The first is: What was the domicil of the testator at the date of his marriage to the first defendant ? The father of the testator was born at Bunbury, Cheshire, on Feb. 7, 1834, and he had an English domicil of origin. There is no evidence of his ever being in France before 1882, although he had travelled and, amongst other places, had been in Australia. On Apr. 10, 1883, the testator's father was married in France, and on Sept. 22, 1884, the testator was born at Fécamp in France. His birth was registered at the British Consulate. There is no doubt about this. I have before me a proper birth certificate. The testator lived at various places in France with his parents until 1891, when they brought him to England. He was educated at what is called in the affidavit "Bedford College", which I understand means one of the many schools in Bedford. After that, the testator went to the Royal Military Academy at Woolwich. From 1891 until 1903 the testator's parents lived in England in furnished accommodation. In 1903, when the testator was nineteen, his parents returned to France and lived at the Chateau de St. Antoine, which the testator's mother had inherited. The testator's father had some kind of business in France. On Jan. 19, 1904, the testator received a commission in the Royal Engineers, and served chiefly at foreign stations. In 1912 the testator's parents gave up the chateau and came to England and set up a home at Great Bedwyn in Wiltshire. In 1913 the testator's father died at Great Bedwyn. On Dec. 14, 1923, the testator married his first wife, Margaret King, at the Garrison Chapel, Rangoon. On Apr. 2, 1930, while the testator was on service in India, his first wife died at Great Bedwyn, at The Croft, her mother-in-law's home. On July 15, 1930, the will of the testator's first wife was proved. In that will she had given her address as Bulford Camp, Salisbury, and in the act of probate she is described as being of "The Croft, Great Bedwyn". There is no suggestion anywhere that she had a French domicil. On Feb. 29, 1932, the testator sailed for England from India. On Apr. 16, 1932, he arrived in England to go on leave. Very shortly afterwards, on May 6, 1932, he married the first defendant at the Paddington District Registry Office. On Aug. 27, 1932, the testator asked to be placed on retired pay "owing to reasons of health and private affairs". On Sept. 18, 1932, his leave expired. He was then granted sick leave from Sept. 19, 1932, until June 20, 1933. Some time in 1932, but later than Sept. 19, he went to France on sick leave pending his retirement. On July 19, 1933, he wrote from The Croft, Great Bedwyn, to the War Office asking for leave to retire from Dec. 21, 1933, and said that on medical grounds he would take up his future residence abroad, probably in the South of France. In August, 1933, he gave a power of attorney to a certain bank to receive his pay from the War Office. On Sept. 17, 1934, he wrote a letter on a business matter to the manager of the Trustee Department of Barclays Bank in which he said: "I will probably be settling shortly in the South of France for reasons of health". I should be disposed to hold that he did not actually settle in France until after Sept. 17, 1934, and that his earlier visits to France were of a more tentative character but, if it were material, I might have been able to decide that he settled in France somewhat earlier. But settle in France he certainly did, and in due course he built himself a house called "Villa Emenda".

For the purpose of building the house, the testator had to acquire land, and he entered into three separate transactions for the purchase of the land. The document in respect of one of the transactions contains the statement that the testator was born at Bexhill in Kent, which was certainly untrue, and I am unable to satisfy myself that he thought that it was true. I should be inclined to think, if it be of any importance, that he deliberately selected an English place of birth because he was so anxious to forestall any suggestions that he had a French domicil. Nothing, however, really turns on that, and that may not be altogether fair to him. The purchase was effected as between the vendor and the first defendant "with the authority and assistance of her husband". That I extract from the documents in regard to the transactions. The three documents were dated Feb. 7, 1937, July 9, 1937, and Dec. 20, 1938, respectively, A but they are broadly the same, in so far as they are material to the present case. There are, I think, three slightly different versions of the passage which I am going to cite, but the one which seems to me most likely to be correct is that of the document of July 9, 1937. The important sentence is this:

> "Mr. and Mrs. Delgue and Mrs. Larrouquere, widow, the appearers B hereby sell . . . to Madame Alice Marie Germaine Hertel [the first defendant] wife of Mr. Charles Hertel Egerton aforenamed, here present and who accepts, together with the assistance and permission of Mr. Egerton her husband. Mr. and Mrs. Egerton married at Paddington district of London on May 6, 1932, declare to be subject to the English régime and to make the present purchase in the name and for the personal account of C Mrs. Egerton née Hertel, so that it may remain the separate property of the said Mrs. Egerton in application of the régime and English law."

On one or other of the sites to which the three documents relate, the testator built the Villa Emenda. I have no doubt that by that time the testator had acquired a French domicil. He and the first defendant lived in France until shortly before Sept. 1, 1939. D

About Sept. 1, 1939, the testator was called up as an officer on the reserve list, but his further service was short, because on Oct. 9, 1939, he was permitted to retire on account of ill health. Most imprudently he returned to France, but he got out in time, and until May 3, 1946, he was in England. On May 3, 1946, he returned to the Villa Emenda, which he was fortunate enough to find upstanding and intact. In 1948 the testator's mother died. The testator did E not go to her funeral or to England at all on that occasion. On Oct. 16, 1951, he died at the Villa Emenda.

The first question which I have to determine is, not what was the testator's domicil at the date of his death, but what was his domicil at the date of his marriage on May 6, 1932. There is absolutely nothing that I can find in his record up to May 6, 1932, which would suggest that he had any domicil other F than English. Faced with that problem, counsel for the first defendant submitted that, as the testator's father was a domiciled Frenchman, the testator's domicil of origin was, therefore, French, and that there was nothing to show that the testator elected to acquire an English domicil, because he had been here, there, and everywhere from the time of his birth until the date of his second marriage in 1932. I think that, if the premise had been well founded, G that argument, although I hardly feel that it savours much of reality, would have been difficult to displace. I think, however, that the premise is ill founded. The testator's father was born in Cheshire in 1834. His domicil of origin was English, and there is, in my judgment, no evidence whatever that he had abandoned his domicil of origin in favour of a domicil of choice in France by the time the testator was born in 1884. There is no evidence that the testator's H father ever was in France before 1882. I am not prepared to find that the testator's father ever had a domicil of choice in France, and, accordingly, that contention of counsel for the first defendant collapses.

That, however, is by no means the end of the case, because counsel for the first defendant propounded an argument which, I think, might almost be said to set the professors by the ears. To start on a safe foundation, I will first I read r. 171 in DICEY'S CONFLICT OF LAWS (6th Edn.) (1949), at p. 795. The rule reads:

> "Where there is no marriage contract or settlement, and where no subsequent change of domicil on the part of the parties to the marriage has taken place, the rights of husband and wife to each other's movables, whether possessed at the time of the marriage or acquired afterwards, are governed by the law of the matrimonial domicil, without reference to

> the law of the country where the marriage is celebrated or where the wife is domiciled before marriage."

That is indisputable law. So that, prima facie, the law applicable in the present case, on the finding of fact which I have just made, is English law. I have deliberately used the phrase " prima facie ". I can also disregard the words of the rule " where no subsequent change of domicil on the part of the parties to the marriage has taken place ". In truth, there was a subsequent change of domicil in the present case. I need not, however, pursue that question further, because, for reasons connected with French law, which I need not elaborate but which counsel for the first defendant found quite compelling (and which he was bound, I think, to find quite compelling), he did not base any argument on the subsequent change of domicil.

What counsel did was to explore the problem which has been the subject of debate between Dr. J. H. C. Morris*, who, I understand, is the author of the note† in Dicey's Conflict of Laws (6th Edn.), at p. 542, which I am going to read, and Dr. Cheshire. The note refers to a somewhat different position, namely, where there is a marriage contract, but for the present purpose that is not important because it is really a discussion of the phrase " matrimonial domicil ". The passage in the text of Dicey's Conflict of Laws (6th Edn.), at p. 541, is as follows:

> " The marriage contract, or settlement, will be construed with reference to the proper law of the contract, i.e., in the absence of reason to the contrary, by the law of the husband's actual domicil at the time of the marriage. The husband's actual domicil at the time of the marriage is hereinafter termed the ' matrimonial domicil '."

I have read that passage in order to explain the note, because it is the note, and not the passage, which really raises the issue. In the note Dr. Morris says (ibid., at p. 542):

> " Whether in this Exception and in the rest of this Digest the term ' matrimonial domicil ' ought to be extended, so as to mean the intended domicil of the husband, when, as occasionally happens, he, though domiciled in one country, intends, to the knowledge of both parties to the marriage, to become immediately domiciled in another country . . . is a question on which there is no decisive English authority."

I stress the word " immediately " in that sentence. The note goes on:

> " On the theory, however, of a tacit or express contract between the parties about to marry, that their mutual property rights shall be determined by the law of their matrimonial domicil, the extension of that term so as to include the country in which they intend to become, and do become, domiciled immediately after their marriage [I again stress the word " immediately "] seems to some authorities reasonable. For instance, if H, domiciled in England, marries in England W, domiciled in South Africa, and H and W sail to South Africa immediately after the ceremony [again I stress the word " immediately "] intending to make it their permanent home, it would seem reasonable at first sight to hold that South Africa, and not England, was their matrimonial domicil. The difficulty is, however, that there is no conclusive English authority in favour of this view, and there are practical difficulties in its application. What if H and W do not sail to South Africa until a month—or a year—after the ceremony ? Where is the line to be drawn ? Are the rights of the spouses to be in suspense until they actually acquire a new domicil in pursuance of their

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* The general editor of the 6th Edn. of Dicey's Conflict of Laws.

† This is a note to Exception 2 to r. 127 in Dicey's Conflict of Laws (6th Edn.), at p. 541.

> pre-matrimonial intention ? It is submitted that the safer rule to adopt is that the matrimonial domicil means the husband's domicil at the time of the marriage. In a clear case where the parties change their domicil very shortly after the marriage, in pursuance of a pre-matrimonial intention to that effect, the change of domicil might well be a ' reason to the contrary ' within the meaning of the Exception." A

I stress the words " In a clear case " at the beginning of that sentence. The note goes on: B

> " This way of looking at the matter has the advantage of avoiding the use of a term of ambiguous meaning which suggests either that a change can be effected by mere intention, or that ' matrimonial domicil ' means something different from ' domicil ' simpliciter."

Different, however, is DR. CHESHIRE'S approach. In PRIVATE INTERNATIONAL LAW (4th Edn.) (1952), at p. 491, he says: C

> " Although there is no clear-cut and decisive authority, the prevalent view is that the determining domicil is that which the husband possesses *at the time of the marriage*. On the whole it is an unobjectionable view, for in the vast majority of cases the parties retain the husband's domicil immediately after the marriage. D Nevertheless, a rule better calculated to function more justly and more conveniently in every case is one which selects the country of the intended matrimonial home. This is equivalent in the normal case to the domicil at the time of marriage, but its merit is that it meets the not unusual case where the parties intend to settle immediately after marriage in another country . . . E It is respectfully submitted, however, that the just and reasonable view to take [on certain facts which had just been mentioned*] is that the law of the country in which the parties intended to settle immediately, in which in fact they did settle, and in which so far as they could foresee they would remain for the rest of their married lives, should be allowed to govern their mutual proprietary rights. The reasonable inference from the circumstances is that they intended to submit themselves in toto F to the matrimonial régime, proprietary as well as personal, obtaining in their future home."

Then DR. CHESHIRE says (ibid., at p. 493):

> " The view that the matter should be governed by the law of the intended matrimonial home lacks neither doctrinal analogy nor juristic support . . . It is undeniable, of course, that the practical application of the doctrine of G the intended matrimonial home may in some cases encounter considerable difficulties . . . How quickly must the intention to settle in the specified country be implemented ? What if there is unforeseen delay or some accident which frustrates the design ? Will effect be given to the alleged intention if it remains a secret locked in the breasts of the parties ? These difficulties are no more insuperable than those which often attend the H ascertainment of intention in a disputed case of domicil. Everything hinges on intention, but the dominion of the lex domicilii of the husband at the time of the marriage is not displaced unless the intention to acquire a new home is established by irrefragable evidence. In fact the suggested rule goes no further than this: There is a strong presumption that the lex domicilii of the husband at the time of the marriage governs the mutual I proprietary rights of the spouses. This presumption is rebutted if it is proved that they intended before the marriage to establish their home in some country other than the husband's domicil and that they have in fact carried this intention out. The presumption may be rebutted, though not lightly,

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*The facts mentioned were those in *Frankel* v. *Commissioners of Inland Revenue*, [1950] S.A.L.R. 220, a decision of the Appellate Division of the Supreme Court of South Africa.

> if the question falls to be considered before the intention has been carried out."

If that suggested rule is, in fact, a rule of English law, then I think there is no doubt that the first defendant would succeed in the present case, because of a statement in her affidavit, which I accept, although she has not been cross-examined on it. She says:

> "Neither before nor at the time of my marriage to the testator, nor at any time afterwards, was there any discussion or express agreement between us as to community or separation of property. It was however agreed between us before marriage that as soon as possible we would settle in France and establish our permanent and only home there. We carried this intention into effect, and neither of us ever had a permanent home outside France after the date of our marriage."

I think that, if Dr. Cheshire's suggested rule is correct, that statement would bring the first defendant within its ambit.

I have, therefore, to approach this controversy between Dr. Morris and Dr. Cheshire with that caution and respect which they both deserve. I think a good starting point is a passage in the judgment of Vaughan Williams, L.J., in the Court of Appeal in *Re Martin, Loustalan* v. *Loustalan* (1) ([1900] P. 211), where he said (ibid., at p. 240):

> "In my opinion, the effect of the husband's domicil on the matrimonial property is based on the presumption that you must read the law of the husband's domicil into the marriage contract as a term of it, unless there is an express agreement to the contrary."

I must respectfully quarrel with those last words, " unless there is an express agreement to the contrary ", because I see no reason why, if the facts warrant it, an agreement which is sometimes erroneously called " a tacit agreement " might not be as effective as an express agreement. What I am referring to is concisely described in Anson's Law of Contract (15th Edn.) (1920), at p. 22*:

> "The description which I have given of the possible forms of offer and acceptance shows that conduct may take the place of written or spoken words, in offer, in acceptance, or in both. A contract so made is sometimes called a tacit contract; the intention of the parties is a matter of inference from their conduct, and the inference is more or less easily drawn according to the circumstances of the case."

For my part, I see no reason why an appropriate agreement excluding the presumption could not be inferred from the conduct of the parties if the circumstances of the case justify such an inference; and it is, I think, something of that kind which was contemplated in Dicey's Conflict of Laws (6th Edn.), at p. 542, when the learned author used the wide phrase " in the absence of reason to the contrary ".

There is one very material point with which I must now deal. It is a point which I do not remember meeting before, and on which no authority has been cited to me. Counsel for the first defendant submitted that, in deciding whether or not an agreement was to be inferred from conduct, the only conduct which could be considered was conduct earlier than, or contemporaneous with, the date on which the alleged contract was made. I see no reason for such a limitation, which would preclude the court from doing palpable justice in some cases. I will give an example, though perhaps a fanciful one. Suppose that it might be relevant to determine whether an intention to make a voyage to South Africa was to be inferred from the conduct of two parties, and suppose that the evidence prior to the date of the journey was that they had consulted tourist offices, obtained particulars of fares, even booked some accommodation, and written to friends saying that they were coming. Suppose, also, that it was quite uncertain at that date whether there was any reason to go to South Africa other than what was to be inferred. Then comes the departure, and they go to New Zealand. It would be ridiculous to exclude from the circumstances from which the inference had to be drawn the circumstance that in the end they went to New Zealand. That is perhaps an extreme case; but I certainly take the view that, if it is a question of inferring something from conduct, the court must look at the conduct as a whole and not stop its investigation at any particular date. That approach, as I think, gets rid of all the difficulties.

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* In Anson's Law of Contract (20th Edn.) (1952), at p. 25, the words " A contract so made is sometimes called a tacit contract " are omitted from this passage.

I will consider first, although the matter is obiter in this case, the case where the parties agreed before the marriage to change their domicil immediately. I can well believe that, in certain circumstances, such an agreement might be enough to lead the court to infer that the parties intended their proprietary rights to be regulated by the law of the new domicil from the moment of their marriage. Take, for example, the case of two comparatively poor persons, one, the woman, having a few national savings certificates, and the man being a weekly wage earner. They both decide to emigrate to Australia. I can well believe that the court might think that that was enough in the circumstances to lead to the inference that they intended their proprietary rights, which at that stage were nugatory, but which might thereafter become of great value, to be regulated from the beginning of their married life by the law of Australia. Take the case of an elderly widower who was a director of half a dozen companies in England and held shares, debentures and exchequer bonds in England. He marries a young wife, and, being ill and in need of a warm climate, agrees to leave immediately to take up his home in South Africa. I cannot imagine that, from the mere fact that they had decided to leave immediately for South Africa to make it their permanent home, and did so, a court would draw the inference that the husband intended that all his proprietary rights should, as from the date of the marriage, be governed by the law of South Africa. I have given those illustrations merely to show that, in my judgment, the inference which the court might or might not draw from the circumstances of an immediate change of domicil would depend on all the circumstances of the case. There does not seem to me to be any particular difficulty. Indeed, I think that I am, roughly speaking, adopting the solution which Dr. Morris suggested, although, in place of the somewhat vague phrase " reason to the contrary ", I should prefer to put it that an inference was to be drawn from all the circumstances of the case that the law of the new domicil was intended to apply as from the date of the marriage.

I am not, however, concerned really with that case, because the first defendant's evidence was that she and the testator had agreed to settle in France " as soon as possible ". That very phrase, in my view, connotes that circumstances might not make it possible to settle there immediately, and, indeed, there were circumstances which did stand in the way of an immediate departure. There were certain circumstances connected with the testator's release from the army, and there may have been—although there is no evidence of that—financial and business reasons. The evidence is singularly scanty in this case. Therefore, I think, the difficulties of inferring anything of that sort are very much greater because, if it is once conceded that the parties contemplated that a period of time was to elapse before they changed their domicil, it is most improbable that they intended the law of the new domicil to apply before they actually changed their domicil. Therefore, if any inference of this sort is drawn, a dichotomy of property rights appears to result, so that they would have some property subject to the law of the matrimonial domicil, that is to say, the husband's domicil at the time of the marriage, and some property subject to the law of the state in which they had newly acquired domicil. I see no juristic difficulty in the way of such an agreement being made; but it seems to me that it is an improbable arrangement, and that, therefore, strong evidence would be required to infer any such arrangement merely from conduct where there was no express arrangement, written or oral.

In the present case, there is no evidence of an intention to substitute the new law, that is to say, the law of the changed domicil, for the law of England. I think that all the matters on which counsel for the first defendant relied were equivocal and could not possibly be said to be evidence which would justify any such inference. I have deliberately said that, because, even if I am wrong in thinking that I am entitled to have regard to the declarations in the three documents to which I have referred, I should still hold that there was not enough evidence to justify the inference which counsel for the first defendant asked me to make. But if, as I think, I am entitled to look at those documents, then it seems to me that there is strong evidence that no agreement between the testator and the first defendant that the law of France was to apply as soon as they took up their residence in France is to be inferred from their conduct. If any kind of change of that sort was in contemplation, I think that the testator would have been bound to have discussed it with the first defendant at some stage, and her evidence is that he never did. In my opinion, in the circumstances of this case, it would be fantastic to infer from what is merely the change of domicil that it was arranged, tacitly or by conduct, at the time of the marriage that French law should apply to their property rights as soon as they settled in France, and I decline to draw any such inference.

If that is the right basis of the law, that, of course, is the end of the matter. If, however, Dr. Cheshire's view is to be adopted, then, as I have already said, I think that the first defendant would succeed; but I can find no foundation in the authorities for Dr. Cheshire's view. In my judgment, the position is reasonably plain, that there is a presumption that the law of the husband's domicil at the time of the marriage applies but that the presumption can be rebutted. It can certainly be rebutted by express contract, and, in my judgment, it could also be rebutted by what is loosely called a tacit contract, if the circumstances warrant the inference of a tacit contract. Therefore, in substance, I adhere to the view expressed by Dr. Morris. The result is that the answer to the question before me is in the negative.

Order accordingly.

Solicitors: *Bell, Brodrick & Gray* (for the plaintiffs); *Janson, Cobb, Pearson & Co.* (for the first defendant); *Thompson, Quarrell & Megaw* (for the second defendant).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

BRYSON v. ROGERS.

A

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Donovan, JJ.), June 27, 1956.]

Street Traffic—Excessive speed—Goods vehicle—Vehicle not being used for carrying goods—Road Traffic Act, 1934 (24 *&* 25 *Geo.* 5 *c.* 50), *Sch.* 1, *para.* 2 (1) (*a*), *as amended by the Motor Vehicles* (*Variation of Speed Limit*) *Regulations,* 1955 (*S.I.* 1955 *No.* 1880), *reg.* 2. B

By the Motor Vehicles (Variation of Speed Limit) Regulations, 1955, reg. 3, the speed limit imposed on goods vehicles does not apply to a dual-purpose vehicle, and, by the Schedule to those regulations, a vehicle to be a dual-purpose vehicle, must, inter alia, be fitted with a rigid roof. A vehicle constructed for the carriage of goods but not fitted with a rigid C roof, in respect of which a farmer's F licence was held, was driven on a non-restricted road at a speed in excess of thirty miles an hour. At the time no goods were being carried in the vehicle. On a charge against the driver of driving the vehicle at a speed greater than the speed specified in Sch. 1 to the Road Traffic Act, 1934, as the maximum speed for a vehicle of that class or description, contrary to the Road Traffic Act, 1930, s. 10, as amended D by the Road Traffic Act, 1934, s. 2,

Held: the driver was guilty of the offence charged since the vehicle was a goods vehicle and not a dual-purpose vehicle within the meaning of the Motor Vehicles (Variation of Speed Limit) Regulations, 1955, and, therefore, the maximum speed at which it could be driven was restricted by the Act of 1934 whether goods were being carried or not. E

Woolley v. *Moore* ([1952] 2 All E.R. 797) negatived by the subsequent regulations.

Appeal allowed.

[**Editorial Note.** The usefulness of this decision is that it should make it understood that tradesmen's delivery vans, whether laden or unladen, cannot be driven lawfully at more than thirty miles per hour (see p. 828, letter G, F post); but shooting brakes unladen are not similarly restricted under the Motor Vehicles (Variation of Speed Limit) Regulations, 1955 (see p. 828, letter C, post) if they are dual-purpose vehicles within the regulations.

As to exceeding speed limits, see 31 HALSBURY'S LAWS (2nd Edn.) 666, 667, paras. 974, 975; and for cases on the subject, see DIGEST SUPPS.]

Cases referred to: G

(1) *Blenkin* v. *Bell,* [1952] 1 All E.R. 1258; [1952] 2 Q.B. 620; 116 J.P. 317; 3rd Digest Supp.

(2) *Woolley* v. *Moore,* [1952] 2 All E.R. 797; [1953] 1 Q.B. 43; 116 J.P. 601; 3rd Digest Supp.

Case Stated. H

This was a Case Stated by justices for the County of Kent in respect of their adjudication as a magistrates' court sitting at Ashford on Feb. 9, 1956. On Jan. 17, 1956, the appellant, Thomas Fiellow Bryson, preferred an information against the respondent, Franklin Rogers, charging that, on Jan. 7, 1956, at Mersham, Kent, he drove a goods vehicle on a road at a speed greater than the speed specified in the Road Traffic Act, 1934, Sch. 1, as the maximum speed in I relation to a vehicle of that class or description, contrary to the Road Traffic Act, 1930, s. 10, as amended by the Road Traffic Act, 1934, s. 2. The following facts were found. On Jan. 7, 1956, at 11.30 a.m., the respondent was driving a vehicle in respect of which a farmer's F licence was held on the A20 road at Mersham, which was an unrestricted road. The vehicle was an Austin pick-up van, one ton in weight unladen, and was fitted with two seats, namely, one for the driver and another for the passenger at the side of the driver's seat. The vehicle was not fitted with a rigid roof, nor with a four-wheeled drive. All the wheels of the vehicle were fitted with pneumatic tyres. No goods were being carried in the vehicle. Over a distance of half a mile, the respondent's minimum speed was forty-eight miles per hour and his maximum speed fifty-five miles per hour.

It was contended on behalf of the respondent that, having regard to the fact that the vehicle was not being used for carrying goods, no speed limit was applicable to it. It was contended on behalf of the appellant that, by reason of the Motor Vehicles (Variation of Speed Limit) Regulations, 1955, the vehicle, whether it was or was not carrying goods, was limited to a maximum speed of thirty miles per hour, and that, on the above facts, the respondent was guilty of driving at a speed greater than the specified maximum speed.

The justices were of opinion that: (i) at the material time the vehicle was being used for a purpose for which it might lawfully be used without the authority of a licence under the Road and Rail Traffic Act, 1933, and, therefore, s. 9 (2) of that Act applied to it; (ii) the Road and Rail Traffic Act, 1933, s. 9 (2), remained unaffected by the Motor Vehicles (Variation of Speed Limit) Regulations, 1955, *Woolley* v. *Moore* (2) ([1952] 2 All E.R. 797) was indistinguishable from the present case and, accordingly, the vehicle, when it was not being used for carrying goods, was not limited to a maximum speed of thirty miles per hour; (iii) the respondent was not guilty of exceeding any limit of speed. The appellant now appealed.

E. L. Gardner for the appellant.

The respondent did not appear and was not represented.

LORD GODDARD, C.J.: This is a Case Stated by justices for the County of Kent, before whom the respondent was charged with driving a goods vehicle on a road

> " at a speed greater than the speed specified in Sch. 1 of the Road Traffic Act, 1934, as the maximum speed in relation to a vehicle of that class or description, contrary to s. 10 of the Road Traffic Act, 1930, as amended by s. 2 of the Road Traffic Act, 1934."

I think that I can concisely state the point. The vehicle in question is a vehicle which can be used for the carriage of goods. It is constructed for the carriage of goods, and, therefore, prima facie it would be a goods vehicle. But in *Blenkin* v. *Bell* (1) ([1952] 1 All E.R. 1258), the court had to consider the case of what is commonly called a shooting brake, which is now very largely used by motorists instead of the ordinary motor car because it is convenient for carrying garden produce about or their luggage to and from the station. After going through the tangle of sections and regulations, the court was forced to the conclusion that the question whether the speed limit applicable to a goods vehicle applied did not depend on whether the vehicle had a carrier's licence or not, but on whether, at the time it was being used, it was being used for the purpose of carrying goods, in which case it was limited to thirty miles an hour, or merely the carrying of passengers, when it would not be affected by a speed limit and would not require a special licence. Of course, it would require more than the ordinary road licence, but not the particular licence which has to be issued under the Road Traffic Act, 1930. Small vehicles, that is to say, vehicles which do not weigh over three tons—the ordinary grocer's van is a very good illustration—were not confined to thirty miles an hour unless they were carrying goods.

That case was followed by this court in *Woolley* v. *Moore* (2) ([1952] 2 All E.R. 797), where the magistrates evidently had thought that some limit had to be put on the decision in *Blenkin* v. *Bell* (1). I think that they thought of the consequences which might follow from the decision rather than the grounds of the decision. When the grounds of the decision were examined, they were found to apply to a delivery van—which was the vehicle in question in *Woolley*

v. *Moore* (2)—as they did to the shooting brake; so the law was finally established on the regulations as they then stood*, that the test was whether the van, at the time when it was being driven at over thirty miles an hour, was carrying goods or carrying only luggage or personal effects for which no special carrier's licence would be required. If the van was carrying goods, it was confined to thirty miles an hour. If the driver, having delivered all his goods, wanted to go home, he could drive at any pace he liked on an unrestricted road. The court did not think it was an altogether satisfactory decision, except for the fact that they said the decision was consistent with common sense and justice having regard to the somewhat complicated state of the regulations.

In July, 1955, the Minister saw fit to exercise the power conferred on him by the Road Traffic Act, 1930, s. 10 (4) and s. 30, by which he can vary these speed limits or apply them to different vehicles. He left the decision in *Blenkin* v. *Bell* (1) (which was concerned with a shooting brake) untouched, but he brought within the scope of the thirty-mile limit the tradesman's delivery van†. He has done it in this way: He has said, in effect, that the thirty mile an hour limit which is imposed on goods vehicles shall not apply to a dual-purpose vehicle as defined in reg. 3 of the Motor Vehicles (Variation of Speed Limit) Regulations, 1955 (that will leave the shooting brake untouched); but that if the vehicle is not a dual-purpose vehicle as defined in reg. 3, then the thirty mile an hour limit will apply, whether it is carrying goods or not.

The first thing that is to be found in the definition of a dual-purpose vehicle‡ is: " 1. The vehicle must be permanently fitted with a rigid roof, with or without a sliding panel ". Then: " 2. (1) The area of the vehicle to the rear of the driver's seat must satisfy the following requirements ", and there are requirements as to the seats and windows, and " 3. The distance between the rearmost part of the steering wheel and the backrests of the row of transverse seats [must satisfy] the requirements specified in sub-para. (2) [of para. 2] ", and matters of that description. This vehicle was not fitted with a rigid roof. It follows that the vehicle does not answer the first requirement that a dual-purpose vehicle for the purpose of these regulations must answer.

For these reasons, the magistrates came to a wrong determination in thinking that the cases to which I have referred applied to this case or that an offence had not been committed. It is quite obvious that the vehicle, on its description, is a goods vehicle and, therefore, must not be driven at more than thirty miles an hour.

The usefulness of this decision is that it ought to be well understood by tradesmen's drivers that tradesmen's delivery vans cannot be driven lawfully at more than thirty miles an hour, whether they are laden or unladen; the new regulations make that perfectly clear.

This case must go back to the magistrates with a direction that the offence was proved.

ORMEROD, J.: I agree.

DONOVAN, J.: I agree. The magistrates have given certain reasons for holding that the Motor Vehicles (Variation of Speed Limit) Regulations, 1955, do not apply to this particular vehicle, and they refer to s. 9 (2) of the Road and Rail Traffic Act, 1933. It would have been more satisfactory if one understood those reasons; but perhaps it is not surprising when the solicitor who advanced those reasons has not explained them, and counsel for the appellant, who is

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* The Motor Vehicles (Variation of Speed Limit) Regulations, 1950 (S.I. 1950 No. 1705).

† By the Motor Vehicles (Variation of Speed Limit) Regulations, 1955 (S.I. 1955 No. 1880), which revoked and replaced S.I. 1950 No. 1705.

‡ See the Motor Vehicles (Variation of Speed Limit) Regulations, 1955, Schedule.

A well versed in these matters, does not understand them, that one cannot understand them oneself. I agree with the judgment proposed. *Appeal allowed.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. P. Tunstall*, Maidstone (for the appellant). [*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

B

SOUTHEY-ROBERTS ESTATES, LTD. *v.* ROE.

[CHANCERY DIVISION (Upjohn, J.), June 19, 1956.]

Practice—Trial—Notice and entry of trial—Inspection of documents not completed.
Practice—Summons for directions—Order for entry of trial—When necessary.
C *Practice—Summons for directions—Order fixing place and mode of trial—When order should be made.*

On May 3, 1955, the plaintiffs issued the writ in this action. A motion in it was heard on July 5, 1955. The statement of claim was delivered on Nov. 26, 1955, and the defence on Jan. 16, 1956. On Feb. 27, 1956, the summons for directions was issued. It was heard on Mar. 23, 1956, and the master then ordered affidavits of documents and " that the plaintiffs and the D defendant respectively do within ten days after such affidavit shall have been filed . . . produce . . . the documents which by such affidavits shall appear to be in their possession . . . And the defendants [sic] and the plaintiff [sic] respectively . . . are to be at liberty to inspect . . . the documents so produced . . . And it is ordered that this action be tried in Middlesex before a judge alone and be set down for trial within fourteen E days after such inspection of documents as aforesaid shall have been completed ". On Apr. 12, 1956, the defendant filed his affidavit of documents, and on May 10, 1956, the plaintiffs filed their affidavit. On June 1, 1956, the plaintiffs issued notice of trial and subsequently entered the trial, but neither party had at that date inspected the other party's documents. The defendant applied to have the entry of trial set aside on the ground that it F was premature since inspection of documents had not been completed.

Held: the entry of trial was premature because on the true construction of the order of Mar. 23, 1956, the trial was to be set down within the period of fourteen days starting with the completion of inspection, and although the defendant had not inspected the plaintiffs' documents within ten days of the filing of the plaintiffs' affidavit, yet in the circumstances of the present G case sufficient time had not elapsed by June 1, 1956, for it to be reasonable (in view of the delays which had already occurred in the action) for the plaintiffs to assume that the defendant did not desire to inspect the plaintiffs' documents and that, therefore, for the purpose of giving notice of trial and setting down the action, inspection was complete.

Per CURIAM: (i) the provisions relating to setting down in para. 29 of H form 3A in Appendix K to the R.S.C. were inserted to deal with actions dealt with by R.S.C., Ord. 36, r. 1A, r. 1B and r. 1C, where no notice of trial is necessary. In those cases where no notice of trial is necessary, it is right that the court should make an order about entry of trial; but in cases where a notice of trial is necessary, and that covers the normal action in the Chancery Division, those provisions are inappropriate and accordingly they should not I normally be used (see p. 832, letter G, post).

(ii) in the ordinary case, as the court could not be satisfied, at any rate until after discovery, whether all necessary matters had been dealt with, the order fixing the place and mode of trial ought not to be made until after the conclusion of discovery (see p. 833, letter D, post).

[As to notice and entry of trial, see 26 HALSBURY'S LAWS (2nd Edn.) 91, 92, paras. 168-175 and Supplement; and for cases on the subject, see DIGEST (Practice) 546-551, *2078-2111.*]

Case referred to:

(1) *Saunders* v. *Pawley*, (1885), 14 Q.B.D. 234; 54 L.J.Q.B. 189; 51 L.T. 903; Digest (Practice) 548, *2093*.

Procedure Summons.

The defendant applied under the summons for directions for an order to set aside the entry for trial of this action by the plaintiffs on the ground that inspection of documents not having been completed the entry for trial was premature.

E. I. Goulding for the plaintiffs.
G. M. Parbury for the defendant.

UPJOHN, J.: A point of some general importance on the proper procedure on the hearing of a summons for directions is raised on this application. The pleadings were closed seven days after delivery of the defence which was delivered on Jan. 16, 1956, and on Feb. 27 a summons for directions was taken out by the plaintiffs which came before the master on Mar. 23, 1956. He ordered affidavits of documents in the usual form and ordered

> " that the plaintiffs and the defendant respectively do within ten days after such affidavit shall have been filed at all seasonable times upon reasonable notice produce at the offices of their respective solicitors the documents which by such affidavits shall appear to be in their possession or power except such of the said documents (if any) as they may by such affidavits respectively object to produce And the defendants [sic] and the plaintiff [sic] respectively or their respective solicitors and agents are to be at liberty to inspect and peruse the documents so produced and to make notes of their contents and are to be entitled to be supplied with copies thereof and extracts therefrom as they respectively shall be advised upon payment therefor at the prescribed rate . . . And it is ordered that this action be tried in Middlesex before a judge alone and be set down for trial within fourteen days after such inspection of documents as aforesaid shall have been completed."

Pursuant to that order the defendant filed his affidavit of documents on Apr. 12, 1956. That was rather out of time. The plaintiffs were even more out of time, for they filed their affidavit of documents on May 10, 1956. The affidavit contained a very large number of documents indeed. I am told that there are some six hundred documents disclosed and numbers of files and numbers of documents described thus " sundry papers and documents contained in the top left-hand drawer of desk used by the defendant ". Nothing further happened, and on June 1, 1956, notice of trial was served. That notice was not accepted and the proceedings took place before the master.

At this stage I must refer to a number of Rules of the Supreme Court. R.S.C., Ord. 30, r. 1 (1), which came into force in 1954, is in these terms:

> " In every action to which this rule applies, the plaintiff shall, with a view to providing an occasion for the consideration by the court or a judge of the preparations for the trial of the action, so that—(a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and (b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof, take out . . . a summons (in these rules referred to as a summons for directions) . . ."

R.S.C., Ord. 30, r. 2, provides:

> ". . . (3) If, when the summons for directions first comes to be heard, the court or judge considers that it is expedient to adjourn the consideration of all or any of the matters which are by the subsequent rules of this order required to be considered on the hearing of the summons for directions, the court or judge shall deal forthwith with such of those matters as the

> court or judge considers can conveniently be dealt with forthwith and adjourn the consideration of the remaining matters and shall endeavour to secure that all other matters which must or can be dealt with on interlocutory applications and have not already been dealt with are dealt with either then or at a resumed hearing of the summons for directions. (4) Subject to the provisions of paras. (5) and (6) of this rule, no order under r. 1 of Ord. 36 as to the place or mode of trial and no order fixing a date for the trial shall be made until all the matters which, by the subsequent rules of this order, are required to be considered on the hearing of the summons for directions have been dealt with."

R.S.C., Ord. 36, deals with the mode and place of trial. Rule 1 is in these terms:

> "The order made on the summons for directions in every cause or matter, shall direct whether the cause or matter is to be tried with a jury, or without a jury (whether by a judge or otherwise), and shall also direct where the cause or matter is to be tried, but the mode and place of trial so directed may be subsequently altered for sufficient cause on a summons or a notice under the summons or order for directions issued by either party without any appeal from the former direction. If the mode or place of trial is so altered the cause or matter shall thereupon be transferred to the appropriate list."

R.S.C., Ord. 36, r. 1A, deals with certain actions in the Queen's Bench Division in London, r. 1B with cases by or against the Crown, and r. 1C with actions ordered to be tried at Liverpool or Manchester. R.S.C., Ord. 36, r. 11, deals with notice of trial:

> "Notice of trial may be given in any cause or matter by the plaintiff or other party in the position of plaintiff as soon as the place and mode of trial have been fixed."

Rule 11A deals with actions in the Queen's Bench Division under r. 1A and under r. 1B and r. 1C. That provides, shortly, that in those actions no notice of trial shall be required, but that the plaintiff may set the action down and if he does not the defendant may apply to set it down or may apply to the court or judge to dismiss the action for want of prosecution. Rule 12 deals with the ordinary case where the action is of a type which requires a notice of trial to be given under r. 11, and provides that if the plaintiff does not set it down within six weeks after the time he first became entitled to give notice under r. 11, the defendant may do so or may apply for the action to be dismissed for want of prosecution. I need not read r. 14, which deals with the length of trial. Rule 15 is in these terms:

> "Notice of trial shall be given before entering the trial: and the trial may be entered notwithstanding that the pleadings are not closed, provided that notice of trial has been given."

Rule 16 provides:

> "In London and Middlesex, Manchester and Liverpool and such other places as the Lord Chancellor shall from time to time direct, unless within six days after notice of trial is given, the trial shall be entered by one party or the other, the notice of trial shall be no longer in force."

Therefore, the procedure where, in an action such as this, a notice of trial has to be given, seems reasonably plain. The plaintiff may give a notice of trial any time after the place and mode of trial has been fixed. If he does not avail himself of that within six weeks, the defendant can do so. When a notice of trial has been given by one party or another the matter must be entered, and if it is not entered within six days after the notice then the notice itself becomes void.

It is submitted that I must read the master's order in the light of the rules A which I have read, and it is said that, reading it in the light of those rules, the plaintiff is entitled to set down the action at any time after the place and mode of trial are fixed, and it is limited only by this, that it must not be later than fourteen days after inspection of documents has been completed. If that be right, then the notice of trial is a good one; but, on the other hand, it is said that, complying with the terms of the order, the action can only be set down within a period of B fourteen days starting after the completion of inspection of documents and concluding fourteen days thereafter. It is therefore a question of construction of the order of Mar. 23, 1956, in the light of those rules. In my judgment, the construction of the order is clear. The action is to be tried in Middlesex before a judge alone and is to be set down within fourteen days after completion of inspection. That seems to me clearly to mean that it must be set down within C a period which starts after the completion of inspection and ends fourteen days thereafter. The word "within" is, in my judgment, conclusive on that point.

The question, therefore, is whether inspection of documents was completed when the notice of trial was given. That must necessarily be a question of fact. [His Lordship reviewed the evidence and came to the conclusion that inspection of documents had not been completed when the notice of trial was issued. D His Lordship continued:] It seems to me that the notice of trial was not in accordance with the master's order because inspection had not in fact been completed. As the notice of trial is not in order, it follows that the action ought not to have been set down.

That is sufficient to dispose of this case, but during the interesting argument a point of some general importance has emerged. As is well known, the relevant E R.S.C. Orders were substantially amended as the result of some recommendations made by the Supreme Court Committee on Practice and Procedure, and, as a result of the amendment of the rules, the forms were also amended. There is to be found a form in Appendix K under 3a on p. 2672 of the Annual Practice, 1956, a very greatly extended pro forma for use on summons for directions. It contains no less than thirty paragraphs, and para. 29 is this (ibid., at p. 2674): F

> "Trial. Place: ——— Mode: ———[Estimated length: ——— to be set down within ——— days [and to be tried immediately after the action 19——, No. ———].]"

It appears that that form is in current use in the Chancery Division and there is indeed no objection to that; but it must be used in the light of the circumstances G of each action. It seems to me reasonably clear that the part of the pro forma which deals with setting down was inserted to deal with actions dealt with by R.S.C., Ord. 36, r. 1a, r. 1b and r. 1c, where no notice of trial is necessary. In those cases where no notice of trial is necessary it is right that the court should make an order about entry of trial; but in cases where a notice of trial is necessary, and that covers the normal action in the Chancery Division in London, it seems H to me that the setting down provisions are inappropriate, and accordingly they should not normally be used. As I have already indicated, R.S.C., Ord. 36, really provides a code for giving notice of trial, and I am at a loss to understand what jurisdiction the court has in such cases to make orders about entry of an action for trial. In the present case the order was made without objection from either side, and whether made per incuriam or not it is binding on them; but it I was suggested that R.S.C., Ord. 64, r. 7, gave the court a power to make such an order. That rule enables the court or a judge to enlarge or abridge a time appointed by the rules and I do not understand how that can apply to this case. Support for that view, although it does not cover this case, is to be found in *Saunders* v. *Pawley* (1) ((1885), 14 Q.B.D. 234).

There may well be cases where the plaintiff comes forward and asks, for example, at a rather late stage for leave further to amend his pleadings and it may be right to grant him that indulgence only on terms that he will undertake

A to give notice of trial and set down the action within a certain time with the consequence that if he is not prepared to give that undertaking then the indulgence will not be granted to him. I am not dealing with that case at all.

It was said that the opening words of R.S.C., Ord. 30, r. 1 (1), also gave the master adequate jurisdiction on the matter. I am unable to give such a broad construction to r. 1 (1). That only relates to the issue of a summons for directions.

B There is another matter to which I would like to draw attention. In this case, the master, on the first hearing of the summons for directions before him, made an order as to the place and mode of trial. In simple cases that may be a proper order to make, and nothing I am saying is intended to fetter the discretion of a court in such cases (see R.S.C., Ord. 30, r. 2 (2)); but in cases of any complication it cannot be right at that stage to fix the mode and place of trial for this reason: C Once that is fixed then under R.S.C., Ord. 36, r. 11, the plaintiff can give notice of trial and so under r. 12 can the defendant later on. That is contrary to the letter and spirit of this new R.S.C., Ord. 30; the court carrying out the spirit of those directions ought to keep the matter under its control until it can see that the matters for consideration which are cast on the court by R.S.C., Ord. 30, r. 1 and r. 2, are really dealt with.

D I again refer, without re-reading, to the express provisions of R.S.C., Ord. 30, r. 2 (4). Accordingly, in the ordinary case, as the court cannot be satisfied, at any rate until after discovery, whether all necessary matters have been dealt with, the order fixing the place and mode of trial ought not to be made until after the conclusion of discovery. I am told that in fact in many cases the practice is followed of " standing over " para. 29 of the pro forma dealing with the place E and mode of trial until after completion of discovery. The matter is then brought back before the court and then further directions can be given according to circumstances. That seems to me the practice which ought to be followed.

To return to this case, I propose to set aside the notice of trial, and entry of trial must also be vacated.

Solicitors: *A. Archdeacon & Co.* (for the plaintiffs); *Kenneth Brown, Baker,* F *Baker* (for the defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

PRACTICE NOTE.

G

DIVORCE REGISTRY.

Divorce—Insanity—Incurable unsoundness of mind—Evidence.

Divorce—Evidence—Affidavit—Medical evidence as to incurable unsoundness of mind—Application for leave to read affidavit.

It is directed by the President that in proceedings for divorce on the ground of incurable unsoundness of mind, application for leave to read affidavit evidence H from medical officers* may, with the consent of the respondent's guardian ad litem, be made to the judge at the trial. Any affidavit which is to be the subject of such an application shall be lodged in the Registry in which the cause is proceeding and, if in order, will be indorsed by the Registrar and filed.

Where the Official Solicitor is acting as guardian ad litem of the respondent, it should be ascertained whether he consents to the reading of affidavit evidence, I and, if so, what is the nature of the evidence required.

The Practice Note of Feb. 18, 1946†, entitled " Evidence upon Affidavit " is hereby cancelled.

B. LONG,
Senior Registrar.

July 3, 1956.

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* See, regarding such evidence, *Usher* v. *Usher*, p. 762 ante.

† See note to Matrimonial Causes Rules, 1950, r. 25 (1) (a), in the ANNUAL PRACTICE, 1956, at p. 2358.

B. P. REFINERY (KENT), LTD. *v.* KENT RIVER BOARD. B. P. REFINERY (KENT), LTD. *v.* LOWER MEDWAY INTERNAL DRAINAGE BOARD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Donovan, JJ.), June 21, 22, 25, 1956.]

Land Drainage—Drainage rates—Rates assessed on basis of annual value of hereditament—Determination of annual value—Whether "determined" when annual value in dispute for income tax purposes—Land Drainage Act, 1930 (20 *&* 21 *Geo.* 5 *c.* 44), *s.* 29 (1).

Income Tax—Assessment—Additional assessment—Valuation of property—When annual value determined for purposes of tax under Sch. A—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 35, *s.* 53.

A drainage board made a rate in accordance with s. 24 of the Land Drainage Act, 1930, on the basis of the annual value of hereditaments occupied by a company (i.e., the annual value for the purposes of Sch. A to the Income Tax Act, 1952). The hereditaments had been revalued at a greatly increased annual value. The Sch. A assessment, which was on the footing of the revaluation, had been signed and allowed pursuant to s. 35 of the Income Tax Act, 1952, but had not been communicated to the company when the rate was made. When the company was notified of the Sch. A assessment it appealed against the assessment. The company now appealed against the rate on the ground that the new annual value had not been "determined" within s. 29 (1) of the Land Drainage Act, 1930, when the rate was made.

Held: in so far as the rate proceeded on the basis of the Sch. A assessment the rate was invalid, since the annual value of hereditaments was not determined within s. 29 (1) of the Land Drainage Act, 1930, until either (a) if there were an appeal against an assessment to Sch. A, the appeal was determined, or (b) if there were no appeal the time for appeal had expired.

Per CURIAM: the use of the word "determined" in s. 53 of the Income Tax Act, 1952, shows that when the commissioners sign and allow an assessment under Sch. A the annual value is then estimated or assessed, and that will stand good unless there is an appeal, but that where there is an appeal, the annual value will be "determined" when the appeal is heard (see p. 842, letter E, post).

[As to drainage rates, see 30 HALSBURY'S LAWS (2nd Edn.) 90, para. 170. For the Land Drainage Act, 1930, s. 29, see 13 HALSBURY'S STATUTES (2nd Edn.) 579.

For the Income Tax Act, 1952, s. 35, s. 53, see 31 HALSBURY'S STATUTES (2nd Edn.) 45, 59.]

Cases referred to:

(1) *Sewers Comrs.* v. *Cheffings*, (1935), 80 L.Jo. 9; Digest Supp.

(2) *R.* v. *Income Tax Special Comrs., Ex p. Elmhirst*, [1936] 1 K.B. 487; 105 L.J.K.B. 759; 154 L.T. 198; 20 Tax Cas. 381; Digest Supp.

(3) *Inland Revenue Comrs.* v. *Sneath*, [1932] 2 K.B. 362; 101 L.J.K.B. 330; 146 L.T. 434; 17 Tax Cas. 149; Digest Supp.

(4) *Lyons* v. *Collins*, [1936] 3 All E.R. 788; [1937] 1 K.B. 353; 106 L.J.K.B. 299; 156 L.T. 59; 21 Tax Cas. 12; Digest Supp.

Special Cases Stated.

These were Special Cases Stated for the opinion of the High Court by consent of the parties under an order of DEVLIN, J., pursuant to the Quarter Sessions Act, 1849, s. 11.

B.P. REFINERY (KENT), LTD. *v.* KENT RIVER BOARD

The respondents, the Kent River Board, were the drainage authority for the internal drainage district formerly under the jurisdiction of the commissioners of sewers for the limits extending from Gravesend Bridge to Sheerness and thence along the River Medway to Penshurst, Kent. On June 24, 1955, the respondents made or purported to make, drainage rates in respect of the year ending Mar. 31, 1956, which were to be assessed and levied on the owners and occupiers of hereditaments in the above drainage district. These hereditaments included certain land and premises (hereinafter called " the premises ") owned and occupied by the appellants, Kent Oil Refinery, Ltd. (now known as B.P. Refinery (Kent), Ltd.), who appealed to quarter sessions against the rates.

The premises, situated on the Isle of Grain, Kent, were at all material times assessable for the purposes of income tax under Sch. A to the Income Tax Act, 1952 (hereinafter called " the Act of 1952 "), and were situated partly within the drainage district for which the respondents were the drainage board for the purposes of the Land Drainage Act, 1930 (hereinafter called the " Act of 1930 "). The appellants were building an oil refinery on the premises, the construction of which was to take place in four phases, each phase being of an installation capable of being brought into operation as soon as it was completed. Phase one was completed and brought into operation during the year ending Apr. 5, 1953, and phases two and three were completed and brought into operation during the years ending Apr. 5, 1954 and 1955 respectively. With reference to phase one of the construction, the gross annual value of the premises for the purposes of Sch. A to the Act of 1952 for the year ending Apr. 5, 1954, was £148,588. This value was apportioned for the year ending Mar. 31, 1955, by the respondents, pursuant to the provisions of the Act of 1930, for the purpose of determining the annual value of that part of the premises lying within their internal drainage district, and the annual value so apportioned was £62,700. On this basis, the respondents made a drainage rate for the year ending Mar. 31, 1955, and the appellants paid this rate. On Mar. 23, 1955, with reference to phases one, two and three of the construction, and in respect of the year ending Apr. 5, 1955, the additional commissioners of income tax signed and allowed under s. 35 and/or s. 41 of the Act of 1952 an assessment of the premises under Sch. A to the Act at a gross annual value of £1,140,004. By a letter dated Apr. 7, 1955, H.M. Inspector of Taxes for the respondents' district, in reply to requests by the clerk to the respondents for information as to the Sch. A assessment of the premises, furnished details of the Sch. A assessment. The appellants, by a notice of assessment dated May 11, 1955, were informed of the assessments and gave notice of appeal on May 16, 1955, which appeal was still pending. The respondents, by a notice of apportionment dated Apr. 29, 1955, informed the appellants that they had apportioned the gross annual value of £1,140,004, so that the annual value for drainage rating purposes of the part of the premises lying within their internal drainage district had been determined to be £703,150. This figure of £703,150 was entered in the respondents' drainage rate book, in respect of the drainage rate for the year ending Mar. 31, 1956, under the heading " Gross annual value of property for income tax purposes (Sch. A) or as apportioned or determined by the board ", and on this basis, on June 24, 1955, the respondents made, or purported to make, drainage rates for the year ending Mar. 31, 1956, in respect of the part of the premises within their internal drainage district. The rate was in the form of an owner's rate of 8d. in the pound and an occupier's rate of 1d. in the pound. All formal requirements as to the making or purported making of the rate and apportionment were properly complied with by the respondents, and on July 4, 1955, the appellants, pursuant to the Act of 1930, gave notice of appeal against the drainage rates.

A The questions for the opinion of the court were:—(i) whether the part of the premises within the respondents' internal drainage district had any annual value for the purposes of the Land Drainage Act, 1930; (ii) whether, if the answer to (i) was in the affirmative, such annual value was the amount of the apportionment made by the respondents of the Sch. A assessments of £148,588 and £1,140,004. It was agreed between the parties that the amounts of the apportionments were correctly computed in relation to the sums of £1,140,004 and B £148,588, respectively; (iii) whether the rate made by the respondents on June 24, 1955, was validly made under the Act of 1930; (iv) whether, if so, the appellants were liable to pay rates on the basis of the annual value as apportioned by the respondents by their notice of apportionment dated Apr. 29, 1955, or on the basis of the annual value as apportioned by the respondents for the purposes of drainage rates for the year ending Mar. 31, 1955, or on some C other, and if so what, basis; (v) what judgment should in the premises be entered.

B.P. REFINERY (KENT), LTD. *v.* LOWER MEDWAY INTERNAL DRAINAGE BOARD

The facts in this Case Stated were the same as those of *B.P. Refinery* (*Kent*), *Ltd.* v. *Kent River Board*, except that the apportioned value for the year D ending Mar. 31, 1955, of the premises within the respondents' internal drainage district was £58,800, and the drainage rate assessed for the year ending Mar. 31, 1956, was an owner's rate of 2s. 6d. in the pound and an occupier's rate of 1s. 3d. in the pound; also the apportioned annual value for the year ending Apr. 5, 1955, was £321,810. The questions for the opinion of the court were the same.

E *Michael Rowe, Q.C.*, and *R. J. Parker* for the appellant company.
Sir Andrew Clark, Q.C., and *P. R. E. Browne* for the respondent boards.

Cur. adv. vult.

June 25. **LORD GODDARD, C.J.:** The judgment of the court will be delivered by DONOVAN, J.

F **DONOVAN, J.**, read the following judgment: These two appeals, which come before the court under Baines's Act* and are in the form of agreed Special Cases, concern the validity of drainage rates made by the respondents on the appellants for the year ended Mar. 31, 1956. The issues are the same in each case, and it will, therefore, be sufficient to deal with the appeal of B.P. Refinery (Kent), Ltd. against the rate levied by the Kent River Board. G

The respondents (whom I will call "the board") are a drainage board for the purposes of the Land Drainage Act, 1930. The appellants (whom I will call "the company") are erecting a refinery within the board's drainage district, and bringing it into operation by stages. The board are entitled, by s. 24 of the Act of 1930, to levy rates on owners or occupiers of hereditaments within their district, and by s. 24 (3) and (4), the rate has to be assessed on the basis of H the annual value of the hereditament, and to be a uniform rate of so much per pound throughout the area. By s. 29 (1), the expression "annual value" is defined to mean

> "the gross annual value of that land as determined for the purposes of income tax under Sch. A of the Income Tax Act, 1918, as amended by any subsequent enactment." I

As is well known, the Income Tax Act, 1952, has replaced the Income Tax Act, 1918, and the intervening Finance Acts, as the current consolidating measure†. To enable a drainage board to obtain information about such annual values,

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* I.e., Quarter Sessions Act, 1849; 14 HALSBURY'S STATUTES (2nd Edn.) 808.

† As regards continuity of income tax enactments and the referring to existing references to the Income Tax Act, 1918, to replacing provisions of the Income Tax Act, 1952, see s. 531 of the latter Act and s. 38 (1) of the Interpretation Act, 1889.

s. 29 (4) of the Act of 1930 provides that surveyors of taxes shall, on request, supply

> “ a copy of the annual values for the time being in force for the purposes of income tax under Sch. A . . .”

The gross annual value of the company’s refinery, so far as then completed, for the income tax year ending Apr. 5, 1954, for the purposes of Sch. A was £148,000 odd, and the board levied a drainage rate on an apportioned part of that figure for the board’s year ending Mar. 31, 1955. The apportionment was necessary because part of the hereditament lay outside the board’s district.

On Mar. 28, 1955, the board were apparently considering what rate they should levy for their next year, namely, that ending on Mar. 31, 1956; and on Mar. 28, 1955, they wrote to the inspector of taxes asking for particulars of the Sch. A assessments on the company. He replied on Apr. 7, 1955, saying that “ revised ” Sch. A assessments were “ signed and allowed ” on Mar. 23, 1955, and set out, inter alia, the figure of £1,140,004 with which alone we need be concerned. Though not so stated in the inspector’s letter, this was an income tax assessment for the year 1954-55. Three weeks later, namely, on Apr. 29, 1955, the board gave notice to the company showing that the board had adopted the figure of £1,140,004 as the annual value, for the purposes of the drainage rate, for the year ending Mar. 31, 1956, and had apportioned some £700,000 of it as the annual value of that part of the refinery within the board’s district.

At this stage, so far as the Case discloses, the company had never even heard of the figure of £1,140,004 as being a Sch. A assessment on them. They did not get notice of it until May 11, and they thereupon, on May 16, appealed against the assessment. The annual value for Sch. A purposes for the income tax year 1954-55 then became a matter of dispute between the company and the Revenue, and is still unresolved. On June 24, 1955, however, the board, treating that annual value as “ determined ” within the meaning of s. 29 (1) of the Act of 1930, levied a rate on the company on that basis. On July 4, the company appealed to quarter sessions.

The point now is whether the board were right in regarding the annual value of the company’s hereditament for the year 1954-55 as “ determined ” for the purposes of Sch. A in the foregoing circumstances. The same point was glanced at, but not decided, by a Divisional Court in 1935: *Sewers Comrs.* v. *Cheffings* (1) ((1935), 80 L.Jo. 9). It was not the issue in the case, and the respondent was unrepresented. At first sight of the point, one may, perhaps, be forgiven for thinking that an annual value could hardly be determined for the purposes of income tax when, in fact, it is in dispute between the income tax authorities and the taxpayer; for one meaning of the word “ determined ” is “ ascertained precisely ”. This, indeed, is the argument for the company, reinforced by considerations based on a number of sections in the Income Tax Act, 1952. But the board say that the annual value is “ determined ” for the purposes of Sch. A at the moment the assessment is laid before the additional commissioners, pursuant to s. 34 (1) of the Income Tax Act, 1952, and they “ sign and allow ” it under s. 35. The board also rely on various sections of the Income Tax Act, 1952, from a short consideration of which, therefore, there is no escape. The board add that, unless they are right, they will never know just what rates they have to levy, because appeals against Sch. A assessments may, in some cases, be lodged up to one year after the end of the year of assessment; they may take a long time to be disposed of, and meantime the board, if the company is right, will have no money, and, therefore, be unable to discharge their statutory duties under the Land Drainage Act, 1930. Accordingly, while stigmatising that Act as loosely and even badly drafted, they ask that the expression “ determined for the purposes of Sch. A ” be given a broad interpretation in their favour.

Dealing at once with this question of prospective administrative difficulty it is, of course, entirely legitimate to take it into account on a question of construction, such as this; but it is, with all respect, an exaggeration to say that the board's interpretation is vital to a performance of their duties. Under s. 46 of the Act of 1930, they have power, with the Minister of Agriculture's consent, to pay their expenses for the time being out of borrowings, and while, no doubt, they would wish to avoid this, the existence of the power is inconsistent with the argument that the board's work must come to a standstill unless their interpretation of s. 29 of the Act of 1930 is correct. One has also to remember that the bulk of Sch. A assessments are fixed in a year of revaluation, and remain in force for five years. It will, no doubt, be administratively inconvenient if the board have to wait in order to see whether a Sch. A assessment is going to be appealed against before levying a rate. When the Land Drainage Act, 1930, was passed, the period for appeal was only twenty-one days. The extension of the time limit under Sch. A came in 1942*. While noticing the apprehension of the board that they may have to wait in a particular case until the House of Lords gives a decision, I do not share it. There is obviously force in an argument that a decision of commissioners on appeal holds the field as a determination until reversed. The grievance here may, indeed, be the ratepayer's, who may pay his drainage rate on the basis of such a determination, and not be able to get back any excess rate he will have paid if that determination is reversed in his favour. For the Land Drainage Act, 1930, contains no provision allowing such repayment—a circumstance relied on by the company as support for its argument. There is, therefore, on any view no such strength in the plea of administrative difficulty as would justify a strained and unnatural interpretation of the word "determined" in s. 29 (1). One may come to that problem without being unduly oppressed by the prospect of disaster should the company's interpretation be right.

I have already indicated what the general contention of the company is. It also argues, as I have just said, that the absence of any right to recover rates paid on annual values which turn out to be excessive, shows that the legislature did not intend rates to be levied on annual values which were in dispute. In reply, the board faintly relied on s. 28 of the Act of 1930; but this merely allows them to amend a rate, not repay part of the proceeds of a rate if the relevant annual value is afterwards reduced for income tax purposes. For the rest—apart from a comparison based on the Rating Acts, into which it is mercifully unnecessary to go—the company's case consisted of meeting in advance arguments which it expected the board to use.

Nothing will be lost, however, if one goes straight to the board's actual arguments, which, in summary, and apart from prophecies of a stoppage of work, were these: first, "determined", in s. 29 (1), means determined for the purposes of or within the meaning of the Land Drainage Act, 1930, not the Income Tax Act, 1952; secondly, so far as the Income Tax Act, 1952, is concerned, the annual value is "determined" once the additional commissioners sign and allow the assessments pursuant to s. 35 or s. 41 of that Act; thirdly, the circumstance that the taxpayer may dispute the assessment and give notice of appeal so that the dispute may be resolved makes no difference at all.

I do not quite follow the first contention. The ultimate purpose of finding out what annual value has been determined for income tax purposes is to enable the drainage rate to be fixed. This does not seem to help very much, however, on the present question of construction, which is: "What is the gross annual value of the land as determined for the purposes of income tax under Sch. A ?" Obviously to answer that question one must find out what constitutes such a determination under the relevant provisions of the Income Tax Act, 1952. If all that the first contention of the board means is that one should not lose sight

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* See p. 841, letter I, post.

A of the ultimate purpose of the inquiry, I agree with it; and it may be that the contention is simply another facet of the argument already noted, that the court should, if it can, give a broad construction to the word " determined ", lest otherwise the board may be prevented from doing their work.

The second argument is based on s. 34 and s. 35 of the Income Tax Act, 1952. Section 34 (1) requires the assessor to deliver to the additional commissioners, B inter alia, his certificate of assessment under Sch. A; and under s. 35 the additional commissioners, if satisfied with the assessments, are to " sign and allow " them. The office of assessor has now been abolished, and the surveyor (now the inspector) of taxes substituted; see s. 15 of the Act of 1952. There may or may not be additional commissioners for any district; see s. 6 (2) of, and Sch. 1 to, the Act of 1952, para. 6 of which makes it clear that when no additional C commissioners are appointed the general commissioners are to do all the work.

The board place such stress on the words " sign and allow " in s. 35 that it is useful to see just what has happened up to this point. Notices to make a return, inter alia, of annual value will normally have been given to the taxpayer: see s. 20 and also s. 24. The usual notice is contained on the front of every income tax return. If no return is made pursuant to the notice, or if the commissioners D are not satisfied with the return, the assessor may, under the commissioners' order, make a survey of the land with the help of a person of skill in order to ascertain the annual value for himself: see s. 33. If, however, the taxpayer's return is acceptable, the assessor makes his " assessment ". Just what this operation consists of the Act seems to leave to the imagination. Presumably the assessor (now the inspector) makes out and certifies lists showing E opposite each person's name the amount of declared income—assuming the declaration to be acceptable—and it may well be that these lists so made out and certified are regarded as " the assessment ", and the " certificate of assessment ". These lists and certificates are now probably all in the form of bound books.

The additional commissioners, or if there are none, the general commissioners, F then consider these assessments and, if satisfied, " sign and allow " them. This does not mean that in all cases the commissioners' duty of ascertaining the true annual value is at an end, so that " signing and allowing " an assessment may be treated as the determination of annual value. For one reason or another the assessment may be simply the commissioners' own estimate of the annual value, and the taxpayer may not, when it comes to his knowledge, agree with G it at all, and may wish to challenge it. If he does, the Act gives him a right of appeal. In the circumstances, it seems a little bold to say that, nevertheless, the annual value has now been " determined ", and an outside body like the board may proceed to levy their drainage taxation straight away on the basis of a figure of annual value which may turn out to be wholly erroneous. When H his appeal is heard by the general commissioners, the taxpayer may want an entirely fresh valuation to be made by a person of skill, and, if he does, the commissioners must allow it. They themselves may want the same thing, and, if they do, the taxpayer cannot prevent it. Any such valuation will, under the Income Tax Act, 1952, be conclusive: see ibid., s. 53 (1)*.

This court and the Court of Appeal had occasion, in *R.* v. *Income Tax Special* I *Comrs., Ex p. Elmhirst* (2) ([1936] 1 K.B. 487), to consider the nature of proceedings by commissioners designed to arrive at a true figure of the taxpayer's income. The case concerned surtax, but, as LORD WRIGHT, M.R., said (ibid., at p. 493) the general principles apply to any form of income tax. LORD HEWART, C.J., giving the decision in the Divisional Court (ibid., at p. 488), adopted what had been said by GREER, L.J., in the earlier case of *Inland Revenue Comrs.* v. *Sneath* (3) ([1932] 2 K.B. 362 at p. 385), namely:

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* See, further, p. 842, letter C, post.

> " . . . the estimating authorities, even when an appeal is made to them, are not acting as judges deciding litigation between the subject and the Crown. They are merely in the position of valuers whose proceedings are regulated by statute to enable them to make an estimate of the income of the taxpayer for the particular year in question."

Lord Wright, M.R., in the Court of Appeal, after examining all the relevant sections comes to the same conclusion, and ends his judgment thus ([1936] 1 K.B. at p. 501):

> ". . . the machinery of these sections shows that in such a case [i.e., where a notice of appeal has been given] the commissioners have the power and the duty of examining all the facts, and that such power is given to them by the mere giving of the notice of appeal. Having a duty to examine the facts, they are bound to give effect to what appears to them to be the proper assessment to be made in view of those facts."

That, therefore, is the duty of the commissioners in the present case where notice of appeal has also been given, and what the board are really contending is that the process can be treated for their purpose as completed almost at the very beginning. They justify this by contending that the " signing and allowing " of the assessment by the additional commissioners has such effects that it is proper to regard the annual value as determined at this stage, even though an appeal is subsequently lodged. The principal effect that the board assert is that the tax becomes payable there and then, despite any appeal, though any excess may be refunded if the appeal is successful. I do not agree that this correctly states the legal position under the Income Tax Act, 1952. I think that it is true to say that there is no provision expressly deferring liability to pay until the conclusion of an appeal. One would hardly expect it. If in any dispute with the Revenue, the taxpayer had always to assume that he was wrong, and the Revenue right, and, therefore, pay up until the contrary were proved, one would expect that situation to be reflected in some express enactment, rather than the reverse, and it certainly is not. The taxpayer and the Revenue have lived together now for about a century and a half under the impression that, except where expressly enacted otherwise, tax which is in dispute becomes payable only when the dispute is resolved in the Revenue's favour by the commissioners when they decide on appeal. That this is correct seems quite clear from those sections which do enact otherwise in certain particular cases: see, for example, s. 63 (2) and s. 64 (10) of the Income Tax Act, 1952, which I will not read or summarise, but which are clearly inconsistent with the existence of a general liability to pay tax once assessments are signed and allowed.

Counsel for the board referred to s. 72 (1) of the Income Tax Act, 1952, which provides, inter alia, that, where an assessment for any year is signed and allowed on or after Jan. 1 (which is the present case), the tax shall be due and payable the day next after the day on which the assessment is signed and allowed. The section cannot, however, be read in isolation. In fact, it begins with the words " Subject to the provisions of this Act ". These provisions include those I have already specified as showing what the position is when tax is in dispute.

Section 51 of the Income Tax Act, 1952, may also usefully be looked at in this connection. It is the section conferring rights of appeal, and, in sub-s. (3), after specifying twenty-one days as the time limit for giving notice of appeal, it proceeds:

> " Provided that where the assessment is under Sch. A or Sch. B and the appellant has not been served with a notice of the assessment—(a) the time within which notice of appeal may be given shall be any time before the expiration of twelve months from the end of the year of assessment;

> but (b) nothing in this proviso shall affect the collection or recovery of any tax assessed or charged, but where the assessment is reduced upon appeal, any tax overpaid shall be repaid."

Proviso (b) thus operates only where the appellant has not been served with a notice of assessment. It is an obvious inference that, where he has been so served, the collection and recovery of tax is not to be enforced pending the hearing of his appeal. In other words, there is no general liability to pay once the assessment is signed and allowed. If there were, then proviso (b) would be quite unnecessary. In the present case, the company was, in fact, served with a notice of assessment. A similar conclusion is reached by a consideration of proviso (a) to para. 2 of Part 2 of Sch. 5 to the Income Tax Act, 1952, dealing with years of revaluation.

The present assessment on the company is almost certainly an additional assessment within the meaning of s. 41 of the Income Tax Act, 1952, being made almost at the end of the year of assessment to which it relates. " Additional " for this purpose simply means additional to the first assessments which are made at the beginning of the fiscal year. This explains the references to s. 41 in the Case Stated. It is, therefore, interesting to note that s. 41 (1) (i) (b) says that the additional commissioners are to sign and allow an additional first assessment " which shall be subject to appeal and other proceedings as in the case of a first assessment ". This language certainly does not support the idea of a " determination " of annual value at the time of signing and allowing the assessment.

Counsel for the board then referred to s. 84 of the Income Tax Act, 1952, which deals with the quinquennial valuation. It requires that the annual values of all properties chargeable under Sch. A " shall be determined afresh " for each fifth succeeding year of assessment; and the proviso to sub-s. (3), after giving a right of appeal, says that the commissioners may confirm or amend the assessment as required, as if the annual value so to be taken, i.e., as the result of the appeal " were the annual value determined for that year as it would have been but for the provisions of this section ". An argument is based on these last words, which I understand to be this. But for the appeal, the annual value would have been " determined ". Therefore, " determination of annual value " cannot mean determination after appeal. But nobody suggests that there cannot be a determination of annual value unless there is an appeal first. As already indicated, if the annual value is fixed by the commissioners on the basis of the taxpayer's own return and he does not appeal, there is no reason why this should not be described as a determination once the time limit for appealing has expired. The question here is: what is the position when the commissioners and the taxpayer are in dispute over the figures which the commissioners assessed him on? At what stage is the annual value then determined? On these questions, s. 84 (3) affords no real help.

Finally, counsel for the board asks: If the annual value is not determined when the assessments are signed and allowed by the additional commissioners, when is it determined ? I would answer, when the time limit for appeal has expired without any appeal being lodged; or, if there is an appeal, when that appeal is decided by the general commissioners. It is objected for the board at this stage that the time limit for appeals is two years, and Parliament cannot have intended the board to be without rates for two years. The answer is that that is obviously true; but, in 1930, when the Land Drainage Act was passed, the time limit for appeals was twenty-one days only: see s. 136 (1) of the Income Tax Act, 1918. In 1942, however, probably as a measure of wartime economy, the legislature abolished the necessity imposed by s. 134 of the Act of 1918 to give notice of assessment under Sch. A to taxpayers, and by way of compensation extended the right of appeal to twelve months after the end of the year of assessment in any case where a notice of assessment under

Sch. A had not, in fact, been given: see the Finance Act, 1942, Sch. 10, Part 1, para. 6 (3), now reproduced in s. 51 (3) of the Income Tax Act, 1952. Unfortunately, when this was done in 1942 no one seems to have given a thought to the position of drainage boards under the Act of 1930—in particular under s. 29 (1). Clearly some amending legislation is now required to deal with the new situation, e.g., to allow drainage boards to do in all cases what they can now do only in some, i.e., fix the annual value themselves. The remedy is not, however, for the courts to put an interpretation on the Act of 1930 which it will not reasonably bear.

I turn now to see whether the company's rival contention as to what " determined " means receives positive support from the Income Tax Acts, as I think it does. When the pending appeal goes before the commissioners, either they, or the appellant, may require the annual value to be estimated by a person of skill, and such a valuation will be conclusive: see *Lyons* v. *Collins* (4) ([1936] 3 All E.R. 788). The result of this operation is described by s. 53 (1) of the Income Tax Act, 1952, in these terms: " The annual value shall be determined in accordance with that valuation ". Thus, if the appellant, having required the appointment of a person of skill, is guilty of delay, sub-s. (2) provides that " the commissioners shall determine the annual value to the best of their judgment ". So that either way the decision of the commissioners on appeal is described as a determination of the annual value. This would be odd language to use if the annual value had already been determined the moment the assessments had been " signed and allowed " by the additional commissioners under s. 35 or s. 41 of the Income Tax Act, 1952. The use of the word " determined " in s. 53 of that Act shows, I think, this: that when the additional commissioners sign and allow the assessments under Sch. A the annual value is then estimated or assessed, and that will stand good unless there is an appeal; but that, where there is an appeal, the annual value will be " determined " when the appeal is heard. This word " determined " is the same word as is used in s. 29 (1) of the Land Drainage Act, 1930.

Counsel for the board was asked in the course of argument what would happen if the board were first told of an existing assessment, and then, before they made their rate were told that it had been increased on appeal. Which figure would the board take as being the annual value " as determined " for the purposes of Sch. A ? Not unexpectedly he said the increased figure, thus involving the proposition, from which he did not shrink, that, in respect of the same property for the same year, there can be two differing determinations of annual value by the commissioners. I do not think that such a situation is contemplated by s. 29 (1) of the Act of 1930.

Both sides sought support for their views from the language of s. 29 (4) of the Act of 1930, which gives the drainage board the right to ask the surveyor of taxes for a copy of the annual values " in force " for the time being under Sch. A. The words " in force " would seem to be intended to mean the same as " determined " in s. 29 (1). If so, what I have already said covers the issue. If it means something other than " determined " it is not the point we have to resolve, and is merely another illustration of the loose drafting of the Act of 1930. " In force " is obviously an ambiguous expression. It may mean the annual value fixed by an assessment which has become final and conclusive, which is the company's argument, or an assessment " in force " in the sense that it is one that has just been brought into being, though this is, to my mind, less likely. In either case one still returns to the problem of what is meant by " determined " in s. 29.

In my opinion where, as in this case, a Sch. A assessment is under appeal, so that the annual value is in dispute, it cannot be said that the annual value has been determined for the purposes of Sch. A to the Income Tax Act, 1952, A and I would send the case back to quarter sessions to proceed on the basis of that opinion.

The board wish to keep open as a subsidiary point that, on that footing, they may make their own estimate of annual value, pursuant to s. 29 (2) of the Act of 1930. That provides, inter alia, that, where any land is not assessed to income tax under Sch. A, the drainage board may themselves determine the annual value. The answer is that the land here in question has been assessed to B Sch. A, and none the less so because the statute should in strictness have used the word "charged". It is a person who is assessed, not land. There are some lands which are not charged under Sch. A, viz., quarries, mines, ironworks, and so on, to which s. 29 (2) will apply.

The relevant question put to us in the Special Cases is this:

> C "(iii) Whether the rate made by [the board on June 24, 1955] is validly made under the Act of 1930?"

I would answer it by saying that, to the extent that it proceeds on the basis that the annual value of the hereditament has been determined for the purposes of Sch. A for the relevant year, it is not validly made. The remaining questions seem to me not to arise. *Case remitted.*

D Solicitors: *Linklaters & Paines* (for the appellant company); *Kennedy, Genese & Syson*, agents for *A. G. Stirk*, Maidstone (for the respondent boards).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

FAIREY v. SOUTHAMPTON COUNTY COUNCIL.

E [COURT OF APPEAL (Denning, Birkett and Parker, L.JJ.), May 14, 15, June 19, 1956.]

Highway—Dedication—Footpath—Enjoyment by public for twenty years—Users orally informed no right of way existed—Whether right of public brought into question—Termination of period of twenty years before passing of Rights of Way Act, 1932*—Retrospective operation of Act—Rights of Way Act,* 1932 (22 *&* 23 *Geo.* 5 *c.* 45), *s.* 1 (1), (6).

F *Easement—Right of way—Bringing right of way into question—Public footpath—Rights of Way Act,* 1932 (22 *&* 23 *Geo.* 5 *c.* 45), *s.* 1 (1), (6).

For forty-six years from 1885 to 1931 members of the public, including mainly local residents but also some strangers to the locality, used a footpath leading to a railway station and a village as of right without interruption. G From 1931 onwards local residents were not prevented from using the path but other members of the public were told by the landowner that they had no right to be there. In 1953 the landowner objected to the inclusion of the footpath as one over which the public had a right of way in the map prepared by the county council under the National Parks and Access to the Countryside Act, 1949, and in 1955 he made an application under s. 31 of that Act for a declaration that no public right of way over the footpath H existed.

Held: the public had a right of way over the footpath because:

(i) the right of way had been brought into question within s. 1 (6)* of the Rights of Way Act, 1932, in 1931, when the landowner first prevented persons from using the footpath, and

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I * Section 1 (1) and (6) of the Rights of Way Act, 1932, as amended by the National Parks and Access to the Countryside Act, 1949, s. 58 (1), provides

"(1) Where a way . . . upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way . . .

"(6) Each of the respective periods of years mentioned in this section shall be deemed and taken to be the period next before the time when the right of the public to use a way shall have been brought into question by notice as aforesaid or otherwise."

(ii) the way had been enjoyed by the public as of right and without interruption for twenty years before that date within s. 1 (1) of the Act, since it was immaterial that the period had terminated before the passing of the Act, which was retrospective in effect.

A.-G. & Newton Abbot Rural District Council v. *Dyer* ([1946] 2 All E.R. 252) applied.

Decision of the QUEEN'S BENCH DIVISIONAL COURT ([1956] 1 All E.R. 419) affirmed.

[As to evidence of the dedication of a footpath as a highway, see 16 HALSBURY'S LAWS (2nd Edn.) 223-232, paras. 269-279; and for cases on the subject, see 26 DIGEST 294-297, *257-278*.

For the Rights of Way Act, 1932, s. 1, see 11 HALSBURY'S STATUTES (2nd Edn.) 217.]

Cases referred to:

(1) *Cooper* v. *Hubbuck*, (1862), 12 C.B.N.S. 456; 31 L.J.C.P. 323; 6 L.T. 826; 142 E.R. 1220; 19 Digest 130, *879*.

(2) *R.* v. *Broke*, (1859), 1 F. & F. 514; 175 E.R. 832; 26 Digest 301, *323*.

(3) *Mann* v. *Brodie*, (1885), 10 App. Cas. 378; 26 Digest 281, *177*.

(4) *Poole* v. *Huskinson*, (1843), 11 M. & W. 827; 152 E.R. 1039; 26 Digest 286, *194*.

(5) *Folkestone Corpn.* v. *Brockman*, [1914] A.C. 338; 83 L.J.Q.B. 745; 110 L.T. 834; 78 J.P. 273; 26 Digest 284, *189*.

(6) *A.-G. & Newton Abbot Rural District Council* v. *Dyer*, [1946] 2 All E.R. 252; [1947] Ch. 67; 115 L.J.Ch. 232; 175 L.T. 387; 2nd Digest Supp.

(7) *Jones* v. *Bates*, [1938] 2 All E.R. 237; 158 L.T. 507; 102 J.P. 291; Digest Supp.

(8) *Merstham Manor, Ltd.* v. *Coulsdon & Purley Urban District Council*, [1936] 2 All E.R. 422; [1937] 2 K.B. 77; 106 L.J.K.B. 603; 100 J.P. 381; Digest Supp.

(9) *Re Athlumney, Ex p. Wilson*, [1898] 2 Q.B. 547; 67 L.J.Q.B. 935; 79 L.T. 303; 4 Digest 13, *27*.

(10) *Re Hale's Patent*, [1920] 2 Ch. 377; 90 L.J.Ch. 35; 124 L.T. 261; 36 Digest (Repl.) 844, *1928*.

(11) *Poyser* v. *Minors*, (1881), 7 Q.B.D. 329; 50 L.J.Q.B. 555; 45 L.T. 33; 46 J.P. 84; 13 Digest 505, *562*.

Appeal.

On May 3 and 4, 1955, the appellant, Sir Charles Richard Fairey, made an application to the Appeal Committee of Hampshire Quarter Sessions under the National Parks and Access to the Countryside Act, 1949, s. 31, for a declaration that on May 11, 1953, no public right of way existed over a footpath at Bossington in the County of Southampton as delineated on a provisional map prepared by the respondents, Southampton County Council, under s. 30 of the Act. The appellant contended that a public right of way over the footpath should not be deemed to have been dedicated under the Rights of Way Act, 1932, s. 1, on the following grounds: (i) the right was not brought into question within s. 1 (6) of the Act of 1932 until 1953, when the appellant objected to its inclusion in the draft map prepared by the respondents under the National Parks and Access to the Countryside Act, 1949, s. 27; and (ii) during the twenty years immediately preceding 1953 the owners of the land for the time being had shown an intention not to dedicate. The respondents contended that the footpath must be deemed to have been dedicated under s. 1 of the Act of 1932 because (i) the public's right to use the footpath was brought into question in 1931 when the appellant's predecessor in title, John Deverell, told users other than local residents that they had no right to use the footpath, and (ii) for more than twenty years immediately preceding that date the public at large used the footpath as of right and without interruption and there was no sufficient evidence of absence of intention to dedicate it. Quarter sessions were of opinion that the period to which the Rights of Way Act, 1932, s. 1 (6) referred was the period immediately preceding the first occasion in 1931 when (as was proved to their satisfaction) the then owner had objected to the use of the footpath by persons other than local residents. They held that a public right of way was deemed to have been dedicated and they dismissed the application. On Jan. 24, 1956, a Queen's Bench Divisional Court (STABLE, J., dissenting) dismissed an appeal from that decision ([1956] 1 All E.R. 419). The appellant appealed to the Court of Appeal.

Percy Lamb, Q.C., and *J. P. Widgery* for the appellant.
Scott Henderson, Q.C., and *M. G. Polson* for the respondents.

Cur. adv. vult.

June 19. The following judgments were read.

DENNING, L.J.: There is a footpath at Bossington in Hampshire which is used by the country folk as a way to get to Horsebridge station and Horsebridge village and also as a walk round from Houghton. For forty-six years from 1885 to 1931 this footpath was used by members of the public as of right without interruption. Some of the persons so using it were strangers to the locality, but it was mainly used by local residents. The Case finds that since 1931 the landowner

> " made no attempt to prevent local residents from using the said path, but if any other member of the public was seen thereon by the [landowner], he was told that he had no right to be there."

In 1953 the county council showed the footpath in their map as a footpath over which the public had a right of way. The owner thereupon objected and took the matter to quarter sessions. They decided that there was a public right of way along the path. Quarter sessions said that, if they had been asked to determine the matter at common law, they would have held that there was no public right of way along the footpath, because they were not satisfied that there was any intention by the owner to dedicate it as a highway: but quarter sessions went on to hold that the public have acquired a right of way under the Rights of Way Act, 1932. The owner appealed to the Divisional Court, who decided against him by a majority. He now appeals to this court.

The Rights of Way Act, 1932, has introduced a new means by which the public may acquire a right of way, in addition to the old means of dedication, which, be it noted, is still preserved; see s. 2 (2). The new means of acquiring it is by prescription for twenty years. The old common law prescription for a right of way had to run from time immemorial, that is, from the time when Richard Coeur de Lion came to the throne in A.D. 1189. The new statutory period of twenty years has no fixed starting point, but only a finishing point. The public must have used the way as of right for the period of twenty years next before their right to use it was " brought into question ". We have now to consider how the period of twenty years is to be calculated.

The thing to do is to find the finishing point and then count back twenty years. This means that in this case we have to find the time when the right of the public to use the way was first " brought into question by notice as aforesaid or otherwise " within s. 1 (6) of the Act. Those words are obviously taken from the similar words in s. 4 of the Prescription Act, 1832, which was considered by the Court of Common Pleas in *Cooper* v. *Hubbuck* (1) ((1862), 12 C.B.N.S. 456). In that case WILLES, J., said that (ibid., at p. 468).):

> " in order to have the claim ' brought in question ', there must be at least enough in the proceedings to apprise the parties that the claim was advanced, so that there might be an opportunity of litigating it."

Applying those observations to this case, I think that, in order that the right of the public should have been " brought into question ", the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that they may be apprised of the challenge and have a reasonable opportunity of meeting it. The landowner can challenge their right, for instance, by putting a barrier across the path or putting up a notice forbidding the public to use the path. When he does so, the public may meet the challenge. Some village Hampden may push down the barrier or tear down the notice: the local council may bring an action in the name of the Attorney-General against the landowner in the courts claiming that there is a public right of way: or no one may do anything, in which case the acquiescence of the public tends to show that they have no right of way. Whatever the public do, whether they oppose the landowner's action or not, their right is " brought into question " as soon as the landowner puts up a notice or in some other way makes it clear to the public that he is challenging their right to use the way.

Applying this test, I ask myself: when did the landowner here make it clear to the public that he was challenging their right to use the way? Quarter sessions held that he did so in 1931, when he objected to the user of the path by persons who were not local residents. We do not know what evidence was before them on that point. If the landowner merely turned back one stranger on an isolated occasion, that would not, I think, be sufficient to make it clear to " the public " that they had no right to use it. He ought at least to make it clear to the villagers of Bossington, Houghton and Horsebridge. They were the members of the public most concerned to assert the right, because they were the persons who used the path. They knew—better than the landowner himself—how long they had used it. They were the persons to tell. It was no good the landowner speaking to a stranger who would know nothing of the public right and would not be concerned to assert it. This view is supported by a case which was decided nearly a hundred years ago—*R.* v. *Broke* (2) ((1859), 1 F. & F. 514)—about a footpath at Ipswich. Seafaring men proved that they had used the path without interruption for a great many years for the purpose of their calling. The landowner sought to rebut the public right by proving that he had turned back all persons who were not seafaring men: but it was held that that was not sufficient for the purpose. Pollock, C.B., said that the user by the seafaring men was a user by the public and that long user by them gave the public a right of way. If the landowner wished to deny the public right, he ought to have made it clear to the seafaring men that they used it by his leave and not as of right. So here the landowner ought to have made it clear to the villagers. We have no information on this point, but I think we ought to assume that quarter sessions had sufficient evidence before them to support their finding. We ought to assume that in 1931, when the landowner turned back strangers, he did it in so open and notorious a fashion that it was made clear, not only to strangers that they had no right to use the path, but also to local residents that they only used it by tolerance of the owner. If so, he did bring the right into question in 1931 as quarter sessions have found.

In this connection I would also mention the finding of quarter sessions that, in and from 1931, the landowner, by turning off strangers, showed an intention not to dedicate the path as a highway for the use of members of the public at large. This raises the same point. In my opinion a landowner cannot escape the effect of twenty years' prescription by saying that, locked in his own mind, he had no intention to dedicate; or by telling a stranger to the locality (who had no reason to dispute it) that he had no intention to dedicate. In order for there to be " sufficient evidence that there was no intention " to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large—the public who used the path, in this case the villagers—that he had no intention to dedicate. He must, in Lord Blackburn's words, take steps to disabuse those persons of any belief that there was a public right (see *Mann* v. *Brodie* (3) ((1885), 10 App. Cas. 378 at p. 386). Such evidence may consist, as in the leading case of *Poole* v. *Huskinson* (4) ((1843), 11 M. & W. 827) of notices or a barrier, or the common method of closing the way one day a year. That was not done here; but we must assume that the landowner turned off strangers in so open and notorious a fashion that it was clear to everyone that he was asserting that the public had no right to use it. On this footing there was sufficient evidence to show that there was no intention to dedicate. I think, therefore, that we should accept the findings of quarter sessions that the landowner brought the public right into question in 1931 and thereafter showed a sufficient intention not to dedicate the path as a highway.

Even so, there is found to be twenty years' user by the public as of right before 1931: and the question is whether that is sufficient to give a statutory right to use the footpath. The difficulty is that the Rights of Way Act, 1932, was not passed until July 12, 1932, and did not come into operation until Jan. 1, 1934. The twenty years' user before 1931 took place before the Act was passed. Could the public acquire a right of way by twenty years' user before the Act? Is the Act retrospective to that extent?

I must say at once that to my mind this Act of 1932 is not a procedural Act. It affects the substantive law in the following respects. It creates a new statutory right to a highway by prescription in addition to the old right by dedication. It reverses the burden of proof; for whereas previously the legal burden of proving dedication was on the public who asserted the right (*Folkestone Corpn.* v. *Brockman* (5), [1914] A.C. 338), now after twenty years' user the legal burden is on the landowner to rebut it. The Act gives reversioners a right to intervene* and enables the public to acquire a right of way if they do not intervene: whereas previously reversioners had no such right and the public could acquire no right of way against them. It is interesting to notice that the courts held that the Prescription Act, 1832, did not relate to pleading or procedure only—see *Cooper* v. *Hubbuck* (1) (12 C.B.N.S. at p. 468, per WILLES, J.). Neither does this Act.

Seeing that this Act does affect the substantive law, it is not to be given a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. I think, however, that such is the case here. The whole tenor of the Act is to establish a public right by twenty years' user, and the wording of s. 2 (1) carries with it the necessary and distinct implication that, except as therein stated, the Act applies to enjoyment of the way before the commencement of the Act. This was the view of EVERSHED, J., in *A.-G. & Newton Abbot Rural District Council* v. *Dyer* (6) ([1946] 2 All E.R. 252 at p. 254)†, and I agree with him.

Counsel for the appellant pointed to the fact that Parliament allowed an interval of seventeen months between the time the Act was passed (July 12, 1932) and the time when it came into operation (Jan. 1, 1934), and he asked was not that period given so as to enable any landowner (who did not intend to dedicate a path as a highway) to put up a notice saying that his property was private and that there was no right of way over it. I agree that that was the object of the interval: but I think the object is substantially achieved. If a notice were put up before 1933, it would have this effect: if the twenty years had not then run, the notice would prevent a public right being acquired, whereas if it had already run, the notice would serve as an emphatic assertion that the path had theretofore been used by tolerance of the owner and not by right of the public; and the longer it remained there without challenge the more effective it would be to prove the correctness of his assertion. If it was challenged before the end of 1933, the landowner could get the matter resolved by the courts under the law as it stood before the Act: see s. 2 (1). If it was not challenged until after 1933, the new law applied. But he could point to the acquiescence in the notice as a strong point in his favour to show that the enjoyment had not theretofore been had as of right.

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* I.e., by putting up a notice inconsistent with dedication of the way as a highway; see the Rights of Way Act, 1932, s. 1 (5).

† See p. 851, letter C, post.

My conclusion is, therefore, that the Act is retrospective. Once the twenty years' enjoyment has been had as of right by the public, then, whether the twenty years' enjoyment was before or after the Act, the way is by the Act a highway, and the landowner cannot escape from that position by saying that he never intended to dedicate it as a highway. I would dismiss the appeal.

BIRKETT, L.J.: This appeal from a decision of the Divisional Court raises important questions affecting landowners and the members of the public under the provisions of the Rights of Way Act, 1932. My Lord has already indicated how the controversy arose in the present appeal. The respondents, in fulfilling their duties under the National Parks and Access to the Countryside Act, 1949, and the regulations made thereunder, prepared a map showing the footpaths where, in their opinion, rights of way subsisted, and giving the necessary information conerning them. On this map the respondents showed the footpath which my Lord has described, and which was used as a short cut to the railway station, and as part of a country walk. The land over which the footpath ran belonged to the appellant, and, when he saw the map, he objected to the inclusion of the footpath thereon; and in due course he made his objection to quarter sessions, as he was entitled to do. He claimed that the public had no right of way over the footpath in question. Quarter sessions decided that, by reason of the Rights of Way Act, 1932, and not otherwise, the public had acquired rights of way over the footpath; and the Divisional Court on a Case Stated affirmed the decision of quarter sessions, STABLE, J., dissenting.

The main purpose of the Rights of Way Act, 1932, was to simplify the procedure when it was sought to establish a way as a public highway. It does not profess to alter the general law as to the manner in which public rights are deemed to have come into existence. The important change is in the length of time which is enough to establish the intention. If the way can reasonably be presumed to have been dedicated as public, then proof of public user for twenty years past is now enough, if the user has been " as of right ", without interruption, and it is not proved by the landowner that the intention to dedicate the way was not continuous during the twenty years: *Jones* v. *Bates* (7) ([1938] 2 All E.R. 237); *Merstham Manor, Ltd.* v. *Coulsdon & Purley Urban District Council* (8) ([1936] 2 All E.R. 422).

Section 1 (6) of the Act of 1932 provides that the twenty-year period shall be deemed to be the period next before the time when the right of the public to use a way shall have been brought into question by notice or otherwise. This subsection differs from the corresponding provision in the Prescription Act, 1832, which required the periods of twenty and forty years therein mentioned to be " next before some suit or action " in which the right was questioned. Therefore, if today a member of the public is turned back from a footpath, on the ground that there is no right of way, and action is taken to assert the public claim, the period of twenty years necessary to be proved will be up to the date of the act of turning back. and not up to the time that the action to assert the public right is taken.

In the present appeal, it is found that members of the public were turned back in 1931, and the same thing happened at intervals after that date. The evidence made it clear that from 1885 to 1931 the public had been using this footpath " as of right ", without interruption, and, on that evidence, the footpath is deemed to have been dedicated under s. 1 (1) of the Act of 1932, for there was no evidence at all that within that period there was no intention to dedicate the way. The act of the landowner in turning members of the public back in 1931 in my opinion is " bringing the right into question ", because, if there had been user as of right for twenty years without interruption, and then steps were taken to stop members of the public from using the way on the ground that the public had no rights there at all, this was clearly an occasion (s. 1 (6))

> " when the right of the public to use a way shall have been brought into question by notice as aforesaid *or otherwise.*"

There is no fixed method laid down by the Act by which the right is to be brought in question. The words " or otherwise " leave the matter at large. A barrier or a notice would, of course, bring the right into question; but when the landowner takes steps to stop members of the public using the way, for my own part I do not think there can be any clearer way of bringing the right into question. After 1931 the landowner showed an intention not to dedicate the path as a public highway, but his act then was unavailing. Forty-six years had passed between 1885 and 1931 and no evidence was given to show that in those years there was an intention not to dedicate the way as a public highway. Everything therefore turns in this appeal on whether the forty-six years ending in 1931 are within the words of s. 1 (1) of the Act of 1932.

The Act, although passed into law on July 12, 1932, did not come into force until Jan. 1, 1934, and the requirement of a period of twenty years of which the sub-section speaks was fulfilled in the present case before the Act was passed in 1932. This raises the important question whether the Act is intended to be retrospective in its operation. The rule is now well established that an Act is not to have retrospective effect, save in matters of procedure, unless the Act makes it plain that it is to have retrospective effect.

In the Divisional Court the view was taken that this Act dealt only with procedure, and the decision in *A.-G. & Newton Abbot Rural District Council* v. *Dyer* (6) was followed. It is not always easy to maintain this clear distinction between Acts dealing with procedure only and Acts which create rights; and the Rights of Way Act, 1932, I should have thought, was more than an Act dealing with procedure only, as the Prescription Act, 1832, was held to be in *Cooper* v. *Hubbuck* (1) ((1862), 12 C.B.N.S. 456). Section 2 (2) of the Rights of Way Act, 1932, makes it quite plain that the new procedure under the Act is an *additional* method of establishing the dedication of highways, and does not abolish or alter the existing methods. In any cases where for any reason the Act has no application, the existing law can be used in the same way as it was used before the Act was passed. Thus, for example, if evidence of public user for five years is enough in all the circumstances of the case to prove the landowner's intention to dedicate, there is no need to prove the user for twenty years. The essential test is: what is the intention of the statute? In my opinion, whilst I think that the statute was not confined merely to procedure but was dealing with rights, I yet think that the intention of the statute was that it should be retrospective in its operation. Section 58 of the National Parks and Access to the Countryside Act, 1949, amended the Rights of Way Act, 1932, by deleting the concluding words of s. 1 (1) and the whole of s. 1 (2). The purpose of this was to make the period of twenty years apply in all cases, but in doing this, the Act of 1949, by s. 58 (2), made a saving in favour of proceedings pending at Dec. 16, 1949, and also for cases then decided by courts of competent jurisdiction. Similarly s. 2 (1) of the Act of 1932 is a transitional provision to prevent possible conflict between the old and the new law in cases already decided, or in cases in course of being decided when the Act came into force on Jan. 1, 1934.

I am therefore of opinion that the period of twenty years laid down by the Act is not to be reckoned from Jan. 1, 1934, but that any way used uninterruptedly and as of right for a period of twenty years can be claimed as a public way, whenever the period of twenty years occurred, subject to the provisions of the Rights of Way Act, 1932. I agree with the conclusion of the Divisional Court that the footpath in question is a public way as claimed by the respondents, and that this appeal ought to be dismissed.

PARKER, L.J.: I have come to the same conclusion. Before the appeal A committee of quarter sessions the only point taken on behalf of the appellant was that the twenty-year period to be considered was that next before the proceedings in question, and that, by reason of the action taken by the appellant and his predecessor, Mr. Deverell, since 1931, there was shown an intention during that period not to dedicate the footpath in question. That such action was sufficient evidence that there was no intention to dedicate I will assume, B since the contrary was not argued, but it is to be observed that no action was taken in regard to a considerable section of the public, namely, " local residents " as described in the Case, but only in regard to strangers. The question, however, remains whether, as the respondents contend, the right of the public to use the footpath had not been brought into question at an earlier date, namely, in 1931, when such action was first taken. The appeal committee and the Divisional C Court held that this contention was right, and, accordingly, subject to the point hereinafter referred to, it is clear that, as a result of what had happened between 1885 and 1931, the footpath pursuant to s. 1 (1) of the Act is deemed to have been dedicated. I agree with this conclusion. It seems to me clear that from 1885 to 1931 the public were asserting a right to enjoy this footpath so that, if in 1931 steps were taken to warn off persons asserting such a right, such action was clearly D bringing into question that right. The question is largely one of fact and, the appeal committee having so found, there is no reason to disturb that finding.

Before the Divisional Court, however, and before this court, the appellant raised a more formidable point, namely, as to the retrospective operation of the Act. The Act was passed on July 12, 1932, and came into operation on Jan. 1, 1934. It clearly applied to a twenty-year period occurring wholly after Jan. 1, E 1934. It was conceded that it applied to a twenty-year period commencing before and ending after Jan. 1, 1934, but it was denied that it could apply to a twenty-year period occurring, as in the present case, wholly before Jan. 1, 1934. To support this, strong reliance was placed on the well-known principle that an Act is *not* to be construed so as to have retrospective effect, except in regard to matters of procedure only, unless the Act is clearly intended to have that effect. F

It is sufficient to cite two passages from the authorities. In *Re Athlumney, Ex p. Wilson* (9) ([1898] 2 Q.B. 547) WRIGHT, J., said (at pp. 551, 552):

> " Perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the G language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

In *Re Hale's Patent* (10) ([1920] 2 Ch. 377), SARGANT, J., said (at p. 386):

> " No doubt the general law is that, while rights are not statutorily altered H retrospectively, procedure is, apart from indications to the contrary, altered retrospectively; but where rights and procedure are dealt with together in the way in which s. 8 of the Act of 1919 deals with them, the intention of the legislature would seem fairly clear—namely, that the old rights are still to be determined by the old tribunal under the Act of 1907, and that only the new rights under the substituted section are to be dealt I with by the tribunal thereby substituted for the Treasury."

The Divisional Court (STABLE, J., dissenting) held that the Act applied where, as here, the twenty-year period was wholly before the commencement of the Act. In arriving at his conclusion, LORD GODDARD, C.J. (with whom HILBERY, J., agreed), said ([1956] 1 All E.R. at p. 422):

> " It has always been held that what is known as a procedural Act does or may act retrospectively, and one test whether an Act is procedural is

> whether it is an Act which mainly deals with evidence. This Act is in many respects very like the Prescription Act, 1832. That was an Act which, as its preamble shows, owing to the difficulties of proving user from time immemorial, provided for changes in the law and, instead of a person who was asserting that he was entitled to an easement over land or of light or water having to give evidence from which the court could infer a grant or user from time immemorial, the prescriptive periods of twenty years in some cases and forty years in others were substituted. The present Act has a similar object."

In other words, they treated the Act as a procedural Act, and, in doing so, came to the same conclusion as EVERSHED, J., in *A.-G. & Newton Abbot Rural District Council* v. *Dyer* (6), where he said ([1946] 2 All E.R. 252 at p. 254):

> "In the first place, it is to be borne in mind that the Act of 1932 is substantially a procedural Act in the sense that it is designed not to create new rights or new causes of action, but rather to simplify and render more easy the means of making good claims of a well-established kind."

Counsel for the appellant has urged with considerable force that this Act, though it admittedly in part deals with matters of procedure, nevertheless, to use the words of LUSH, J., in *Poyser* v. *Minors* (11) ((1881), 7 Q.B.D. 329 at p. 333), "gives or defines" legal rights. That was indeed the view of STABLE, J. For my part, I think that that conclusion is right, and, without going into the matter in detail, I am content to adopt what was said by WILLES, J., in *Cooper* v. *Hubbuck* (1) ((1862), 12 C.B.N.S. at p. 467), in dealing with the Prescription Act, 1832, which, as LORD GODDARD, C.J., pointed out, the present Act resembles in many respects. WILLES, J., with whom ERLE, C.J., and BYLES, J., concurred, in considering s. 4 of the Prescription Act, 1832 (which was similar to s. 1 (6) of the Act of 1932), said (ibid., at p. 467):

> "The section in question is the last of those which deal with the creation of the right. It is not a section relating to pleading or procedure only, but has for its object to appoint the terminus of the period of prescription which by the previous sections was to confer a right. This it does by reference to the commencement of 'some suit or action wherein the claim or matter, etc., shall have been or shall be brought in question'. The effect, therefore, is that, immediately upon the bringing of such suit or action, the enjoyment, if within the previous sections as to length and otherwise, shall ripen into a right."

This case was unfortunately not before the Divisional Court; nor was it referred to in *A.-G. & Newton Abbot Rural District Council* v. *Dyer* (6).

That, of course, does not dispose of the matter, because the question remains whether, even though the Act gives or defines legal rights, the intention is clear that it should have a retrospective operation. If so, it should be so construed, even if the consequences may in certain cases appear unjust or hard. In order to ascertain the intention, it is, I think, legitimate to consider not only the language used in, but the object of, the enactment.

In *Jones* v. *Bates* (7) ([1938] 2 All E.R. 237), SCOTT, L.J., discussed at some length the purpose of the Rights of Way Act, 1932, in these words (ibid., at p. 244):

> "Before discussing the evidence and judgment below, I want to consider what the law now is since the passing of the Rights of Way Act, 1932, which the judge had to apply. The new Act, as stated in its long title, was an amending Act. Before the Act, the law applicable was the common law. The main alteration is effected by s. 1, which gives a new statutory effect to mere proof of actual user as of right and without interruption. At the time of the passing of the Act, the main outline of the law affecting proof of a public highway, whether a carriage-road, a bridle-path or a footpath,

> had been drawn quite clearly by judicial decisions. Whereas in Scotland proof of forty years' user as of right, and without interruption in the enjoyment of the right, ipso facto established the legal conclusion that the way was public by prescription, in England no such convenient rule of law had been evolved by our courts. Our legal theory had always been—at any rate within the last century or two—that the sole origin of a public highway was dedication to the public use by the owners of the land over which it ran, and in consequence that, in case of dispute, the public right could be established only by such evidence as would justify an inference of fact that the way had at some date, known or unknown, been so dedicated. The corollary followed that, on this as on all other issues of fact, the tribunal had to decide, once there was some affirmative evidence before it of user, whether or not on balance it was sufficient to establish dedication. That decision if given by a High Court judge sitting alone, was open to revision by a Court of Appeal, but not if given by a county court or other court, whose decision on fact was made final by statute. Whichever jurisdictional mode of deciding questions of fact happened to have been invoked in the particular case, the task of the tribunal of fact was not limited to deciding the necessary questions of user—Was it of right? Was the exercise of the right interrupted? How long had it continued? These findings would in Scotland have sufficed for the decision of the legal issue. In England, however, the tribunal had to deal with such difficult investigations as the state of the title of the owners and whether there was an owner who could dedicate, and consequently sometimes even the time when the dedication—usually quite imaginary—had in fact taken place. Above all the other difficulties, the tribunal had solemnly to infer as an actual fact that somebody or other had in fact dedicated. It was often a pure legal fiction, and yet put on the affirmant of the public right an artificial onus which was often fatal to his success. The practical result of the English rule of law was that in many cases, although quite a formidable body of evidence was available to demonstrate what I will call the Scottish premises, the public claimant failed on the additional English requisites. I infer from its terms that the Rights of Way Act, 1932, was passed for the definite purpose of getting rid of these extra difficulties of proof, and of assimilating our English legal position to the more sensible one obtaining north of the Tweed."

Accepting his analysis, as I do, I would not expect to find any limitation on its operation. Turning to the language used, it is to be observed that s. 1 (6), which defines the twenty-year period, introduces no limitation as to the time when the right of the public to use the way shall have been brought into question. Indeed, the words " by notice as aforesaid ", which are clearly a reference back to sub-s. (3) and cover therefore a notice " placed before . . . and maintained after the commencement of this Act ", point to a period ending before the commencement of the Act.

Again, it seems to me that the necessary implication from s. 2 (1) is that the Rights of Way Act, 1932, is retrospective in operation. It was suggested that that sub-section was necessary in order that the new provisions as to evidence (see s. 3) should not apply to pending actions, and that this was its only effect. I cannot accept this argument, which appears to ignore the latter part of the sub-section, where it says that, in regard to decisions given before the commencement of the Act, and in regard to decisions given in actions pending at the commencement of the Act,

> " this Act shall not apply except as regards enjoyment of the way after the date of the decision."

These words, as it seems to me, can only be explained on the basis that the Act, except to that extent, was intended to be retrospective. Indeed, that was the view of EVERSHED, J., in *A.-G. & Newton Abbot Rural District Council*

v. *Dyer* (6) ([1946] 2 All E.R. at p. 254). I appreciate that, as STABLE, J., pointed out, this interpretation may in certain circumstances produce consequences which are hard and even extraordinary, but in my judgment the language of the Act taken as a whole is sufficiently clear to rebut the presumption. Accordingly, I would dismiss the appeal.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Ashurst, Morris Crisp & Co.* (for the appellant); *Theodore Goddard & Co.*, agents for *G. Andrew Wheatley*, Winchester (for the respondents).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Re BARR'S CONTRACT.

MOORWELL HOLDINGS, LTD. *v.* BARR AND ANOTHER.

[CHANCERY DIVISION (Danckwerts, J.), June 15, 1956.]

Sale of Land—Contract—Time not of the essence—Failure of expected sub-sale—Notice to complete within twenty-eight days—Whether reasonable in all the circumstances—National Conditions of Sale (16*th Edn.*), *cl.* 23 (1).

By a contract in writing dated Jan. 19, 1956, the vendors sold and the purchasers bought two properties, one in London for £50,000 and one in Buckinghamshire for £30,000. The purchasers paid a deposit of £3,500. Clause 7 of the contract provided: " The date for completion of the purchase of the [London] property . . . shall be Jan. 31, 1956, when upon payment by the purchaser to the vendors of a sum of £50,000 . . . the vendors will assure such property to the purchaser . . ." The National Conditions of Sale (16th Edn.) were deemed to be incorporated in the contract. Clause 23 (1) of those conditions provided: " At any time on or after the completion date, the vendor, being himself able, ready and willing to complete, may . . . give to the purchaser . . . notice in writing requiring the purchaser to complete within such period (not being less than twenty-eight days) as the notice shall prescribe. And if the purchaser shall not complete accordingly, the vendor may at any time after the expiration of the notice . . . forfeit the deposit and re-sell the property . . ." At the date of the contract the vendors as agents for the purchasers were negotiating a sub-sale of the London property for £45,000. The sub-buyers were, however, unable to find the money and negotiations came to an end just before Jan. 31, 1956. On Feb. 1, 1956, the vendors served a notice on the purchasers requiring them to complete the contract in respect of the London property within twenty-eight days from the date of the notice. The purchasers were unable to raise the £50,000 in that time and the vendors claimed to rescind the contract and forfeit the deposit under cl. 23 (1) of the National Conditions of Sale (16th Edn.). On an application by the purchasers for a declaration that the vendors were not entitled to rescind the contract and forfeit the deposit,

Held: on the true construction of the National Conditions of Sale (16th Edn.), cl. 23 (1), the notice to complete although it might not be less than twenty-eight days, must be of such a time as was reasonable in all the circumstances; in the present case the purchasers were not in default because a period of twenty-eight days was too short to be reasonable in view of the fact, known to the vendors, that the purchasers would not have the £45,000 from the sub-sale towards the purchase price of £50,000, and accordingly the vendors' notice of Feb. 1 was ineffective and they were not entitled to rescind.

[As to making time the essence of a contract for the sale of land, see 31 HALSBURY'S LAWS (2nd Edn.) 403, para. 472; and for cases on the subject, see 40 DIGEST 113, 114, *909-918*.

As to conditions providing for forfeiture of the deposit and re-sale, see 29 HALSBURY'S LAWS (2nd Edn.) 306, para. 403; and for cases on the subject, see 40 DIGEST 227-229, *1971-1991*, 225, 226, *1949-1957*.]

A Cases referred to:

(1) *Smith* v. *Hamilton*, [1950] 2 All E.R. 928; [1951] Ch. 174; 2nd Digest Supp.

(2) *Green* v. *Sevin*, (1879), 13 Ch.D. 589; 49 L.J.Ch. 166; 41 L.T. 724; 44 J.P. 282; 40 Digest 113, *911*.

Adjourned Summons.

The purchasers, Moorwell Holdings, Ltd., applied by summons under the B Law of Property Act, 1925, s. 49, for a declaration that the respondent vendors' notice dated Feb. 1, 1956, to complete within twenty-eight days from the date thereof, was of no effect and that the respondents had not effectively rescinded the contract between the parties dated Jan. 19, 1956, which was a contract for the sale of lands in London and Buckinghamshire, and were not entitled to forfeit the deposit paid at the time of the contract.

C The facts appear in the judgment.

S. A. Stamler for the purchasers.

Peter Foster for the vendors.

DANCKWERTS, J.: The contract relates to two properties, a freehold property situate in London and known as Nos. 11, 12 and 13, King Street, D Covent Garden, and another property which is a piece of land at Burnham, in the County of Buckingham, and has been used for a number of years as nursery gardens and the like. The two properties were sold together by a contract dated Jan. 19, 1956, for a total sum of £80,000, of which £50,000 related to the property in London and £30,000 to the property at Burnham. A deposit of £3,500 was paid, and the provisions as to completion in cl. 7 of the contract E were as follows:

> "The date for completion of the purchase of the property first hereinbefore described [that is the London property] shall be Jan. 31, 1956, when upon payment by the purchaser to the vendors of a sum of £50,000 (no credit being given for the deposit paid on the signing hereof) the vendors will assure such property to the purchaser. The date for completion of the F purchase of the property secondly hereinbefore described shall be May 31, 1956, when upon payment by the purchaser to the vendors of the sum of £30,000 (credit being given for the said deposit) the vendors will assure such property to the purchaser."

In cl. 9 there is a reference to an appeal against the refusal of the local planning G authority to grant planning permission for the erection of residential dwelling-houses on the land at Burnham, and there is a provision that the purchaser shall take over and prosecute the appeal with the assistance of the vendors. Clause 10 contains the following provision:

> "In the event of planning permission being granted within five years from the date hereof enabling the purchaser or its successors in title to develop the H land secondly hereinbefore described for residential or industrial purposes or in the event of the said land within the said period being zoned under the Town and Country Planning Acts for residential or industrial purposes the purchaser or its successors in title as the case may be will pay to the first named vendor hereto personally or to his personal representatives as the case may be the sum of £5,000 and the purchaser shall in the conveyance of I such land to him enter into a covenant to this effect such covenant to be framed so as to bind not only the purchaser but its successors in title."

Then there is a provision about removal of boilers, and so on. In cl. 12 there is a provision for the continuance by the vendors as the agents for the purchasers of a contemplated sub-sale of the London property to a sub-purchaser, whose name I need not mention, at the price of £45,000; and it is provided that the National Conditions of Sale (16th Edn.), are deemed to be incorporated in the contract.

This is an application by the purchasers for a declaration that the vendors are not entitled to rescind the contract as they claim and forfeit the deposit. The vendors rely on cl. 23 of the National Conditions of Sale (16th Edn.) as giving them the right, which they claim to have exercised, to determine the contract and forfeit the deposit of £3,500. The facts as regards that particular clause, which I shall have to go into in detail later, are that on Feb. 1, 1956, that is the day after the date fixed for completion in regard to the London property, the vendors by their solicitors served a notice on the purchasers requiring them to complete the contract with regard to the London property, that is as regards the price of £50,000, within twenty-eight days from the date of the notice given to complete. The facts in more detail are as follows. The negotiations for the purpose of the contract began about September, 1955. At that time, planning permission which was required for the erection of dwelling-houses on the land at Burnham had been refused, but there was an appeal pending against that decision. Subsequently the purchasers sent a cheque for £200 to the vendors for the purpose of paying counsel's fees in regard to the conduct of that appeal. That cheque was unfortunately dishonoured when it was presented, but this appears to have been, so far as I can see from the account of the purchasers, an accident, because when the cheque was re-presented it was duly paid and apparently there was no difficulty in obtaining payment for the cheque which was given for the deposit of £3,500. Negotiations continued, but although the price had been agreed at a comparatively early date (in November, 1955) the contract was not signed until Jan. 19, 1956. It is right to say that this was not due entirely to any delay on the part of the purchasers, because the vendors undoubtedly introduced some new provisions in regard to the contract at a comparatively late date and consequently they cannot be entirely acquitted of some responsibility for the delay in the eventual signing of the contract. When, however, the contract was signed on Jan. 19, 1956, there was obviously a very short time before the date for completion in regard to the London property would arise. At that time the negotiations for the sub-sale of the London property appeared to be going well, and it was not until the last moment, when the sub-purchasers found that they had difficulty in financing their £45,000 purchase, that the proposed sub-sale failed to result in the signing of an actual contract. If the sub-sale had gone through the purchasers would have been able to obtain a large part of the price which they had to find on completion through the payment by the sub-purchasers which would be made to them under the sub-contract. The sub-sale fell through just before the date fixed for completion, it seems to me, and thereupon the purchasers were faced with the formidable task (which as everybody knows is more formidable in present conditions of restricted credit) of finding a sum of no less than £50,000 (because they could get no credit for their deposit) on Jan. 31, 1956. Thereupon they found themselves faced with what I can only describe as this sudden demand for completion within twenty-eight days with, as I have pointed out, the task of finding a sum of £50,000.

The clause which is relied on by the vendors is a clause which differs from that to be found in the 15th edition of the National Conditions of Sale, and is in these terms:

> "23 (1) At any time on or after the completion date, the vendor, being himself able, ready and willing to complete, may (without prejudice to any other right or remedy of the vendor against the purchaser) give to the purchaser or his solicitor notice in writing requiring the purchaser to complete within such period (not being less than twenty-eight days) as the notice shall prescribe. And if the purchaser shall not complete accordingly, the vendor may at any time after the expiration of the notice, without previously tendering a conveyance, forfeit the deposit and re-sell the property by public auction subject to such conditions as he shall think fit."

It is admitted, and it is plain, that under the terms of the contract of Jan. 19, 1956, time was not of the essence as regards the completion of the contract. It is contended, however, that this clause allows the vendors unilaterally, by notice, to make time of completion of the essence; and it is contended that the notice may be given on the very day when completion is due, when it is still open to the purchaser to complete in accordance with the terms of the contract and when, therefore, he is not in default in any way at all. In this case, the notice in question was not given on the actual date fixed for completion; it was given on Feb. 1 when, I suppose, the purchasers might be said to be one day in default. The notice required completion to be within twenty-eight days " from the date hereof ", " the date hereof " being the date at the end of the notice, that is, Feb. 1, 1956. A point was taken on behalf of the purchasers in regard to that. It was argued that this notice did not give a minimum time of twenty-eight days required by cl. 23 (1) of the National Conditions of Sale because it was not in fact received, as appears from the receipt indorsed on it, until Feb. 2, 1956, and therefore, it is said, that twenty-eight days from Feb. 1 would not be more than twenty-seven days and therefore less than the minimum. It is, however, notice to complete within twenty-eight days " from the date hereof ", and there is authority in regard to tenancies and the like for saying that " from " excludes the actual day of the date of the notice, so that the time starts from the following day, and on that construction it may be there is a full time of twenty-eight days allowed by the notice for completion by the purchaser. I am bound to say, however, that when I first saw the proposition which was made on behalf of the vendors it did startle me, in that I was amazed to find that if the vendors' construction be right there was a condition of sale, in common form of conditions of sale of this type, apparently enabling the vendors to forfeit the deposit and determine the contract immediately on the date for completion falling due or being exceeded. It is a very startling proposition and one which obviously most purchasers would be well advised not to accept, and one which might be very difficult to comply with, at any rate, in regard to a substantial sale.

The question is whether this clause is to be effective according to the stark nature of its terms, or whether it must be construed in such a way as to give it a reasonable effect according to the circumstances of the case. Apart from the provisions of any plain and clear conditions of sale, the law about making time of the essence of the contract for the purpose of completion, as is accepted on both sides, is subject to the following conditions. First of all, the vendor must be able, ready and willing to proceed to completion; and it is not contested that the vendors were able and ready to proceed with the completion of the sale of the London land in the present case, because they were registered with possessory title from a date in 1921, and consequently there was very little difficulty in ascertaining their title. Secondly, at the time when the vendor purports to make time of the essence, the purchaser must be guilty of such default as to entitle the vendor to rescind the contract subject to its being done by a reasonable notice. Thirdly, once the right to serve a notice of the kind in question has arisen, the time allowed by the notice must be a reasonable time. Certainly, down to the introduction of the 16th edition of the National Conditions of Sale, those propositions applied not only to an open contract of sale, or a contract which did not include conditions of this type, but also to a contract which incorporated the 15th edition of the National Conditions of Sale. The point came before HARMAN, J., in *Smith* v. *Hamilton* (1) ([1950] 2 All E.R. 928). I need not read the facts of that case except to refer to cl. 25 (1) of the National Conditions of Sale (15th Edn.) which provided the following:

> " If the purchaser shall neglect or fail to complete his purchase according to these conditions, his deposit shall thereupon be forfeited (unless the court otherwise directs) to the vendor and the vendor may, with or without notice or without previously tendering a conveyance, re-sell the property

> at such time, in such manner and subject to such conditions as he shall think fit."

The law is expressed by Harman, J., as follows (ibid., at p. 933):

> "If time be not of the essence of the contract initially, one party cannot, by his own motion, make it so, and to say that by writing a letter you can make time of the essence when it was not so before is quite inaccurate. That has been pointed out on many occasions, and, among others, by Fry, J., in *Green* v. *Sevin* (2) ((1879), 13 Ch.D. 589). Fry, J., says (ibid., at p. 599): 'What right then had one party to limit a particular time within which an act was to be done by the other? It appears to me that he had no right so to do, unless there had been such delay on the part of the other contracting party as to render it fair that, if steps were not immediately taken to complete, the person giving the notice should be relieved from his contract. It has been argued that there is a right in either party to a contract by notice so to engraft time as to make it of the essence of the contract where it has not originally been of the essence, independently of delay on the part of him to whom the notice is given. In my view there is no such right. It is plain on principle, as it appears to me, that there can be no such right. That which is not of the essence of the original contract is not to be made so by the volition of one of the parties, unless the other has done something which gives a right to the other to make it so. You cannot make a new contract at the will of one of the contracting parties. There must have been such improper conduct on the part of the other as to justify the rescission of the contract sub modo, that is, if a reasonable notice be not complied with. That this is the law appears to me abundantly plain'."

In the case before him, Harman, J., held that the purchaser had not been guilty of impropriety and therefore the notice by the vendors purporting to determine the contract was not effective. It was argued in the present case that cl. 23 (1) in the 16th edition of the National Conditions of Sale was framed with particular regard to that decision of Harman, J., and was intended to alter the law, drastically as it seems to me, in favour of the vendor, with, it may be, disastrous results to a purchaser who may not be in default at all, at any rate until the date when the notice had been given. It is said, however, that this clause (which, of course, has been accepted by the purchasers in the present case, whether or not they appreciated the dangers implicit in it) enables a vendor to give notice on the date for completion and fix the unfortunate purchaser with the necessity of completing within a given time named by the vendor at his option and being not less than the period of twenty-eight days. That may be so, but the clause still requires the vendor, in giving such a notice as this, to give a notice which must not in any case be less than twenty-eight days and must be reasonable having regard to all the circumstances of the case. The clause may obviate the need for the purchaser to be guilty of improper conduct and guilty of such delay that the law, apart from any special condition, would give the vendor a right to rescind the contract; but in my view, giving the clause its proper construction, it still requires the notice, which may not be less than twenty-eight days but may well be more, to be for such a period as is reasonable in all the circumstances.

Counsel for the vendors has contended that the notice allowing twenty-eight days for completion in the present case was reasonable because there were no particular conveyancing difficulties and, therefore, it was simple for the purchasers to complete within the time allowed. In my view that is not the right consideration. In naming a period which suddenly makes a definite requirement for completion and makes time of the essence in this way, regard must be had to all the circumstances of the case, and to the practical considerations of the ability of the purchaser in the circumstances to find the money, having regard to reasonable behaviour as well as to mere conveyancing matters, though it is quite true that conveyancing difficulties may be some of the circumstances. In the present case, until a few days before the date fixed for completion, the purchasers were expecting that they would be not fixed with the necessity of finding £50,000 cash down, but of finding perhaps a balance of £5,000 by reason of the provision of part of the price by a sub-sale of the property. The facts of the negotiations of the sub-sale were within the knowledge of both parties. Indeed, the vendors were negotiating the sub-sale as agents for the purchasers and were under a duty to use their best endeavours to secure a successful outcome to those negotiations. Suddenly those negotiations came to an end. The situation was changed from the point of view of the purchasers and, indeed, also from the point of view of the vendors, because instead of getting part of the price by virtue of the sub-sale they will now have to look to the purchasers to find £50,000; and, in these circumstances, it does not seem to me to be reasonable to fix such a short time as twenty-eight days for the purchasers to find a sum of £50,000.

The attempt of the vendors to rely on a clause of this type in such circumstances was mistaken. The clause did not enable the vendors to act in the way in which they did act and their notice was ineffective. The purchasers desire to complete the contract now and are in my view entitled to have that opportunity. The vendors were not entitled to rescind the contract and forfeit the deposit.

Declaration accordingly.

Solicitors: *C. Butcher & Simon Burns* (for the purchasers); *J. D. Langton & Passmore* (for the vendors).

[*Reported by* Philippa Price, *Barrister-at-Law.*]

PYRAH (INSPECTOR OF TAXES) *v.* ANNIS & CO., LTD.

[Chancery Division (Vaisey, J.), June 14, 15, 1956.]

Income Tax—Deduction in computing profits—Capital expenditure—Expenditure on abortive application for variation in road haulage licence—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *Sch. D, Case I.*

The taxpayers, who were haulage contractors, applied to the licensing authority to vary their existing public carrier's licence under the Road and Rail Traffic Act, 1933 (an A licence) by increasing the number of articulated vehicles which they were entitled to operate from four to seven. The application was refused, and an appeal against the refusal to the Transport Tribunal was dismissed. In the computation of the profits of their business for income tax purposes, the taxpayers sought to deduct the legal costs of the application and appeal as a trade expense.

Held: the costs were not deductible in computing the taxpayers' profits for income tax purposes, since the application was not part of the carrying on of their trade but an attempt to improve their capital position by making their fleet of lorries more useful as income-winning assets.

Southwell v. *Savill Brothers, Ltd.* ([1901] 2 K.B. 349), *Kneeshaw* v. *Abertolli* ([1940] 3 All E.R. 500) and *Morse* v. *Stedeford* ((1934), 18 Tax Cas. 457) applied.

[As to deduction of payments in the nature of capital expenditure in computing profits for income tax purposes, see 17 Halsbury's Laws (2nd Edn.) 158-161, paras. 325-327; and for cases on the subject, see 28 Digest 47-49, *242-252.*]

Cases referred to:

(1) *Southwell* v. *Savill Brothers, Ltd.*, [1901] 2 K.B. 349; 70 L.J.K.B. 815; 85 L.T. 167; 65 J.P. 649; 4 Tax Cas. 430; 28 Digest 57, *288.*

(2) *Moore (A. G.) & Co.* v. *Hare*, (1914), 6 Tax Cas. 572; 28 Digest 48*l.*

(3) *Kneeshaw* v. *Abertolli*, [1940] 3 All E.R. 500; [1940] 2 K.B. 295; 109 L.J.K.B. 760; 164 L.T. 220; 23 Tax Cas. 462; 2nd Digest Supp.

(4) *Morse* v. *Stedeford*, (1934), 18 Tax Cas. 457; Digest Supp.

Case Stated.

The taxpayers appealed to the General Commissioners of Income Tax for the division of Uxbridge, Middlesex, against an estimated assessment made on them under Case I of Sch. D to the Income Tax Act, 1952, for 1953-54 in the sum of £15,000 less £2,500 capital allowances in respect of their profits of their trade of haulage contractors. In the accounts for the year ending on Mar. 31, 1953, which they submitted, they included a sum of £1,272 legal charges incurred on an application made by the taxpayers in 1952 before the licensing authority for the metropolitan traffic area for variation of their existing public carrier's licence as defined in s. 2 of the Road and Rail Traffic Act, 1933 (an A licence) and on an appeal from the refusal of the application by the licensing authority to the Transport Tribunal. In 1939 the taxpayers held an A licence for seven rigid tipper vehicles. After the war, when A licences had been restored, the taxpayers applied for an A licence for five articulated vehicles. In 1952, the taxpayers then having an A licence for four articulated vehicles, they applied to the licensing authority for the inclusion of a further three articulated vehicles to bring the number of articulated vehicles licensed up to seven. This was refused and the taxpayers appealed to the Transport Tribunal who dismissed the appeal. The taxpayers contended that the legal expenses were incurred in attempts to obtain replacement of the A licence which they had held before the war and were admissible expenses in computing their liability under Case I. The Crown contended that the A licence was in the nature of a capital asset and the purpose of the application and the appeal was to acquire an A licence of greater value to the taxpayers than the one they held; the legal expenses incurred were, therefore, capital expenditure and were inadmissible as deductions in computing the taxpayers' Case I liability. The commissioners held that the taxpayers' claim had been established and reduced the assessment. The Crown appealed.

Cyril King, Q.C., and *Sir Reginald Hills* for the Crown.
W. Lindsay for the taxpayers.

VAISEY, J.: This is an appeal from a decision of the General Commissioners for the division of Uxbridge in Middlesex, in favour of the taxpayers, holding that a sum of £1,272 could properly be admitted as a deduction from their trading profits for income tax purposes. That sum represents the expenses incurred by the taxpayers in trying to obtain a variation of an A licence which they held under the Road and Rail Traffic Act, 1933, to allow them to use vehicles additional to those already covered by the licence. The licensing authorities refused the application to vary it and the £1,272 are the cost of trying to persuade them to accede to its variation. If the sum was an admissible expense in arriving at the taxpayers' Case I liability, the obvious consequences follow as regards the sums to be assessed for income tax purposes.

At the outbreak of war, the taxpayers held under the Act of 1933 an A licence for seven rigid tipper vehicles. Various changes took place in the permissible use which they were entitled to make of their vehicles. After the war began, A licences were no longer issued or were replaced by what were called A defence permits under which, at the inception of the change, the taxpayers got the necessary permission to use the seven rigid tipper vehicles which it was already entitled to use under its A licence. Further variations of that permission occurred at various stages between 1943 and 1952.

The difficulty arose in regard to what are called articulated vehicles as distinguished from rigid vehicles, that being, I understand, the proper description of a vehicle with a trailer which was fit for carrying long, unbroken loads such as timber and lengthy machinery of various kinds. In 1952 the taxpayers applied to the licensing authority to vary the existing licence by including a further three articulated vehicles (in the words of the Case Stated)

> " in an endeavour to bring the number of vehicles authorised by the said A licence up to seven ",

and that application was refused. An appeal against the refusal to the Transport A
Tribunal was also dismissed. A voluminous report of the hearing of the appeals is attached to the Case Stated, which is very difficult to follow. I do not find much information as to what use, if any, the commissioners made of it or how far they paid attention to what it contains.

The taxpayers contended that the legal expenses, the £1,272, were admissible expenses in computing their liability to tax, basing that on a finding of fact B
that those expenses were admissible because they were expended in attempts to obtain replacement of what is described in the Case Stated as " the said A licence ", which, I suppose, means the original A licence held before the war. It was argued before the commissioners, apparently with success, that that was the sort of business expense which (putting the matter in very loose language) could be said to be part of the administrative expenses of the day-to-day running C
of the taxpayers' business of road hauliers.

The Crown submitted that the purpose of the further applications to the licensing authority and the appeal to the Transport Tribunal was to acquire an A licence of greater value to the taxpayers than that which they then held. Obviously the A licence sought was of greater value than the permissions, permits and licences which the taxpayers already had. The Crown's submission is D
summarised in this way:

> " Accordingly the legal expenses in question were capital expenditure and as such were inadmissible in computing the Case I liability of the [taxpayers]."

The Crown's contention amounts to this, that the taxpayers' business was road E
haulage and not buying, selling and dealing in tractors, and the case is covered by a long line of authorities dealing with the analogous matter of excise licences for the sale of excisable liquors; and that this application to the Transport Tribunal, if successful, would have resulted in an accretion to the value of the taxpayers' capital assets by improving their existing fleet of haulage vehicles, through either an increase in their number or an augmenting of their usefulness. F
That is to say, that this was an attempt to add to the taxpayers' capital resources, and the £1,272 were not a trading or administrative expense or an expense incurred in the carrying on of the business, but an expense incurred in an attempt to add to or increase the capital assets of the taxpayers. I think that the same principle applies as would apply to a successful attempt.

So far as it is based on the authorities that argument must depend not merely G
on the similarity but on the identity for present purposes of a licence under the Road and Rail Traffic Act, 1933, and a licence of licensed premises. My task in determining this point is not made easier by the omission from the Case of any indication of the contents of a licence granted to a licensed victualler in respect of licensed premises. I have, therefore, to compare one unknown with another unknown, and I have hesitated to deal with the question at all on the materials before me. However, I have assumed the substantial identity of the licensed H
victualler's licence and the carrier's licence, or at least that they can be treated for the purpose of this case as though they were the same thing.

The headnote in *Southwell* v. *Savill Brothers, Ltd.* (1) ((1901), 4 Tax Cas. 430) reads as follows:

> " Income tax, Sch. D.—Brewers.—Licensing magistrates require surrender I
> of licences before grant of new licences for new houses; brewers claim to deduct sums paid for ' call of licences ' and other expenses of unsuccessful applications for new licences in arriving at profits for assessment."

In that case, the Divisional Court (KENNEDY and PHILLIMORE, JJ.), held that those deductions were not admissible. KENNEDY, J., said (ibid., at p. 433):

> " In our view, this case is one in which, having listened to, and, I hope, fully appreciated, the argument addressed to us, we think the appeal of the

> Crown is right. The commissioners, who have stated the case here, have found that in allowing the amounts, against the allowance of which the Crown appeals, they have allowed them as a necessary annual trade expense incurred by the respondents as brewers. That is an inference from the facts which are stated before, and the question is whether or not this ought to be dealt with in the way the respondents here contend, or whether or not this is not really an investment upon what I may call the whole realised profits, an investment which ought to go into capital and not be brought into the question of income and the balance of profits and gains. I have come to the conclusion that the view the commissioners have taken is the wrong one. It seems to me that this is not an expenditure which ought to be treated as a loss, a something to be put against that which they have gained in the year as profits, and to be deducted therefrom for the purpose of getting at the sum on which they are assessable to income tax, that it is a sum which may be treated as an investment; not an investment of a sum out of profits which they have realised, but an investment which goes to capital, and it seems to me that if, as they admit they do not feel themselves justified in treating in the same way their expenditure, which is an expenditure for obtaining licences of houses where it is successful, they cannot claim that as a deduction. It has seemed to me from the very first very difficult to see how the nature (so far as taxability is concerned) of an expenditure can be different when it turns out that they do not get a profitable investment of that sum of money, instead of it representing capital in future years, it does not represent capital, but the nature of it as an investment of money seems to me not to be altered."

PHILLIMORE, J., took the same view.

In *A. G. Moore & Co.* v. *Hare* (2) ((1914), 6 Tax Cas. 572), a Scots case, a coal company, finding the accommodation afforded it by the ordinary railroad service not satisfactory, conceived the idea of promoting a Bill in Parliament for permission to build a railway of its own. The application for leave to promote such a Bill was unsuccessful and the Bill was ultimately dropped by agreement, with the happy result that the railway service was improved. But the expenditure incurred in the promotion of the Bill constituted a capital outlay and was inadmissible as a deduction in computing the company's liability for income tax. The business of the company was not the construction of a railroad or anything of that kind, but the mining of coal. Therefore, the losses which occurred in the promotion of a Bill to build a railway had nothing to do with the trading activities of the company. It was an unsuccessful attempt to put the company in the way of earning further profits by its coal-mining activities, but both the profit to be derived from the railway if it had been constructed and the expense of trying to get the railway constructed had nothing to do with the company's trading. They were designed as capital expenditure to put the company into a position to earn profits, but had nothing to do with the earning of the profits themselves.

Decided on something of the same principle was *Kneeshaw* v. *Abertolli* (3) ((1940), 23 Tax Cas. 462; [1940] 3 All E.R. 500). The headnote reads:

> "The respondent, a restaurant proprietor, was granted a renewal of his beer and wine on-licence for three years, subject to a payment for monopoly value of £75, payable in three annual instalments. Held, that the sums so paid were capital sums and were not admissible deductions in computing the respondent's profits for income tax purposes."

There again the commissioners had decided in favour of the subject and the appeal was allowed. Judgment was given for the Crown on the ground that the expenditure of that sum on the renewal of the licence was an expenditure, not for income purposes, but referable to capital.

The headnote in *Morse* v. *Stedeford* (4) ((1934), 18 Tax Cas. 457) reads: A

> " The appellant, who carried on the business of brewer and owned a number of licensed premises let to tied tenants, applied to the licensing justices for the removal of an existing licence to a new house to be erected, on the terms that a licence at another inn should at the same time be surrendered. In due course the removal was effected in the manner approved by the justices. B Neither of the outgoing tenants of the two inns, the licences of which were thus withdrawn, became the tenant of the new inn, and certain sums were paid to them in 1931 as compensation in order to secure their consent to the application to the licensing justices. On appeal against assessments to income tax under Sch. D for the years 1931-32 and 1932-33, the appellant contended that the legal expenses incurred in connection with the applications to the licensing justices C and the sums paid to the outgoing tenants as compensation were admissible deductions in computing the amount of his profits assessable under Sch. D. The General Commissioners confirmed the assessments.
>
> " Held, that, on the facts of the case, the General Commissioners, in applying the principle in *Southwell* v. *Savill Brothers, Ltd.* (1), had not made an error of law." D

It seems to me that, quite apart from the cases, the matter must turn on ordinary principles. If a man buys and sells stocks and shares and it is his business to buy and sell stocks and shares, then any losses which he incurs or profits which he makes in the conduct of that business are brought in as income profits or as part of his losses in the computation of his income in carrying E on that business. On the other hand, if his purchasing of stocks and shares is not his business but is something which cannot be treated as the carrying on of a trade, the profit or loss which he makes in buying an investment is not part of his profit or loss in carrying on any business.

Here the purpose for which this sum of £1,272 was expended is an attempt to make the fleet of lorries owned by the taxpayers more useful and more advantageous as income-winning assets, F which is not part of the carrying on of the business at all. It was designed to improve the taxpayers' capital position, and I think that this unsuccessful attempt to better the capital position by obtaining the desired variation of the A licence was properly attributable in the accounts to capital and not to income.

I have hesitated about this case, because I have had to draw inferences and make assumptions which may rest on rather insecure foundations, G but, having regard to all the circumstances of the case, I think I am justified in dealing with the matter on the materials before me and forming the conclusion that this A licence is exactly comparable with and analogous to the licence granted in respect of licensed premises under the Licensing Acts. I think that the principle of the cases to which I have referred really governs my decision in the present case. H It is unfortunate that I have not some better information about these A licences, although one has been produced to me. In the circumstances it is better that, with this licence before me and the somewhat imperfect information about what the licence of a public house looks like and contains, I should state my conclusions. The result is that I must allow this appeal.

Appeal allowed. I

Solicitors: *Solicitor of Inland Revenue; Stanley Wise & Co.* (for the taxpayers).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

R. *v.* TOTTENHAM AND DISTRICT RENT TRIBUNAL, *Ex parte* NORTHFIELD (HIGHGATE), LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Donovan, JJ.), June 29, 1956.]

Rent Control—Rent tribunal—Jurisdiction—Reference of lease to the tribunal by assignee of lease—Whether tribunal had jurisdiction to hear reference—Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6 *c.* 34), *s.* 2.

Prohibition—Rent tribunal—Prohibition against proceeding in excess of jurisdiction—When application for prohibition should be made.

A lease, being a contract to which s. 2* of the Furnished Houses (Rent Control) Act, 1946, applied, was assigned by the lessee to Mr. and Mrs. S. who referred it to a rent tribunal. The lessors applied for an order of prohibition.

Held: an assignee of a contract for furnished letting was not entitled to refer the contract to a rent tribunal under s. 2 of the Act of 1946, and an order of prohibition would be granted.

Per LORD GODDARD, C.J.: where the question is whether a rent tribunal has no jurisdiction and a clear question of law is raised not depending on particular facts there is no reason why application should not be made for prohibition, rather than that the point should be taken before the rent tribunal and that motion should be made for certiorari if the decision goes against the applicants (see p. 865, letter B, post).

[As to prohibition in cases of error of law, see 11 HALSBURY'S LAWS (3rd Edn.) 63, para. 120.

For the Furnished Houses (Rent Control) Act, 1946, s. 2 (1), see 13 HALSBURY'S STATUTES (2nd Edn.) 1086.]

Motion for order of prohibition.

This was a motion by the applicants, Northfield (Highgate), Ltd., for an order of prohibition to restrain the Tottenham and District Rent Tribunal from proceeding to hear a reference purporting to be made under s. 2 (1) of the Furnished Houses (Rent Control) Act, 1946. The applicants were the owners of a block of flats in Highgate. By a lease dated Mar. 14, 1949, they had granted a lease of a flat to a Mrs. Oram for a term of seven years from Mar. 25, 1949, at a rent which included payment for services. That lease was assigned on Mar. 4, 1954, to a Mr. and Mrs. Salviche. On Feb. 7, 1956, the assignees sought to refer the lease to the Tottenham and District Rent Tribunal. The applicants now moved for an order of prohibition to restrain the rent tribunal from hearing that reference on the ground that an assignee of a lease was not entitled to refer the lease under s. 2 of the Act of 1946.

Desmond Ackner for the applicants.
G. Avgherinos for Mr. and Mrs. Salviche, the assignees of the lease.
Rodger Winn for the rent tribunal.

LORD GODDARD, C.J.: Counsel in this case moves for an order of prohibition to prohibit the Tottenham and District Rent Tribunal from proceeding with a reference under the Furnished Houses (Rent Control) Act, 1946, by a Mr. and Mrs. Salviche. They endeavoured to refer to the tribunal a lease of a flat (which is for the purposes of this Act a furnished flat) dated Mar. 14, 1949, for seven years of which they are the assignees. The only possible question in this case is whether an assignee of a lease is entitled to refer the lease under which he or she holds to the tribunal, and that depends entirely on the wording of the Act.

In spite of the gallant efforts of counsel for Mr. and Mrs. Salviche I think that this case is quite unarguable. The only question is whether Parliament has included assignees as persons entitled to refer a lease. I look, therefore, at s. 2 (1) of the Furnished Houses (Rent Control) Act, 1946, which says this:

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* The relevant terms of s. 2 (1) are printed at p. 864, letter A, post.

> " Where a contract has, whether before or after the passing of this Act, been entered into whereby one person (hereinafter referred to as the ' lessor ') grants to another person (hereinafter referred to as the ' lessee ') the right to occupy as a residence . . . it shall be lawful for either party to the contract or for the local authority to refer the contract to the tribunal for the district . . . "

This is the only section in the Rent Acts, so far as I know, which uses the expression " lessor and lessee " and not " landlord and tenant ". It is also the only section in the rent restriction legislation which uses the expression " It shall be lawful for either party to the contract ". Parliament is always presumed to know the law and to be legislating with regard to the condition of the law as it exists at the time when the legislation is passed; and it has been the common law in this country for hundreds of years that there is a distinction between an assignee and a lessee, and that there is no privity of contract between the lessor and assignee. There is what is called privity of estate, but there is no privity of contract, and it is impossible to read the word " lessee " which has been apparently deliberately used, because it is used throughout the Act and the regulations*, as meaning " assignee ". If Parliament had intended the word " lessee " to include an assignee, it could have said so.

This point receives emphasis from observing the provisions of the Landlord and Tenant (Rent Control) Act, 1949, which enable unfurnished houses to be referred to the tribunal for the purpose of considering the standard rent, and in those provisions the words are not " lessor " and " lessee " but " landlord " and " tenant ". Then you find that in the definition section [s. 18 of the Act of 1949] it is provided that expressions have the same meanings as in the principal Act. There is no corresponding provision in the Furnished Houses (Rent Control) Act, 1946. The principal Act is the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, by s. 12 (1) (f) of which:

> " The expressions ' landlord ', ' tenant ', ' mortgagee ', and ' mortgagor ' include any person from time to time deriving title under the original landlord, tenant, mortgagee, or mortgagor."

Even there, the words " lessor " and " lessee " are not used. It is impossible for this court, because other Acts which deal with similar legislation use these expressions, to read the provision to which I have just referred into the Furnished Houses (Rent Control) Act, 1946. The fact is that, either by design or by mischance, Parliament has not dealt with the case of an assignee. There is, therefore, no power for an assignee of a furnished house (i.e., premises which are a furnished house within the purview of the Furnished Houses (Rent Control) Act, 1946), to refer the contract of letting to the tribunal. Therefore, the order of prohibition must go.

There is only one other word I need add. Counsel for the tribunal has taken no part in the argument but he has asked us to express some opinion whether it was right for the applicants in this case to apply to this court for prohibition or whether they ought not to have gone to the tribunal and taken the point there. Of course, they could have taken the point before the tribunal, and if the tribunal had decided in their favour, well and good. If the tribunal had decided contrary to their contention, then they would have had to come here and ask for certiorari instead of asking for prohibition. It would not be at all desirable to lay down any definite rule when a person should go to the tribunal or when he should come here for prohibition where the objection is that the tribunal has no jurisdiction. Where there is a perfectly simple, short and neat question of law, as there is in this case, it is quite convenient and certainly within the power of the applicants to come here for prohibition. That does not mean that if the tribunal, during the time between the grant of leave to move for prohibition and the hearing of the motion, like to continue the hearing they cannot do so; if prohibition goes it will stop them from giving any decision, and if prohibition does not go they can give their decision. For myself, I should say that where there is a clear question of law not depending on particular facts (and there is no fact in dispute in this case) there is no reason why the applicants should not come direct to this court for prohibition rather than wait to see if the decision goes against them, in which case they would have to move for certiorari.

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* Furnished Houses (Rent Control) Regulations, 1946 (S.R. & O. 1946 No. 781).

For these reasons, prohibition must go.

ORMEROD, J.: I agree, for the same reasons.

DONOVAN, J.: I agree. I find no difficulty about construing the expression "either party to a contract"; they are the person who makes the offer and the person who accepts it. The argument in this case that it includes reversioners and assignees as well in the case of a contract for a lease depends on a very artificial construction of s. 2 of the Furnished Houses (Rent Control) Act, 1946. It is said that the word "grants" must be read as indicating a continuous process during which the identity of the grantor and the grantee may change, and each in turn may thus be regarded as parties to the contract. That, I think, puts a very forced and unnatural interpretation on the words "either party to the contract" which are the crucial words of s. 2.

We were also pressed with the odd consequence which it is said will follow the applicants' construction. That may be so. There may be no good reason for confining the benefit of the Act to the original parties to the contract; but the Act will operate as between those parties while they both exist; and furthermore the assignee has protection under the Act in that a local authority can if it thinks fit refer the contract to the tribunal. That being so, and the Act being in part also a penal one, interfering with the common law freedom of contract, I find no compelling reason to put an artificial construction on s. 2. I think the words "either party to the contract" must be given their ordinary, natural meaning, which will exclude an assignee of a lease. One is reinforced in this conclusion by the fact to which LORD GODDARD, C.J., has referred, that apparently none of the other Acts dealing with this subject use the expression "party to a contract".

Lastly, counsel for Mr. and Mrs. Salviche referred to s. 7 of the Landlord and Tenant (Rent Control) Act, 1949. That section refers to a tenant and a landlord and says that in certain circumstances the Act of 1946 shall apply to the contract. I appreciate the force of the argument he places on that section, but a subsequent statute may be used to construe an earlier one only if it resolves some ambiguity in the earlier one, and I find no such ambiguity in s. 2 of the Act of 1946. Section 7 of the Act of 1949 is not empty of content if the Act of 1946 is regarded as applicable only to the parties to the contract and no one else.

For those reasons I agree with the judgment proposed.

Order of prohibition granted.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the applicants); *Agar-Hutton & Co.* (for Mr. and Mrs. Salviche); *Solicitor, Ministry of Health* (for the rent tribunal).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

KARSALES (HARROW), LTD. *v.* WALLIS.

[Court of Appeal (Denning, Birkett and Parker, L.JJ.), June 11, 12, 1956.]

Hire-Purchase—Fitness of article sold—Exception clause that no warranty made of fitness—Hire-purchase of car—Car when delivered to hirer incapable of self-propulsion—Fundamental breach of contract—Implied term as to maintenance of car pending delivery—Whether hire-purchase instalments recoverable.

Contract—Exception clause—Hire-purchase of car—" No condition or warranty . . . as to its fitness for any purpose . . ."—Car when delivered would not go—Fundamental breach—Whether hirers protected by clause.

The defendant inspected a Buick car which S. wished to sell and found it to be in excellent condition. The defendant agreed to buy it, if S. made arrangements for hire-purchase by the defendant. S. sold the car to the plaintiffs who re-sold it to a finance company with whom the defendant subsequently entered into a hire-purchase agreement. The agreement contained an exception clause which included the following terms: " No condition or warranty that the vehicle is roadworthy or as to its age, condition or fitness for any purpose is given by the owner or implied herein ". Possession of the car was retained by S. The finance company never inspected the car. Shortly after the date of the agreement the car was left at night outside the defendant's premises and on inspection by the defendant on the following morning was found to be in a deplorable condition and incapable of self-propulsion. The defendant refused to accept the car which was towed to S.'s premises. The finance company assigned all their rights under the hire-purchase agreement to the plaintiffs who sued the defendant for instalments under the agreement, relying on the exception clause.

Held: (i) the car delivered was not the thing contracted to be taken on hire-purchase and there was a fundamental breach of the contract which disentitled the plaintiffs from relying on the exception clause.

Dictum of Devlin, J., in *Smeaton Hanscomb & Co., Ltd.* v. *Sassoon I. Setty, Son & Co.* ([1953] 2 All E.R. at p. 1473) applied.

(ii) (per Denning and Parker, L.JJ.) the instalments could not be recovered by the plaintiffs for the further reason that delivery of the car had not been accepted and that the only remedy of the finance company was by action for damages, and any right to bring such an action had not been assigned to the plaintiffs (see p. 869, letter F, and p. 871, letter H, post).

National Cash Register Co. v. *Stanley* ([1921] 3 K.B. 292) applied.

Per Denning, L.J.: it is an implied term of a hire-purchase agreement [where the application for hire-purchase is made on the basis of an inspection of the car hired by the intending purchaser] that pending delivery the car will be kept in suitable order and repair for the purposes of the bailment (see p. 868, letter H, post).

Appeal allowed.

[As to the duty of supplying suitable goods under a hire-purchase agreement, see 16 Halsbury's Laws (2nd Edn.) 515, para. 759; and as to the owner of a chattel subject to hire-purchase being bound, if he retains possession of it, to keep it in repair, see ibid., 519, para. 763.]

Cases referred to:

(1) *Robertson* v. *Amazon Tug & Lighterage Co.*, (1881), 7 Q.B.D. 598; 51 L.J.Q.B. 68; 46 L.T. 146; 3 Digest 89, *224*.

(2) *Pinnock Bros.* v. *Lewis & Peat, Ltd.*, [1923] 1 K.B. 690; 92 L.J.K.B. 695; 129 L.T. 320; Digest Supp.

(3) *Alexander* v. *Railway Executive*, [1951] 2 All E.R. 442; [1951] 2 K.B. 882; 2nd Digest Supp.

(4) *Smeaton Hanscomb & Co., Ltd.* v. *Sassoon I. Setty, Son & Co.*, [1953] 2 All E.R. 1471; 3rd Digest Supp.

(5) *J. Spurling, Ltd.* v. *Bradshaw*, ante, p. 121.

(6) *National Cash Register Co.* v. *Stanley*, [1921] 3 K.B. 292; 90 L.J.K.B. 1220; 125 L.T. 765; Digest Supp.

(7) *Andrews Bros. (Bournemouth), Ltd.* v. *Singer & Co., Ltd.*, [1934] 1 K.B. 17; 103 L.J.K.B. 90; 150 L.T. 172; Digest Supp.

(8) *British Automatic Co.* v. *Haynes*, [1921] 1 K.B. 377; 90 L.J.K.B. 271; 17 Digest (Repl.) 110, *240*.

Appeal.

The defendant appealed from an order of His Honour JUDGE RAWLINS at Aldershot County Court, dated Apr. 17, 1956, whereby the defendant was ordered to pay ten monthly instalments due under the terms of a hire-purchase agreement between the plaintiffs and the defendant.

The facts appear in the judgment of DENNING, L.J.

J. Lloyd-Eley for the defendant.

M. J. Anwyl-Davies for the plaintiffs.

DENNING, L.J.: Mr. Wallis, the defendant in this action, is the owner of the By Pass Garage, Bagshot. At the end of 1954 a Mr. Stinton came to him wishing to sell him a second-hand Buick motor car. The defendant inspected it and found it an excellent car. He had not the money to pay the price asked, some £600, and he said he would buy it through a hire-purchase finance company, if Mr. Stinton could make the necessary arrangements. Mr. Stinton at first put forward forms for the North Central Wagon Company as the hire-purchase finance company. They rejected the application. He next suggested Mutual Finance Ltd., and got the defendant to sign their forms. The defendant signed them in blank over a sixpenny stamp, with no details filled in. He did not on that occasion pay any sum cash down to Mr. Stinton; nor did he take delivery of the car, thus departing from the usual practice in these matters. Mr. Stinton took the forms away and kept the car in his possession. The forms were in due course submitted to Mutual Finance, Ltd. Mr. Stinton, however, did not do it himself; he did it through an intermediary called Karsales (Harrow), Ltd. Mutual Finance, Ltd. accepted the application and the transaction was concluded in this way: the intermediary bought the car from Mr. Stinton and re-sold it to Mutual Finance, Ltd.; then Mutual Finance, Ltd., let it out on hire-purchase terms to the defendant on the terms of the form which the defendant had signed. No one in the offices of Mutual Finance, Ltd. ever inspected the car, but someone must have filled in the details on the form, giving the registration number of the car, the total price, the initial payment, and the instalments. They dated it Feb. 10, 1955, and sent a copy to the defendant. He accepted the form without objection, and has in the pleadings in this action admitted that it is an agreement between Mutual Finance, Ltd. and himself. When however, the defendant received the agreement the car had still not been delivered. It was apparently still in Mr. Stinton's possession. The defendant had not seen it since his first inspection; so he got into touch with Mr. Stinton and asked for delivery. Mr. Stinton said that he would not deliver it because he had not been paid—meaning, presumably, that he had not been paid by the finance company the sum due for the car. He told the defendant that he would make inquiries. It would appear that he was paid soon afterwards, because what happened next was this. About a week later the vehicle was left, late at night, outside the defendant's garage. It was examined by the defendant the next morning and was found to be the same Buick car as he had previously inspected in this sense, that it had the same body and engine and registration number, but it had been badly damaged. It had evidently been towed in. There was a rope attached to the front bumper. It was, as the judge found, "in a deplorable state ". The new tyres had been taken off and old ones put on; the wireless A set had been removed from it; the chrome strips round the body were missing; and when the defendant's fitter looked at the engine, the cylinder head was off, all the valves were burnt, and there were two broken pistons. The car would not go. The defendant said to Mr. Stinton " I will not accept the car in this condition "; the car was towed away to Mr. Stinton's place and was never repaired. It would have cost £150 to put it into the condition in which the defendant B had first seen it.

Mutual Finance, Ltd., after several months, assigned all their rights under the hire-purchase agreement to Karsales (Harrow), Ltd., the intermediary to which I have referred, and Karsales (Harrow), Ltd. now sue the defendant for ten months' instalments of payments under the hire-purchase agreement. The judge has found that they are entitled to those payments as having become C due under the agreement, and the question is whether that decision is right in point of law or not.

On this matter, counsel on behalf of the defendant says that he agreed to take on hire-purchase terms a Buick motor car which he had seen a week or two before he had signed these documents. He says that it was the duty of Mutual Finance, Ltd. to see that there was delivered to the defendant a motor car D which corresponded to the car which he had seen; further that, owing to the condition of the car on delivery, there was a fundamental breach by Mutual Finance, Ltd. and that Karsales (Harrow), Ltd. (to whom I will hereafter refer as the plaintiffs) cannot recover the instalments. In answer, counsel on behalf of the plaintiffs says that there was delivered to the defendant a Buick motor car of the registration number specified in the agreement and they are in no way E responsible for its condition on delivery. They rely on cl. 3 (g) of the hire-purchase agreement:

> " No condition or warranty that the vehicle is roadworthy or as to its age, condition or fitness for any purpose is given by the owner or implied herein."

F

The judge held that that clause meant that the hire-purchase company were not responsible in any way for the condition of this car when it was delivered, and that although it was in this deplorable condition they could still recover the instalments due under the agreement; and that, even though the car was rejected by the defendant, they could still recover them.

In my opinion, under a hire-purchase agreement of this kind, when the hirer G has himself previously seen and examined the motor car and made application for hire-purchase on the basis of his inspection of it, there is an obligation on the lender to deliver the car in substantially the same condition as when it was seen. It makes no difference that the lender is a finance company which has bought the car in the interval without seeing it. The lender must know, from the ordinary course of business, that the hirer applies on the faith of his H inspection and on the understanding that the car will be delivered in substantially the same condition: and it is an implied term of the agreement that pending delivery the car will be kept in suitable order and repair for the purposes of the bailment. This is supported by STORY ON BAILMENT, arts. 383 to 385, and *Robertson* v. *Amazon Tug & Lighterage Co.* (1) ((1881), 7 Q.B.D. 598). The plaintiffs say that there can be no such implication in this case in view of the I express terms of cl. 3 (g). The law about exempting clauses, however, has been much developed in recent years, at any rate about printed exempting clauses, which so often pass unread. Notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract. It is necessary to look at the contract apart from the exempting clauses and see what are the terms, express or implied, which impose an obligation on the party. If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses. I would refer in this regard to what was said by ROCHE, J., in *Pinnock Bros.* v. *Lewis & Peat, Ltd.* (2) ([1923] 1 K.B. 690 at p. 695) to the judgments of DEVLIN, J., in *Alexander* v. *Railway Executive* (3) ([1951] 2 All E.R. 442) and *Smeaton Hanscomb & Co., Ltd.* v. *Sassoon I. Setty, Son & Co.* (4) ([1953] 2 All E.R. 1471), and a recent case in this court, *J. Spurling, Ltd.* v. *Bradshaw* (5) (ante, p. 121), and the cases there mentioned. The principle is sometimes said to be that the party cannot rely on an exempting clause when he delivers something " different in kind " from that contracted for, or has broken a " fundamental term " or a " fundamental contractual obligation ". However, I think that these are all comprehended by the general principle that a breach which goes to the root of the contract disentitles the party from relying on the exempting clause. In the present case the lender was in breach of the implied obligation that I have mentioned. When the defendant inspected the car prior to signing the application form, the car was in excellent condition and would go: whereas the car which was subsequently delivered to him was no doubt the same car but it was in a deplorable state and would not go. That breach went to the root of the contract and disentitles the lender from relying on the exempting clause.

The only real difficulty that I have felt in the case is whether this point is put with sufficient clarity in the pleadings. It is not put as clearly as one could wish. Nevertheless, I have always understood in modern times that it is sufficient for a pleader to plead the material facts. He need not plead the legal consequences which flow from them. Even although he has stated the legal consequences inaccurately or incompletely, that does not shut him out from arguing points of law which arise on the facts pleaded. Looking at this defence, it is quite plain that the defence pleaded all the material facts which I have mentioned, and it is, I think, sufficient.

There is a further point. It is quite plain from the authorities (for example, *National Cash Register Co.* v. *Stanley* (6) ([1921] 3 K.B. 292) that when goods are let on hire-purchase and there is a refusal by the hirer to take them, the proper remedy of the lender is not to claim for arrears of instalments but for damages for failure to accept delivery. In this case, therefore, in any event there could not be a claim for arrears of instalments but only for damages. The assignment by Mutual Finance, Ltd. to the plaintiffs only covers moneys payable under the agreement. It does not cover a claim to damages. On that ground also the plaintiffs could not succeed in this action. I am therefore of opinion that the appeal should be allowed.

BIRKETT, L.J.: I am entirely of the same opinion. I think this is an unfortunate case; and a troublesome case, which has been extremely well argued by the learned counsel on both sides.

The plaintiffs' case against the defendant, put simply, is that he owes them certain hire charges on a motor car and that he would continue to be liable for further charges in the circumstances which my Lord has already indicated. The answer that the defendant makes is: " I am not liable at all ". [HIS LORDSHIP stated the facts and continued:] Clearly it was the duty of Mutual Finance, Ltd., to supply to the defendant a " car ", in the ordinary sense of that term, not something that needed towing, because in the true meaning of words a car that will not go is not a car at all. This matter was raised in the court below, and it is the only matter with which I shall deal. In the court below according to the judge's notes counsel for the defendant submitted that the defendant got something for which he did not contract and then there appears on the notes, in parenthesis, " (Don't take this matter further) ". In the judgment the learned judge says:

> " [Counsel] says that in certain circumstances you can read into a contract a term similar to that in the Sale of Goods Act dealing with description of the article hired. He says that the description given in December or January, 1955, was not complied with and that since one can read such a term into a hire-purchase contract there was a fundamental breach of the agreement, upon which the defendant is entitled to rely. At one stage in his argument [counsel] submitted that something other than that contracted for had been delivered but was forced to admit that this allegation had not been pleaded."

We inquired into that matter, and although there did not appear to be perfect agreement between the learned counsel, what counsel for the defendant said was this:

> " I did make that submission to the learned judge on the pleading which I had myself drawn ";

and if one looks at the defence it is quite true that these words are used:

> " David William Stinton delivered to the defendant's garage a Buick motor car . . . but the same did not correspond with the car submitted to the defendant prior to entering into the said agreement as aforesaid and was not reasonably fit for the purpose as hereinbefore alleged and the defendant refused to accept the car and the plaintiffs or Mutual Finance, Ltd., or the said David William Stinton removed the same forthwith from the defendant's premises ":

and then particulars of the defects are set out. Counsel said that on that pleading he did submit to the learned judge what the learned judge has recorded in his note, and certainly did submit on the form of the pleading which he had made that that contention was open to him. That does not appear to be quite acceptable to counsel for the plaintiffs, but that is what we are told. It is clear to this extent that the submission was made, and it was made on these facts (and my Lord has read the evidence that was given to support the pleading). Those facts, counsel for the defendant says, were before the learned judge. Counsel says that it is not quite accurate to say that he was forced to admit the matter was not pleaded, but that what really happened was that the learned judge said he was not able to accept the main argument which was being submitted and that then the learned counsel said that he would not press that any further. I agree with what my Lord has said with regard to this matter. I think that it was clearly shown that there was a fundamental breach—indeed, those are the very words of the submission that was made. It may be put in alternative forms—that the thing delivered was not the thing contracted for. It seems to me that Mutual Finance, Ltd., being fundamentally in breach, the plaintiffs cannot rely, as they have sought to rely, on the provisions of cl. 3 (g) in the written agreement. In those circumstances, therefore, I think that the defendant is entitled to succeed and should have succeeded in the court below. For my own part, I would allow the appeal.

PARKER, L.J.: I have come to the same conclusion. I think it is the duty of a hire-purchase finance company, which is letting out a chattel on hire-purchase, to ascertain that the chattel is reasonably fit for the purpose for which it is expressly hired. It is for that reason that it has become common practice for hire-purchase finance companies to insert exception clauses. In the present case the company had inserted a very extensive clause in their agreement, cl. 3 (g). I need not read the whole of it, but the opening words are:

> " No condition or warranty that the vehicle is roadworthy or as to its

> age condition or fitness for any purpose is given by the owner or implied herein."

Accordingly, Mutual Finance, Ltd., and their assignees, the plaintiffs, said (in effect) that it does not matter what is delivered so long as it bears the appellation of a " Buick " car as described in the agreement, and that the hirer is bound to take it. In my judgment, however extensive the exception clause may be, it has no application if there has been a breach of a fundamental term. We were referred to a number of cases including *Smeaton Hanscomb & Co., Ltd.* v. *Sassoon I. Setty, Son & Co.* (4), where the learned judge says this ([1953] 2 All E.R. at p. 1473):

> " It is, no doubt, a principle of construction that exceptions are to be construed as not being applicable for the protection of those for whose benefit they are inserted if the beneficiary has committed a breach of a fundamental term of the contract . . . I do not think that what is a fundamental term has ever been closely defined. It must be something, I think, narrower than a condition of the contract, for it would be limiting the exceptions too much to say that they applied only to breaches of warranty. It is, I think, something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates."

Applying that to the facts of this case, it seems to me that the vehicle delivered in effect is not properly described (as the agreement describes it) as a motor vehicle, " Buick ", giving the chassis and engine number. By that I am not saying that every defect in a car which renders it for the moment unusable on the road amounts to a breach of a fundamental term; but where, as here, a vehicle is delivered incapable of self-propulsion except after a complete overhaul and in the condition referred to by my Lord, it seems to me that it is abundantly clear that there was a breach of a fundamental term and that accordingly the exceptions in cl. 3 (g) do not apply.

I think the same result is achieved by saying, in effect, that what was delivered was not what was contracted for; and I think that *Andrews Bros. (Bournemouth), Ltd.* v. *Singer & Co., Ltd.* (7) ([1934] 1 K.B. 17) might well have been decided on the basis that there had been a breach of a fundamental term. In that case the contract was for the sale of new Singer cars, and again there was an elaborate exception clause. SCRUTTON, L.J., held that, there being an express term that what was sold was a new Singer car, and there having been a breach of that express term, the exception clauses dealing with implied conditions and warranties had no application. In my view the position is perfectly clear, and my only doubts in this case have arisen by reason of the pleadings. All I desire to say on that is that, for the reasons given by my Lords, I think it is open to this court to decide the case on that ground.

I should add that in my view these proceedings for arrears of instalments cannot possibly be sustained on any view. It is clear from the cases to which we were referred (*National Cash Register Co.* v. *Stanley* (6), [1921] 3 K.B. 292, and *British Automatic Co.* v. *Haynes* (8), [1921] 1 K.B. 377) that, unless delivery of the chattel has been made and accepted, the only possible action is for damages and not for rent. In this case, by reason of the form of the assignment, if delivery was not made and accepted the plaintiffs must fail. As to delivery, it is plain that no delivery was made until, at the end of February or early in March, the vehicle was towed and left outside the defendant's premises. Counsel for the plaintiffs has argued that thereafter delivery was accepted because the vehicle was not at once returned to Mutual Finance, Ltd.; nor indeed were they immediately notified; but it was sent back to Mr. Stinton. I do not think that that really amounts to an acceptance of delivery. Mr. Stinton, in leaving it outside the defendant's premises, must have been acting as agent of the finance company to deliver the vehicle, and all that the defendant did was immediately to return it to that same agent. For these reasons, it seems to me that delivery was never accepted, and the only claim could be a claim in damages. Accordingly, I would allow this appeal.

Appeal allowed.

Solicitors: *Sampson & Co.* (for the defendant); *Horne, Engall & Freeman*, Egham (for the plaintiffs).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

R. *v.* CORNWALL QUARTER SESSIONS APPEAL COMMITTEE, *Ex parte* KERLEY.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Donovan, JJ.), June 28, 1956.]

Food and Drugs—Food unfit for human consumption—Condemned by justice—Executive act, and not judicial process—No right of appeal—Food and Drugs Act, 1938 (1 *&* 2 *Geo.* 6 *c.* 56), *s.* 10 (3), *s.* 88.

Justices—Court of summary jurisdiction—Single justice condemning food unfit for human consumption—Executive not judicial act.

Quarter Sessions—Appeal to—Food condemned by justice as unfit for human consumption—Justice acting administratively—No right of appeal—Food and Drugs Act, 1938 (1 *&* 2 *Geo.* 6 *c.* 56), *s.* 10 (3), *s.* 88.

A sanitary inspector, acting as the authorised officer of the local authority under the Food and Drugs Act, 1938, s. 10 (1)*, seized on Oct. 10, 1955, some meat which appeared to him to be unfit for human consumption and brought it before a justice of the peace, who condemned it and ordered it to be destroyed under s. 10 (3)* of the Act of 1938. The owner of the food having given notice of appeal to quarter sessions under s. 88† of the Act of 1938 (which enables a person aggrieved by an order of a court of summary jurisdiction to appeal), the sanitary inspector applied for an order of prohibition prohibiting the appeal committee from hearing the appeal.

Held: in condemning the meat and ordering it to be destroyed the justice was not acting as a court of summary jurisdiction and no appeal lay from his order; accordingly an order of prohibition would be granted.

White v. *Redfern* ((1879), 5 Q.B.D. 15) considered.

[**Editorial Note.** The Food and Drugs Act, 1938, as amended by the Food and Drugs Amendment Act, 1954, s. 36 (1) and Sch. 3, was repealed and is replaced as from Jan. 1, 1956, by the Food and Drugs Act, 1955. Section 9 and s. 118 of the Act of 1955 replace s. 10 and s. 88 of the Act of 1938.

For the Food and Drugs Act, 1938, s. 10 and s. 88, see 10 HALSBURY'S STATUTES (2nd Edn.) 393, 463; and for s. 9 and s. 118 of the Food and Drugs Act, 1955, see 35 HALSBURY'S STATUTES (2nd Edn.) 108, 201.]

Case referred to:

(1) *White* v. *Redfern*, (1879), 5 Q.B.D. 15; 41 L.T. 524; 44 J.P. 87; sub nom. *R.* v. *White*, 49 L.J.M.C. 19; 25 Digest 109, *330*.

Motion for order of prohibition.

The applicant, William Kerley, who was a sanitary inspector of the Wadebridge Rural District Council, and part of whose duties was to act as a meat and food inspector for the council, applied for an order of prohibition directed to the Appeal Committee of the Court of Quarter Sessions for the County of Cornwall to prohibit the committee from hearing an appeal by the respondent, Richard Peter Montague Whittington, from an order of justices of the peace made on Oct. 10, 1955,

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* The relevant terms of s. 10 are set out at p. 873, letter G, post.

† The text of the section is printed at p. 873, letter F, post.

A and described in the notice of appeal as " an order of the Court of Summary Jurisdiction of the Petty Sessional Division of Wadebridge," condemning the carcase of a cow and ordering it to be destroyed as appearing to be unfit for human consumption.

On Oct. 1, 1955, the applicant inspected the carcases of two cows which belonged to the respondent and were deposited at the slaughter house at Wadebridge B for the purpose of sale or of preparation for sale. As the carcase of one cow appeared to the applicant to be unfit for human consumption, he seized it and brought it, on Oct. 10, 1955, before two justices of the peace for examination and condemnation. One of the justices then made the order in respect of which the respondent had given notice of appeal.

The grounds on which the order of prohibition was sought were that the C order appealed against was an executive order of justices of the peace, made in pursuance of s. 10 (3) of the Food and Drugs Act, 1938, that the appellant had no right of appeal against the order to quarter sessions, and that, accordingly, the appeal committee had no jurisdiction to hear the appeal.

N. J. Skelhorn, Q.C., and *A. L. Mildon* for the applicant.
D *H. Edmund Davies, Q.C.*, and *J. B. Worsley* for the respondent.

LORD GODDARD, C.J.: Counsel for the applicant in this case moves for an order of prohibition directed to the Appeal Committee of Quarter Sessions for the County of Cornwall to prohibit them from hearing an appeal of which notice has been given by the respondent, Richard Peter Montague Whittington, against an order, as it is called, of justices of the peace condemning the carcase E of a cow as appearing to be unfit for human consumption under s. 10 of the Food and Drugs Act, 1938. An appeal is a statutory remedy. Unless a statute gives a right of appeal, there cannot be an appeal against any order, whether it is made administratively or whether it is made judicially. Section 88 of the Food and Drugs Act, 1938, provides:

> F " Where a person aggrieved by an order, determination or other decision of a court of summary jurisdiction under this Act, or under any regulation made under this Act, is not by any other enactment authorised to appeal to a court of quarter sessions, he may appeal to such a court."

Therefore, the question here is whether this is an order of a court of summary G jurisdiction.

Section 10 of the Food and Drugs Act, 1938, provides:

> " (1) An authorised officer of a local authority may at all reasonable times examine any food intended for human consumption which has been sold, or is offered or exposed for sale, or is in the possession of, or has been deposited with or consigned to, any person for the purpose of sale or of preparation for H sale, and, if it appears to him to be unfit for human consumption, may seize it and remove it in order to have it dealt with by a justice of the peace. (2) An officer who seizes any food under the preceding sub-section shall inform the person in whose possession it was found of his intention to have it dealt with by a justice of the peace, and any person who under the last preceding section might be liable to a prosecution in respect of the food shall, I if he attends before the justice upon the application for its condemnation, be entitled to be heard and to call witnesses. (3) If it appears to a justice of the peace that any food brought before him, whether seized under the provisions of this section or not, is unfit for human consumption, he shall condemn it and order it to be destroyed, or to be so disposed of as to prevent it from being used for human consumption."

Section 10 (3) is the material sub-section. Section 10 (4) provides that, if on the food being brought before a justice he refuses to condemn it, the owner of the food shall be compensated for any deterioration in its value resulting from the seizure.

Before the Act of 1938, or, at any rate, when this procedure was governed by the former Public Health Acts, it is clear, and is conceded by counsel for the respondent, that an appeal could not be allowed because it was held in *White* v. *Redfern* (1) ((1879), 5 Q.B.D. 15) that a justice acting in this respect was not acting judicially, but was acting administratively. Field, J., in that case, did call attention to the fact that it would seem wrong that a man's property should be seized and condemned without him being heard on the subject. It is quite possible in a case of this sort that the owner might be able to say that he was not exposing, and had no intention of exposing, the food for sale, or, perhaps, that, although the meat appeared to be bad, it was not bad. Accordingly, when the Act of 1938 was passed, the matter to which Field, J., had referred was put right by s. 10 (2), which requires the officer to give notice to the person in whose possession the food was found and to allow the person who may be liable to be prosecuted for having the food in his possession an opportunity of coming before the justice who is asked to condemn it and to state his case why it should not be condemned. This is a matter, however, with which it is essential to deal in a rapid manner. Field, J., said (5 Q.B.D. at p. 17) that "rapid and summary proceedings should be taken," and he went on to say (ibid.):

> "It is necessary therefore that the power to take these measures should be entrusted to some person of authority, who will not be likely to abuse them, and who will be in a position to act promptly."

Accordingly, under s. 10 (1) of the Act of 1938, the person who may seize the food must be an authorised officer, who may be supposed to be regarded by the local authority as a sensible person and one who can be relied on to act properly, and there is also a provision that a justice must examine it. One knows in practice how often there are seizures in markets like Smithfield and Billingsgate, and even in Covent Garden, and, no doubt, also in country markets. If the sanitary inspector, or whoever is entrusted with the duties under s. 10, finds food which, in his opinion, is putrid, stinking, or going bad, he seizes it and carries it before a justice. The person in whose possession it was must now be warned under s. 10 (2), but the matter cannot be kept in suspense for a long time in the ordinary way. The food must be brought quickly to the justice, who has to look at it to form his own opinion whether or not it is bad. In some cases it may be necessary for a justice to be informed why the food is said to be bad, but I do not think that the justice is acting judicially. He is really acting as a sort of superior inspector of nuisances, and in saying that I do not mean any disrespect to justices. The authorised officer brings the food before the justice and says, in effect: "In my opinion, this is bad, do you agree ?" If the justice does agree, he then says, in effect: "I condemn it, take it away and destroy it". It may be taken out to sea or buried or burned. Section 10 (3) says: ". . . he shall condemn it and order it to be destroyed, or to be so disposed of as to prevent it from being used for human consumption". In acting so, it does not seem to me that the justice is acting in any more elevated position than as a superior inspector. He is somebody to check the action of the authorised officer of the local authority and to give a safeguard to people that their property will not be improperly destroyed. At the same time, he is exercising very much the same sort of jurisdiction as a local authority can exercise with regard to what are called statutory nuisances. If they find a statutory nuisance, they deal with it and, if necessary, they abate it.

I have considerable doubt whether, when the justice condemns the food and orders it to be destroyed, there is any necessity to draw up any order. It is, no doubt, convenient to have a minute of the destruction, but the clerk need not be there. The food which has been seized can be taken to the justice's house, or it can be dealt with by a justice in the street, and in places like London that, no doubt, often happens. The seized food is not taken to the police courts, but

A is put before a justice wherever he may be found, and he is asked to look at it and to form his own opinion on it. I think it is impossible to say that the justice is there acting as a court of summary jurisdiction. A court of summary jurisdiction, in the ordinary way, assumes jurisdiction to try matters which are brought before them on information or complaint, information if it is a criminal matter, complaint if it is a civil matter. No information or complaint has to be laid B under s. 10 of the Act of 1938. The justice is invited to decide on sight, after hearing the person whose property has been taken, if that person chooses to be present with any witnesses. After hearing him, the justice simply says whether or not he thinks that the food ought to be condemned. If he does condemn it, he tells the inspector how to deal with it. I do not think that, in so doing, the justice is acting as a court of summary jurisdiction. The cases in which a single C justice, sitting as a court, can convict a person of an offence are very rare*. In this case, power is given to one justice to condemn food. In my opinion, the justice in so doing is acting administratively and is not acting as a court of summary jurisdiction. It has to be remembered that food can be condemned only after examination; it cannot always be kept until the next quarter sessions. In the present case, the meat was seized on Oct. 1, 1955, and the appeal would D come before the court of quarter sessions which will be sitting in July, 1956. It was impossible for the meat to be kept, and the justices who will sit in quarter sessions will not be able to see the meat, as did the justice who condemned it in October, 1955. For these reasons, I think that the justice was not sitting as a court of summary jurisdiction, and no appeal is given by any statute, and, therefore, there is no appeal.

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ORMEROD, J.: I agree.

DONOVAN, J.: I also agree. The mere fact that there is a dispute and that witnesses may be called and heard does not of itself show that the proceeding is judicial or that there is a lis between the parties. One has also to consider, as well as those matters, what the tribunal is actually doing. In this case it is F deciding whether meat is fit for human consumption, a matter to be dealt with by inspection, assisted in some cases by evidence which the party objecting requires to be called. In my opinion, that is not a judicial process but an executive act, and the justice in deciding it is really an agent of the executive and not a person exercising judicial office, although he has to bring qualities of impartiality and fairness to bear on the problem.

G *Order of prohibition granted.*

Solicitors: *Robbins, Olivey & Lake,* agents for *Stephens & Scown,* St. Austell (for the applicant); *Champion & Co.,* agents for *Spencer, Gibson & Son,* Sutton (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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* See s. 98 of the Magistrates' Courts Act, 1952; and the notes to the section in 32 HALSBURY'S STATUTES (2nd Edn.) 499, 500.

Re G. (an infant).

[Court of Appeal (Lord Evershed, M.R., Morris and Romer, L.JJ.), June 18, 19, 1956.]

Ward of Court—Illegitimate child—Father's application to make child a ward—Refusal to grant father access—Termination of wardship—Jurisdiction of Court of Appeal—Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 *&* 14 *Geo.* 6 *c.* 100), *s.* 9 (2).

The father of an illegitimate child, a girl of four years of age, applied in the Chancery Division of the High Court for an order that the child be made a ward of court and for directions as to custody, care and control, and access. The father was a coloured man and the mother a white woman. The court, having heard evidence on affidavit and viva voce, ordered: " . . . the [mother] by her counsel undertaking not to have any contact of any kind with the [father] in the future It is ordered that [the infant] be handed over to the [mother] . . . And the said infant having become a ward of this court . . . by virtue of s. 9 (2) of the Law Reform (Miscellaneous Provisions) Act, 1949 . . . order that the infant do cease to be a ward of this court immediately upon being handed over to the " mother. The father appealed against the order in so far as it directed that the child should cease to be a ward of the court and in so far as it failed to make provision for access by the father.

Held: the court would not interfere with the exercise of his discretion by the judge who had concluded that it was in the best interests of the child that she should be in the mother's exclusive care and that a complete break of the connection with the father should be made; moreover the view which the courts generally took that it was in the interests of a child to know both parents proceeded on the premise that the child was born of lawful wedlock.

Per Lord Evershed, M.R.: my present view certainly is, on general principles, that this court, as the Court of Appeal under the Rules of the Supreme Court under the Supreme Court of Judicature (Consolidation) Act, 1925, has the usual powers to substitute its own view where the Chancery Division has made an order either determining or continuing a wardship (cf. p. 879, letter F, post).

Observations on termination of wardship orders where parties were of small means (see p. 878, letter E to p. 879, letter A, post).

Appeal dismissed.

[As to principles on which the court acts in matters concerning the custody and upbringing of infants, see 17 Halsbury's Laws (2nd Edn.) 658, 696, paras. 1377, 1438; and for cases on the subject, see 28 Digest 261, 262, *1151-1157*, and 3 Digest 383, *215-224*.]

Case referred to:

(1) *Re M. (an infant)*, [1955] 2 All E.R. 911; [1955] 2 Q.B. 479; 119 J.P. 535.

Appeal.

This was an appeal by the applicant, the father of an illegitimate child, from that part of the decision of Wynn-Parry, J., given on Nov. 23, 1955, refusing his application that the child should be made a ward of court, and that directions might be given as to the access of the applicant to the said infant.

P. Ingress Bell, Q.C., and *M. O. Stranders* for the father.
Raymond Jennings, Q.C., and *J. A. Wolfe* for the mother.

LORD EVERSHED, M.R.: This appeal relates to a small girl child who was born on Jan. 17, 1952: she is, therefore, now about 4½ years old. Her parents, unfortunately, were not married. Her father (who is the appellant here) is a gentleman who comes from the Gold Coast, and he is what is called a coloured man. The child's mother, on the other hand, is an English girl and a white woman; so that the small child is the result of a union of a white woman with a coloured man. I mention that fact because of certain of the arguments put forward on the father's behalf by counsel.

The proceedings arose out of these circumstances. Unhappily, the father and the mother of this child, having lived together as man and wife for a time, quarrelled violently. The little girl was sent to a lady in Wales, a Mrs. P., who, with great kindness, looked after this child, as she also looked after the legitimate child of the father. The mother, however, during the long vacation of 1954, applied to the vacation judge, Glyn-Jones, J., for a writ of habeas corpus directed to obtaining delivery to her (the mother) of this small child. As the child was illegitimate, according to the common law of the land, the mother was, and is, the person responsible for the upbringing of the child. Glyn-Jones, J., did not, however, make an order*. He expressed the view that the child was attached to her father and the father was attached to her, a point which he desired should be brought to the attention of any judge exercising the equitable jurisdiction of the court if and when (as later happened) application was made to make the child a ward of court. That application was made in September, 1954, and those are the proceedings with which we are now concerned.

The matter came before Wynn-Parry, J., in November, 1955, and the form of the order which he made was as follows. After referring to a great volume of written evidence and the oral evidence of the father, the mother and a Dr. Isaacs, the order proceeds:

> " And the respondent [the mother] by her counsel undertaking not to have any contact of any kind with the applicant [the father] in the future It is ordered that [the infant] be handed over to the respondent at the office of the applicant's solicitors [at a time and on a day stated]. And the said infant having become a ward of this court . . . by virtue of s. 9 (2) of the Law Reform (Miscellaneous Provisions) Act, 1949 . . . order that the infant do cease to be a ward of this court immediately upon being handed over to the respondent in accordance with the direction hereinbefore contained."

The appellant here, the father (and I will continue so to call him) appeals against that part of the order which directs that the infant should cease to be a ward of court. He has not appealed from that part of the order which directed the delivery over to the mother of the infant on the date stated in the order; nor, of course, has he (because it did not affect him) complained of the undertaking which was obtained from the mother, though he has suggested that the form of that undertaking and its indefinite duration indicated that the judge was overmuch concerned with the interests of the mother instead of the interests of the child. I do not agree with that criticism. It is quite true (as counsel for the father pointed out) that the undertaking was indefinite in duration; but I have no doubt whatever that the judge thought it right to request and obtain (and acted on) that undertaking because he thought that such an undertaking would serve the best interests of the little girl. The reasons for that view I will come to presently.

I will next read a note which was taken of the reasons for the judgment of Wynn-Parry, J. No shorthand note was made of the judgment, and we have been supplied with the indorsements made on their briefs by the four learned counsel concerned, which in one respect give rise to a divergence about which I shall have to say something; but the part of the judgment which I shall now read (not in full, but substantially in full) is agreed by all to represent what the judge said. He said that he had no doubt that he had the jurisdiction to accede to the course which had been put before him, and continued:

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* On Aug. 31, 1954, on certain undertakings, including an undertaking by the father to apply to the Chancery Division to make the child a ward of court, no order was made for delivery of the child to the mother.

> "The authorities also make it clear that I ought to give primary consideration to the wishes of the mother. The view of the courts for many years has been that it is preferable that the infant should be with a parent rather than strangers . . . So far as the mother is concerned, I have had the supreme advantage of seeing her and hearing her cross-examined. I have carefully considered the whole evidence and taken into account satisfactory testimonials of the mother. I have doctor's evidence that for some time past she has been suffering from a nervous trouble due to anxiety as to the outcome of these proceedings. He has told me that there is nothing wrong with the respondent not attributable to these proceedings and being parted from the child and that she will soon be able to take a post. Until then she will have enough money to keep the child but only just enough. In addition it will be borne in mind by her that in the interests of the infant she should press such rights as she has against the [father] for maintenance. I have come to the conclusion that I cannot possibly regard her as an unsatisfactory mother or that circumstances would be sufficient to take the strong and unusual course of separating mother and daughter. I have decided to exercise my discretion by accepting the mother's undertaking not at any time hereafter to have any contact with the [father]. I regard that as vital. On that undertaking I direct that the infant be handed over to the mother."

The last few lines that I have read make it, to my mind, quite plain that the judge's view was broadly this: First, that, particularly since this was an illegitimate child, prima facie the child should be with her mother; and, secondly, that, in order to give the child the best chance of obtaining the benefits of her mother's upbringing and affection, there must be a break between the mother and the father, the applicant. There then follows in this note a reference to access, and, though I shall not read it, what (it is suggested) emerges from that note is that the learned judge expressed the view that, since this was a legally aided case, therefore, acting in accordance with what was suggested to be the concerted view of the Chancery judges, the court would order that the wardship should cease; and, consequentially, that no order for access should (or, indeed, could) be made. The recollections (as recorded in the indorsements) of counsel for the mother do not at all accord with that line of reasoning; and I am myself satisfied that there must have been a misunderstanding on the part of counsel for the father in regard to that matter. During the adjournment, Romer, L.J., took the opportunity of consulting with certain of the Chancery judges, and it is quite plain that the Chancery judges have not arrived at any such concerted conclusion. That fact seems to me to make it plain that Wynn-Parry, J., could not have so said and that, therefore, there must have been in this matter some misapprehension. I add that any such view would appear to be contrary to the express Parliamentary intention: for, by s. 1 (7) (b) of the Legal Aid and Advice Act, 1949, it is clearly stated that:

> "the rights conferred by this Part of this Act on a person receiving legal aid [i.e., to litigate with the advantage of legal aid] shall not affect . . . the principles on which the discretion of any court . . . is normally exercised."

It no doubt is true enough that, where parties are persons of small means, and provided that the interests of the child are not adversely affected, the court would naturally discourage the parties from dissipating their resources on frequent or unnecessary applications; but that is applicable generally and not exclusively to cases in which legal aid may be invoked. I, therefore, am satisfied in my own mind that the latter part of the order, particularly the order that the wardship should cease, did not proceed on some misapprehended view of the duty of the Chancery judges in legally aided cases.

The father appeals against that part of the order and that part of it exclusively and counsel for the father naturally enough desires that the wardship should continue as a means whereby he can obtain for the father directions entitling him to access to the child. He puts his case for such access with great force, if I may say so, under four heads, which I will briefly state. First, he says that, in the interests of the child, it is desirable that there should be at any rate some sort of supervision: the mother is the sole reed on which the child's life rests and continuance of the wardship would give the supervision. Secondly, he says that it is not to be forgotten, whatever the common law rights of the father may be, that he in fact is providing maintenance for the child, and it is to the child's advantage that she should continue to receive that financial help: that being so, it is ordinary common sense and human reason that the father would be more inclined to make provision for this child if he had some opportunity of seeing her. Thirdly, it is said that, bearing in mind the paternity of the child, it will be in her interests that she should know the father, a coloured man, and that she should therefore be brought up in circumstances which would create less likelihood of her being affected by colour prejudice or things of that kind. Last, he says that there is the natural affection which a parent has for a child and the child has for a parent, a feeling which nature has implanted as a result of the community of blood.

On those grounds, therefore, counsel for the father urges that this direction for terminating the wardship should be reversed. At this stage it is perhaps convenient just to mention the question of jurisdiction, which was intimated in argument. It was said: Has this court any jurisdiction, where the Chancery Court has made an order either determining or continuing a wardship (as the case may be), to interfere ? In the view that I take, it is unnecessary to express a final view about it; but my present view certainly is, on general principles, that this court, as the Court of Appeal under the Rules of the Supreme Court under the Supreme Court of Judicature (Consolidation) Act, 1925, has the usual powers to substitute (if it thinks it right) its own view of the right order for that of the judge appealed from; and not less so in a case where the order appealed from was one under the Law Reform (Miscellaneous Provisions) Act, 1949.

I do not think it necessary in this case to attempt to express general propositions about the duty of a court in cases of this kind, except to assert once more the rule which has long governed the jurisdiction of the courts exercising the equitable jurisdiction which it has in regard to infants, i.e., that the court will consider as the paramount concern the interests of the child. That being so, it is clear that cases might well arise in which the court would regard it as being in the best interests of the child that she should have some relationship with her father although the father is not the lawful father, as that phrase is understood by our law. At the same time, however, it is not to be forgotten that the position of the so-called putative father under our law is widely different from the position of the father of a child born in lawful wedlock, as was pointed out by this court in *Re M. (an infant)* (1) ([1955] 2 All E.R. 911); and it may be stated broadly (and accurately too, I think) that in the case of an illegitimate child the limit of the obligation of the father will be to make financial provision for the child in order to relieve other people, and particularly the general public, of such obligation. The father has no such obligation to bring up the child as has a lawful father. The only parent in that respect which the law regards as responsible for the child is the mother. That being so, I think that the view which the courts generally take in regard to the interests of a child of lawful wedlock, viz., that it is in the child's interests to know both parents, is not at any rate by any means necessarily applicable in the case of an illegitimate child. For I think that that general view proceeds on the premise that the parents mentioned are the child's lawful parents.

I return, however, to the facts of this case; for the points alleged by counsel for the father are points of force, deserving close consideration, which I do not doubt that they received in the court below. The learned judge in the exercise of his discretion (to use his own language) came to the conclusion that the proper course, the course most in the interests of the child, was that she should be handed over to her mother and that the mother should be left exclusively responsible for her, the wardship provisions ceasing. I clearly conclude in my own mind that in arriving at that conclusion the learned judge thought (and, since he heard the witnesses whom I have mentioned, it is not for this court to doubt in this respect the validity of his conclusion) that here the interests of the child required the exclusive care of her mother and a clean break of the connection with the child's father; and that in order to achieve that it must follow, as the night the day, that the mother herself ought to cease to have any connection of any kind with the father. That (as I am quite sure in my own mind) was the basis of the learned judge's conclusion and of his requiring, or accepting, the mother's undertaking not at any time to have any further contact with the father. As the judge said, " I regard that as vital ". In other words, bearing in mind what the doctor had said, he concluded that in this case what the child needed was the exclusive care of the mother, the mother being herself free from the emotional disturbance to which she had been subjected as a result of contact with the father.

It is naturally a sad matter for the father. I do not doubt that he has a true affection for this child. But it is, I am afraid, the consequence of the relationship, and the nature of the relationship, that he had with the mother, and of the view which the courts take in such cases of illegitimate children. At any rate, I think that the conclusion rested, and properly rested, on an apprehension of the facts of this case, which the judge was able to enjoy, having seen and heard the witnesses.

That being so, I am myself satisfied that it would not be right for this court to interfere with the exercise of the learned judge's discretion. I think it undesirable that I should say any more about the case; but I hope that the result will be (as the learned judge intended it to be) that this unfortunate little child will be given the best chance she can have of a happy and useful life. In my judgment, this appeal must therefore be dismissed.

MORRIS, L.J.: I find myself in complete agreement with the judgment which my Lord has just delivered, and I do not desire to add anything.

ROMER, L.J.: I agree.

Appeal dismissed.

Solicitors: *Curwen, Carter & Evans* (for the father); *Edward F. Iwi*, agent for *Armstrong & Co.*, Forest Hill (for the mother).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

Re INGLETON CHARITY.
CROFT AND OTHERS *v.* ATTORNEY-GENERAL.

[Chancery Division (Danckwerts, J.), June 19, 1956.]

Education—School—Conveyance under School Sites Acts—Cesser of use of school—Reverter—Possession retained by trustees and possessory title acquired—Whether land held on trusts of original grant.

By a deed dated Aug. 11, 1846, grantors granted certain land in the parish of Ingleton in the County of York pursuant to the School Sites Act, 1841, to persons who later became the vicar and churchwardens of a parish to be applied "as a site for a school for poor persons of . . . the . . . district and for no other purpose whatsoever such school to be always in union with the National Society for Promoting the Education of the Poor in the principles of the Established Church . . ." The school was carried on according to the provisions of that deed until it was finally closed on Dec. 20, 1929. Thereafter the property was used for a Sunday school and occasional parish purposes; the property was let to a territorial association in November, 1932, subject to this user, and in 1940 it was requisitioned. On Apr. 1, 1946, the property was derequisitioned and was let by the vicar and churchwardens to a limited company. In 1952 the vicar and churchwardens sold the property. On a summons to determine what were the trusts applicable to the property immediately before the conveyance of the property on sale in 1952 the court assumed that the right of reverter under the School Sites Act, 1841, operated on Dec. 20, 1929, but that the title of the successors of the grantors was ousted by possession, and

Held: the trusts created by the deed of grant had not been brought to an end before the sale in 1952 and the vicar and churchwardens then held the property on the trusts of the deed of grant unless and until either the court or the Minister of Education had settled some scheme for an application cy-près.

Dictum of Lord Cozens-Hardy, M.R., in *A.-G.* v. *Price* ([1912] 1 Ch. at p. 678) applied; *A.-G.* v. *Edalji* ((1907), 97 L.T. 292) considered.

[As to reverter of land on failure of purposes for which it was granted under the School Sites Acts, see 13 Halsbury's Laws (3rd Edn.) 703, para. 1434.

As to acquiring title to charity land under the Limitation Act, 1939, see 4 Halsbury's Laws (3rd Edn.) 333, para. 686.]

Cases referred to:

(1) *Churcher* v. *Martin*, (1889), 42 Ch.D. 312; 58 L.J.Ch. 586; 61 L.T. 113; 8 Digest (Repl.) 376, *665*.

(2) *A.-G.* v. *Edalji*, (1907), 97 L.T. 292; 71 J.P. 549; 8 Digest (Repl.) 463, *1638*.

(3) *A.-G.* v. *Price*, [1912] 1 Ch. 667; 81 L.J.Ch. 317; 106 L.T. 694; 76 J.P. 209; *on appeal* sub nom. *Price* v. *A.-G.*, [1914] A.C. 20; 8 Digest (Repl.) 463, *1639*.

Adjourned Summons.

The plaintiffs, who were the trustees of a charity known as the Ingleton Trusts at Ingleton in the County of York, applied by originating summons for the following relief, namely, whether on the true construction of a deed of grant dated Aug. 11, 1846, and the School Sites Act, 1841, or any of them and in the events which had happened, the freehold property known as the Ingleton Old National Schools (which formed the endowment of the said charity) was immediately before the purported conveyance or conveyance thereof on sale in 1952, to the Parkland Manufacturing Company, held by the plaintiffs either: (a) on trust to apply the same for the purposes of education so as to constitute the said property as an educational endowment within the meaning given to that expression by

s. 5 of the Endowed Schools Act, 1869 (as amended by the Education (Miscellaneous Provisions) Act, 1948); or (b) on trust to apply the same for ecclesiastical purposes within the parish of Ingleton in the County of York; or (c) on trust to sell the same and to stand possessed of the net proceeds of sale and of the net rents and profits thereof until sale on trust for themselves as joint tenants beneficially; or (d) on some other and if so what trust.

The facts appear in the judgment.

W. S. Wigglesworth for the plaintiffs.
Denys B. Buckley for the Attorney-General.

DANCKWERTS, J.: In this case certain land in the parish of Ingleton, in the County of York, was granted by deed dated Aug. 11, 1846, by the lords of the manor, pursuant to the School Sites Act, 1841, to persons who were not then the vicar and churchwardens, but were the vicar and chapel wardens of what afterwards became a parish, for the purpose of a school, to be applied (the deed of grant says)

> " as a site for a school for poor persons of and in the said district and for no other purpose whatsoever such school to be always in union with the National Society for Promoting the Education of the Poor in the principles of the Established Church and to be conducted according to its principles and for the furtherance of its ends and designs."

The result of that conveyance, according to the provisions of s. 7 of the School Sites Act, 1841, was that the school was held by the vicar and churchwardens from time to time of what became the parish, and the estate automatically vested, pursuant to the statute, in the vicar and churchwardens for the time being without any transfer or other conveyancing troubles; but there was, under s. 2 of the School Sites Act, 1841, a right of reverter if the school ceased to be used for the purposes of a school. The school was carried on according to the provisions of the deed until it was finally closed on Dec. 20, 1929. Thereafter until Nov. 1, 1932, the property was used as a Sunday school and for meetings of the parochial church council of the parish of Ingleton and for social gatherings in connection with the church of the parish. On Nov. 1, 1932, the property was let by the vicar and churchwardens for the time being to the Westmorland Territorial Association on a yearly tenancy, reserving the right to use the premises for a Sunday school and for other occasional purposes, and that continued until 1940, when the property was requisitioned by the War Department. It was derequisitioned on Apr. 1, 1946, and was let by the then vicar and churchwardens to a limited company. Then in 1952 the land was sold to the same limited company for the sum of £6,500; and the balance remaining after payment of legal and other costs was invested by the vicar and churchwardens in consols. On Dec. 20, 1952, the vicar and churchwardens of the parish executed a declaration of trust in respect of those consols.

The position now is that it is contended by the Minister of Education that the vicar and churchwardens had no authority to sell the land in the way in which they did, because they did not obtain the consent either of the court or the Charity Commissioners or the Minister of Education. The present summons has been taken out by the vicar and churchwardens, joining the Attorney-General as defendant, for the purpose of finding out what were the trusts applicable to the land after the closing of the school on Dec. 20, 1929, because it is apprehended that if that question can be decided, the matter can be disposed of without in any way disturbing the title of the company to whom the property was sold and conveyed in 1952. It is contended by counsel on behalf of the vicar and churchwardens that the vicar and churchwardens, on the termination of the use of the property as a school, were in possession of the property and retained possession in such a way that they acquired under the Real Property Limitation Acts, 1833 and 1874, and the Limitation Act, 1939, a possessory title which would be good against the successors in title of the lords of the manor even on the assumption that the right of reverter which is given by the School Sites Act, 1841, operated immediately on the closing of the school on Dec. 20, 1929. Alternatively, it is contended by counsel that the vicar and churchwardens acquired a title by their possession as trustees; not as trustees for the school, but as trustees on fresh trusts created by user and by the manner in which they employed the property, for trusts other than that of the school and for general church purposes in the parish; and that, therefore, one way or another they had full power to make the declaration of trust on Dec. 20, 1952, because they could declare any trusts they liked.

The successors of the lords of the manor are not parties to these proceedings. I am proceeding, therefore, on an assumption that the right of reverter operated on Dec. 20, 1929, but that the title of the lords of the manor's successors was ousted by the possession for the statutory period and longer by the vicar and churchwardens. There is no doubt that persons who happen to be trustees can acquire a possessory title. That was decided by *Churcher* v. *Martin* (1) ((1889), 42 Ch.D. 312), where there was a conveyance for charitable purposes which, owing to the absence of compliance with the formalities of law, was not effective and consequently conveyed no title to the trustees in question. The trustees remained in possession for the statutory period, and it was held that they had acquired a possessory title, but that that possessory title in the land was held by them on the trusts for which they had been made trustees by the transaction in question.

The case as put by counsel for the vicar and churchwardens depends on my being convinced that, on the closing of the school and the automatic operation of the right of reverter to the successors of the lords of the manor, there was a complete break, so that the persons who remained in occupation (who, I should observe, are not the same vicar and churchwardens throughout, but varied from time to time as there were changes in those offices) started a fresh title to the land, either for fresh purposes for their benefit or on fresh trusts which in no way were tied to the trusts which were undoubtedly contained in the deed of grant of Aug. 11, 1846. Those contentions are not supported by any case and are, as it seems to me, contrary to the decisions in two cases to which I am about to refer and entirely contrary to the view which I formed on the case when it was presented to me. It seems to me that they remained in occupation of the property, and carried out the lettings and the other dealings with the property, because they were trustees under the deed of 1846 and for no other reason. They were the trustees of that deed; they carried on as trustees. It is quite true that their paper title came to an end, owing to the operation of the School Sites Act, 1841, when the school was closed, but they then held the land under a pure right of possession. Their right, none the less, was good against everybody in the world except persons who could claim successfully through the lords of the manor, and they simply carried on in the same capacity as trustees on the trusts of the deed and on trusts which required them to use it for the purposes of the school, unless and until those trusts were varied in a manner authorised by law; that is, by means of a scheme settled by the court or the Minister of Education.

Counsel referred me to two cases, both of which he admitted to be against him but which he sought to distinguish. The first is *A.-G.* v. *Edalji* (2) ((1907), 97 L.T. 292), and the other is *A.-G.* v. *Price* (3) ([1912] 1 Ch. 667) which was settled when it went to the House of Lords ([1914] A.C. 20). Counsel sought to distinguish those cases in the first instance because he said there was no mention in *A.-G.* v. *Edalji* (2) of either the School Sites Act, 1841, or the right of reverter. From a perusal of the terms of the document which was relevant in that case, it appears to me that it was almost certain that it must have been a grant under the powers conferred by the School Sites Act, 1841, and the fact that the reverter was not discussed is immaterial. In the present case, we are careful not to deal with the reverter, because we do not want to have anything to do with the lords of the manor's successors. The whole basis on which we are proceeding is that the trustees have got a title, even though the right of reverter has arisen, by virtue of the possession which they have had. In the same way, *A.-G.* v. *Price* (3) avoided the question of the reverter, although there was some argument whether one particular scheme might not prevent the right of reverter operating. LORD COZENS-HARDY, M.R., however, deals with the question where he says ([1912] 1 Ch. at p. 678):

> " In the fourth place, whatever may be the rights of some person not before the court under the reverter clause in the Act (as to which it would be wrong for me to express any opinion), the trustees so long as they are in possession under the deed are bound by the trusts declared in the deed as varied by any scheme made by the court."

It seems to me that the power of the court to make a scheme for the cy-près application of the property in question, which was done in *A.-G.* v. *Price* (3), must depend on the continuance of the trusts as binding on the trustees unless and until varied by law, because if the charitable trusts immediately came to an end on the operation of the reverter, there would be (as, indeed, was argued by counsel for his own purposes) a complete determination of the trust, so that there would be no power to direct any cy-près application. On the footing that the court had power to direct a cy-près application, it must be inferred that the trusts would continue after the closing of the school; that is, after the possible right of reverter had arisen. Consequently, it is impossible to come to any other conclusion than that the closing of the school and the arising of the right of reverter to the estates of the grantors does not bring to an end the trusts which were created by the deed of grant. If that is so, then the trustees, the vicar and churchwardens and their successors who are named in the deed of grant, must remain trustees on those trusts; and, if they remain trustees on those trusts, it is not open to them to deny the trusts and to claim either that they hold the property for their own beneficial purposes or that they hold it on trusts other than those which were operative under the deed of grant. It is, therefore, plain that after the closing of the school in the present case, the vicar and churchwardens for the time being remained trustees on the trusts to maintain a school and that they could not hold the property on any other trusts unless and until either the court or the Board or Minister of Education had settled some scheme for a cy-près application.

Declaration accordingly.

Solicitors: *Ward, Bowie & Co.*, agents for *Booth & Co*, Leeds (for the plaintiffs); *Treasury Solicitor.*

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

Re MERCURY MODEL AIRCRAFT SUPPLIES, LTD.

[CHANCERY DIVISION (Roxburgh, J.), June 19, 1956.]

Costs—Taxation—Solicitor and own client costs—Costs not limited to what was necessary as distinct from what was proper—R.S.C., Ord. 65, *r.* 27 (29).

Costs—Taxation—Company—Compulsory winding-up—Costs incurred by company's solicitor before winding-up—Action against company in Queen's Bench Division—Taxation to be by Supreme Court Taxing Office—Orders for taxation made in Companies Winding-up Department to state in which department taxation is to take place.

Solicitors acted for a company who were defendants in an action in the Queen's Bench Division for the price of toy aircraft manufactured to the company's design and who counterclaimed for damages for faulty manufacture. The proceedings involved complicated technical matters, and the hearing lasted seven days. The company having gone into liquidation, the liquidator obtained an order on the solicitors to deliver an itemised bill of costs and for taxation of the bill as between solicitor and own client. The order for taxation did not specify where the taxation should take place, and it in fact took place in the Companies Winding-Up Department. Objections (Nos. 1-4) having been taken to disallowances or reductions of certain items charged in the bill (including certain fees paid), the registrar disallowed the objections for various reasons, but did not state in his answers that he had considered the amounts of the items not to be proper and did not distinguish between what might be necessary on the one hand as between party and party and what might be proper on the other hand to be allowed to a solicitor as against his own client. In relation to charges for attending court, the attendances having begun before the sitting of the court and having concluded after 6 p.m. on each day of the hearing, the amounts allowed were the maximum under fee No. 172 in App. N. to the R.S.C., but objection was taken (by objection No. 5) that more should have been allowed in the circumstances. In relation to charges of refresher fees objection was taken (by objection No. 6) that the amounts allowed were computed on the basis of the five-hour rule under R.S.C., Ord. 65, r. 27 (48), for a total hearing of twenty-five hours and thirty-seven minutes, four fees being allowed and the fee for the hearing on the final day (which only occupied thirty-seven minutes) being reduced by apportionment according to time.

Held: (i) on taxation of costs as between solicitor and own client the costs allowed (apart from items expressly authorised by the client) should include, by virtue of R.S.C., Ord. 65, r. 27 (29), not only what was "necessary" but also what was "proper for the attainment of justice or for . . . defending the rights of any party", and in the circumstances the disallowances or reductions which were the subject of objections Nos. 1-4 were not maintainable, since by excluding consideration of what might be proper as distinct from what might be necessary the registrar had made a wrong approach to the taxation.

(ii) although the maximum fee prescribed by App.N. to the R.S.C. had been allowed for attendances at the hearing (objection No. 5) the work for which the charge was made was not limited to the time of the hearing in court, and accordingly it was wrong to limit the sum allowed by the maximum amount of the prescribed fee without deciding whether more should not be allowed for the attendances beyond court hours.

Re Ermen, Tatham v. *Ermen* ([1903] 2 Ch. 156) considered.

(iii) a rule of mathematical apportionment of a refresher fee according to the duration of the hearing (where the last part of the hearing lasted less than five hours) should not be applied.

(iv) having regard particularly to the fact that the taxation was a taxation as between solicitor and own client and to the circumstances that the costs related to proceedings in the Queen's Bench Division and to a time before the liquidation, the taxation should have taken place in the Supreme Court Taxing Office and the items which were the subject of the objection would be referred there for further consideration.

Re Defiant Cycle Co., Ltd. ([1955] 2 All E.R. 58) followed.

Per CURIAM: it is now incumbent to set out in every order [for taxation] made in the Companies Winding-Up Department whether taxation is to take place in that department or in the Supreme Court Taxing Office (see p. 887*, letter F, post).

[As to taxation of costs as between solicitor and own client, see 31 HALSBURY'S LAWS (2nd Edn.) 212, para. 235; and for cases on the subject, see DIGEST (Practice) 947, 948, *4872-4881*.

For R.S.C., Ord. 65, r. 27 (29), see the ANNUAL PRACTICE, 1956, p. 1496.]

Cases referred to:

(1) *Re Defiant Cycle Co., Ltd.*, [1955] 2 All E.R. 58; [1955] Ch. 490.

(2) *Re Ermen, Tatham* v. *Ermen*, [1903] 2 Ch. 156; 72 L.J.Ch. 492; 88 L.T. 353; Digest (Practice) 947, *4873*.

(3) *Lynch to Chance*, (1892), 30 L.R. Ir. 278; 42 Digest 250, *k*.

Summons for review of taxation.

The applicants acted as the company's solicitors in an action brought against the company in the Queen's Bench Division before an order was made for the company to be wound-up. After the commencement of the winding-up, the official receiver, as liquidator of the company, applied for an order on the applicants to deliver an itemised bill of costs, and, after receiving the bill, obtained an order for its taxation. On taxation, which took place in the Companies Winding-Up Department, the registrar disallowed certain items and reduced others. The applicants lodged objections, but they were disallowed. The applicants now applied by summons for review of the taxation by allowing the objections and that the matter be referred back to the registrar to vary his certificate accordingly.

Arthur Bagnall for the applicants, the solicitors.

K. W. Mackinnon for the respondent, the official receiver (the liquidator).

ROXBURGH, J.: Mercury Model Aircraft Supplies, Ltd. is in compulsory liquidation, and the official receiver is the liquidator. The matters to which I have to direct my attention all occurred before the liquidation at a time when the company was a going concern and the parties were sui juris. I am concerned, not with a party and party taxation, nor with a taxation of costs as between solicitor and client which takes place where costs are payable out of a fund or out of a company's assets, but with a taxation between a solicitor and his own client. I emphasise that fact because, while I shall find reason to regret the course which has been taken in this case, I wish to make it plain that that is the foundation of that regret. The company in liquidation had two unfortunate experiences. One had relation to purchase tax and I need not consider it further. The other, which is the matter with which I have to deal, arose in this way.

The company controlled or owned an invention under which a toy aircraft could be made to respond to radar direction. They did not themselves attempt to manufacture it, but A. C. Cossor, Ltd. contracted to do so on their behalf in accordance with a prototype which was successful and then the company was to dispose of the manufactured article itself. Some, if not all, of the toy aircraft manufactured by Cossor failed to respond to the radar direction. On Mar. 14, 1950, A. C. Cossor, Ltd. began proceedings against the company for the price of the toys which it had manufactured and the company counterclaimed alleging that it was the fault of A. C. Cossor, Ltd. that the toy aircraft did not respond. This dispute involved some complicated electrical and mechanical considerations. The action was tried for seven days in the Queen's Bench Division before Lloyd-Jacob, J., sitting as an additional judge. In the end the company had to pay the purchase price (which was never really disputed), but, on the other hand, received substantial damages on the footing that the fault was with A. C. Cossor, Ltd. and not with the prototype.

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* The text of R.S.C., Ord. 65, r. 27 (29) is printed at p. 888, letter B, post.

The solicitors to the company had in their hands at the commencement of the liquidation a substantial sum of money paid to them on account of costs generally. The official receiver did what he was entitled to do and obtained an order on the solicitors to deliver an itemised bill of costs. This they did and the official receiver applied by summons under s. 66 of the Solicitors Act, 1932, for an order for taxation of the bill. On Apr. 25, 1955, the registrar made the order for taxation, although the order does not in terms say where the taxation was to take place. The order was made so soon after the decision of Vaisey, J., in *Re Defiant Cycle Co., Ltd.* (1) ([1955] 2 All E.R. 58) that the full force and effect of that case had not by that time been appreciated, and it seems to have been assumed that an order made in the Companies Winding-Up Department which did not specify where the taxation was to take place would involve a taxation in that department. I apprehend that since that case orders for taxations of this kind made in the Companies Winding-Up Department have taken a different form; if they have not, they certainly should do. Vaisey, J., said ([1955] 2 All E.R. at p. 60):

> " My own view is that I have jurisdiction to direct the taxation in such a case as the present to be carried out either in the Companies Winding-Up Department or by a taxing master of the Supreme Court, at my discretion. I can imagine cases in which the choice should fall on the first alternative. Here, I think that the reference should be to the Supreme Court Taxing Office, and this is probably the course which ought generally and in normal circumstances to be followed."

Clearly it is now incumbent to set out in every order made in the Companies Winding-Up Department whether taxation is to take place in that department or in the Supreme Court Taxing Office. It is, in my view, a pity that an order for taxation in the Companies Winding-Up Department was made in the present case, though I ought to say that I do not think that anybody argued the matter before the registrar. It was a pity for two reasons. In the first place, this was a taxation in relation to proceedings in the Queen's Bench Division, involving technical and mechanical matters of some complication. Secondly, this is not a case of a taxation out of a fund such as takes place where costs are to be paid out of a company's assets in a winding-up. This is a taxation as between a solicitor and his own client, and it is undesirable that costs as between a solicitor and his own client should be taxed by different tribunals and apparently on different principles according to whether the client is a company in liquidation or not, which, after all, is not a relevant consideration. The directors could have asked for this taxation while they were in control, and the question is what charges were necessary or proper as between a going concern and the solicitors of the going concern.

The taxation proceeded and the solicitors lodged objections. Each one was disallowed, and I have come to the conclusion that none of the disallowances can be supported on the grounds set up by the registrar. It is, I think, unfortunate that the taxing officer did not formulate his objections by reference to R.S.C., Ord. 65, r. 27 (29), because, had he done so, two things would have emerged which might have altered his approach to the problems. First, he would have noticed the marked difference which sub-r. (29) contemplates between taxation between a solicitor and his own client and any other form of taxation; and, secondly, he would have noticed that in the sub-rule not only the word " necessary " but also the word " proper " occurs. It has been decided that " proper " may include costs not strictly necessary*; in other words, that " necessary " and " proper " are not interchangeable terms. R.S.C., Ord. 65, r. 27 (29), reads as follows:

> " On every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for the defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses."

There is the differentiation. In considering whether costs, charges and expenses ought to be allowed in a taxation between a solicitor and his own client, the taxing officer has only to decide whether they appear to him to have been " necessary or proper for the attainment of justice or for the defending the rights of any party ". Where, however, it is a taxation other than one between solicitor and own client he has to take other things into consideration, because even if the costs are proper they must not be allowed if they appear to the taxing officer to have been

> " incurred or increased through over-caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses."

The first objection is to the disallowance of three items, namely:—" Attending appointing conference. Conference fee and clerk. Attending conference ". The reasons for the objections are:

> " Conference on brief to counsel on the plaintiffs' application for further and better particulars of defence and counterclaim had reference to the technical aspect of the particulars required. Such conference was attended by Mr. H. J. Nicholls of the defendant company, charged for and fee paid."

This is a striking disallowance because the solicitor had paid the costs. It was a disbursement and, therefore, if this item is disallowed he may have to bear that loss personally. He cannot recover the fees from counsel save by agreement. What is more, a representative of the defendant company attended at the conference and, therefore, must presumably have authorised it. It seems to me almost impossible in those circumstances to say that the conference was not proper, but I should have been unhappy in interfering if the registrar had said that the conference did not appear to him to have been proper. The registrar's answer is as follows:

> " It is not usual to allow a conference on such an application in the Queen's Bench Division, especially where counsel settles the document the subject of the application and in this case further and better particulars. A double conference on Sept. 29 is charged and allowed on the same page of the bill."

That answer does not seem to me to be an indication that the taxing officer has taken all the circumstances into consideration and arrived at the conclusion that the conference was not proper. Only on that basis could he properly disallow this item, that is, a conference attended by a director of the client company.

The second objection is to the partial disallowance of the following fee: " Fee to counsel to settle particulars of defence and counterclaim ". The reasons for the objection read:

> " The fee charged for settling particulars of defence and counterclaim

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* See *Ex p. South Dublin Rural District Council, Gilson* v. *Bennett*, [1920] 1 I.R. 75.

> was the fee charged and paid. It is respectfully submitted such fee was reasonable as between solicitor and own client having regard to the data which fell to be considered by counsel."

£2 4s. 6d. was allowed. There again the taxing officer's duty was to consider and settle for himself what appeared to him to be a proper fee for settling particulars of the defence and counterclaim having regard to the data which fell to be considered by counsel. If he had said that in his opinion the proper charge was £2 4s. 6d., and no more, I could not have interfered with that exercise of his discretion. What he has said is: "This was the fee charged on the party and party taxation and I see no reason for increasing it ". That is the wrong approach. He ought to start, not with the fee allowed on party and party taxation, but with the fee paid to counsel, and then decide whether he sees any reason to reduce it on the ground that it was excessive. This was a disbursement and the solicitor was entitled to be reimbursed unless it was not a proper payment.

The third objection was to disallowance of the following items: "Consultation fees to senior counsel. Attending to appoint consultation. Consultation fee to junior counsel. Attending consultation ". The reasons for the disallowance were:

> "On the plaintiffs' application made Feb. 6, 1952, the hearing of the action was fixed for Feb. 19, 1952, on grounds that one Roberts, the plaintiffs' former general manager was going to Far East and would be away several months. It subsequently became known Squadron Leader Hunt was proposing departing for Belgium on Feb. 17 with some heavy equipment in connection with an exhibition. Squadron Leader Hunt designed the prototype of the apparatus the subject-matter of the action and his evidence was vital to the defence. The plaintiffs refused under any circumstances whatsoever to consent to an adjournment and intimated any application to the court would be strenuously opposed. The defendant company considered Hunt's evidence so essential to their case that they instructed leading counsel be briefed to make the application. Consultation was duly had between senior and junior counsel as to the vital necessity of Hunt's evidence; consultation fees were charged by both counsel and paid."

I may add that it appears from the bill of costs that the solicitor attended the consultation. To this the registrar answered:

> "These fees were charged on a brief to fix a new date for hearing. I consider (as did the taxing master on the party and party taxation) that a consultation was not necessary. A fee of seven guineas was allowed to junior counsel to advise on evidence."

There again the registrar seems to have forgotten that he had to say, not only that the disbursement and charge was not necessary, but that it did not appear to him to be proper. He gives no reason why he should hold that the consultation was improper and he seems to think that what happened on the party and party taxation assisted his conclusion. I cannot take that view. The solicitor may have been expressly authorised to hold the consultation. There is no evidence that he was; but I must assume in absence of evidence to the contrary that the solicitor would not have attended the consultation unless he considered it necessary or proper in his client's interest. The solicitor in his objections sets out the reasons why he thought it necessary or proper. If the taxing officer thought that it was not proper, he ought to have said so, and I think he might well have been expected to give some reasons for his view.*

Now comes the biggest item, which is the subject of objection No. 4. It is the item: "Instructions for brief ", which was allowed at £236 5s. The reasons for the objections to this are:

> "The amount allowed on the contested party and party taxation was

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* Compare, as regards the desirability of giving reasons, *Eaves* v. *Eaves and Powell* ([1955] 3 All E.R. 849).

> £157 10s. The issues between the parties were technically complex and an unusual amount of work of a solicitor and own client nature was necessitated for reasons amongst others (a) it was necessary to show that whilst the plaintiffs were an established company with a world-wide reputation in matters of radio, radar control and aero-dynamics with a large staff of qualified research and other engineers, they had failed to appreciate the technicalities involved in the proper functioning of the apparatus, the manufacture of which formed the subject-matter of the proceedings; (b) the apparatus was entirely novel and at that time despite the widest inquiry it was not possible to find experts with sufficient technical appreciation to prove such failure by the plaintiffs, to the satisfaction of the court, without the fullest introductory explanation and demonstration, before they could begin to qualify to give evidence. The work of a purely solicitor and own client nature involved, was at least as great as that of a party and party nature and taking into account the allowance for solicitor and own client items in respect of letters, instructions and attendances disallowed as separate items in other parts of the bill, it is respectfully submitted the allowance of £78 15s. for solicitor and own client work is inadequate."

If the registrar had said that he considered that a fee of £236 5s. was a reasonable fee for work which it was necessary or proper for the solicitors to do, I should not have interfered, for I have no idea whether it was or was not a reasonable fee for that work. It is to be remembered, however, in this connection that costs are not necessarily to be disallowed between a solicitor and his own client because the solicitor was over-cautious or because of any other unusual expenses. Therefore, it is quite plain that the words " necessary " and " proper " are not in this connection by any means coterminous. The solicitors may have done quite a little work which was not necessary but which none the less was proper, even if due in some degree to over-caution or some other cause. Therefore, the registrar does not sufficiently answer the objection by finding, as he does find, that he has considered all the work necessarily done. What he says is:

> " On fixing this fee, I have considered all the work necessarily done by the solicitors. I do not consider it necessary for a solicitor to go fully into technical complexities, other than necessary to draw the proofs of experts."

His answer seems to me to indicate that he has deliberately excluded from his consideration any work which could not be said to have been " necessary ". That is a wrong approach.

I now come to objection No. 5 which relates to four items for " Attending court " on four occasions. £3 3s. was allowed for each attendance. The objection is:

> " On each day of the hearing the defendants (Messrs. Nicholls & Gold) and such of their expert witnesses as were not at the time under oath were attended all day (beginning before 10 a.m. and concluding after 6 p.m.) by a solicitor and managing clerk on technical matters and fresh considerations which arose out of the examination and cross-examination and notes were prepared for counsel. It is respectfully submitted that on a solicitor and own client basis the figure of £7 7s. inserted in the bill is fair and reasonable."

To that the answer is: " The allowance is in accordance with Fee No. 172 App. N . . ." Fees Nos. 170, 171 and 172 of App. N read as follows:

> " 170. On hearing or trial of any cause, or matter, or issue of fact, in London or Middlesex, or the town where the solicitor resides or carries on business, whether before a judge with or without a jury, or commissioner, or referee, or on assessment of damages, when in the paper, 10s. 171. When heard or tried, 13s. 4d. 172. Or according to circumstances not to exceed, £3 3s."

A Three guineas is, of course, the maximum. But it will be noticed that that relates to attendance at the hearing. The registrar continues: "... which applies to solicitor and client as well as party and party". So it does; but it is pertinent to observe, although it is not the ground of my decision on this objection, that R.S.C., Ord. 65, r. 27 (29), was altered in January, 1902, and that in *Re Ermen, Tatham* v. *Ermen* (2) ([1903] 2 Ch. 156) FARWELL, J., after an exhaustive investi-
B gation of the altered position, said (ibid., at p. 162):

> "... I see no reason why [the taxing officer of the court] should not have a twofold discretion, namely, a discretion to allow the maximum or minimum, or something between the two, and, in addition to that, in special cases a general discretion to allow 'all such costs, charges and expenses,
> C as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party'. That appears to me to be the true construction of r. 8 [of R.S.C., Ord. 65] and the new sub-r. 29, nor do I find anything contrary to that in the addition to sub-r. 37."

The registrar proceeds:

> D "There is no justification for the allowance for more than the fee allowed as between party and party (*Lynch to Chance* (3) ((1892), 30 L.R. Ir. 278))."

If the charge had been limited to attendance at the hearing in court, I would have been prepared to hold, although with some hesitation, that the registrar had appreciated the twofold duties prescribed for him by *Re Ermen* (2), and that he
E had reached a conclusion that there was no justification for allowing more than the maximum fee. But this charge for attendance extends to a time before the sitting of the court and to a time long after the conclusion of its sitting, and it seems to follow that more should be allowed than would have been allowed if the attendance had been confined to the hearing in court. Therefore, again it seems to me that the registrar has made the wrong approach.

F The last objection is in respect of two refresher fees: "Refresher fee to senior counsel", allowed at eleven guineas, and "Refresher fee to junior counsel", allowed at £7 12s. The objection was:

> "The hearing of the action lasted five whole days after the first day and it is respectfully submitted counsel is entitled to five refreshers. Five
> G refreshers were charged and paid."

The refreshers which were paid were £53 15s. to leading counsel and £35 13s. to junior counsel. Here again, in my view, the question which the taxing officer had to consider was whether these payments of refreshers to counsel were proper in amount in the circumstances of the case. What he says is:

> H "In accordance with Ord. 65, r. 27 (48), the fee was fixed on the five hour rule. Five refresher fees *have* been allowed, the last being apportioned as there was an odd time of thirty-seven minutes. (The whole time occupied on the hearing was twenty-five hours thirty-seven minutes.) The first four refresher fees have been allowed as charged, although they are larger
> I figures than those allowed on the party and party taxation."

To deal with the last point first; I expect that the refresher fees allowed are larger figures, and why should they not be larger when different considerations apply altogether? For example, it might have been (although it was not the case here) that the client desired an expensive counsel, whose fee was a thousand guineas, and instructed the solicitor to employ that counsel knowing that his fee would be something in that region. In those circumstances quite obviously that thousand guineas would be a proper disbursement in a taxation as between a solicitor and his own client, although it is hardly to be imagined that a fee of A that magnitude would be allowed on a party and party taxation. The real point, however, relates to the apportionment.

I have heard of a refresher being reduced when a case has lasted for only a short part of a further day, as far as I know generally by agreement; I do not really know of any other method of doing it. I have also known only a small refresher to be charged in such circumstances; but the one principle which I B should have thought was quite unfair was to apportion the refresher on a mere time basis because, after all, the loss of thirty-seven minutes in the morning may mean the loss of a whole day from other work, or may not involve that; everything depends on the circumstances. The one thing that I should have thought would be quite unfair would be to adopt a rigid mathematical rule of apportionment. In my experience at the Bar I never heard of an apportionment of that C sort being made, although, as I have said, I have heard of refreshers being reduced by agreement in those circumstances or even remitted altogether; but I know of no practice of any mathematical apportionment, and I cannot think that it is right to say that a solicitor made an improper payment to counsel because he did not insist on a mathematical apportionment.

Therefore, it seems to me that again the registrar has made a wrong approach. D I am expressing no opinion what is the proper amount to allow for refreshers.

These matters are not matters in respect of which I can possibly fix an amount, and I have already given the reasons why I should be reluctant to have a further taxation in the Companies Winding-Up Department. These objections and answers, as I have already said, have really nothing to do with the fact that the company is being wound-up. It is a kind of taxation which I should imagine E is not common in the Companies Winding-Up Department, a taxation as between a solicitor and his own client of costs incurred in an action in the Queen's Bench Division. It is extremely desirable that all taxations of that sort should be, as far as possible, conducted by the same body of taxing officers, and, in my judgment, I ought to refer all the items to which objection has been taken to the Supreme Court Taxing Office for further consideration and for a further certificate. F

Order accordingly.

Solicitors: *Perkins & Co.* (for the applicants); *Stafford Clark & Co.* (for the respondent).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

HIGGINS *v.* SILVERSTON.

[COURT OF APPEAL (Denning, Birkett and Parker, L.JJ.), June 15, 18, July 4, 1956.]

Rent Restriction—Decontrol—Separate and self-contained premises produced by conversion of other premises—Need for change of identity—Ground floor of house made into self-contained premises—Housing Repairs and Rents Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 53), *s.* 35 (1) (*a*).

The owner of a house let the second and first floors to tenants and occupied the ground floor (which was assessed at a rateable value which would have brought it within the Rent Restrictions Acts) himself, using the bathroom and lavatory on the first floor in common with the tenant of that floor. In 1955 the owner sold the house and the purchaser carried out structural alterations to the ground floor making an entrance lobby by putting a door across the passage, making inside doors to allow passage from one room to another without going into the passage and converting part of a bedroom (which he partitioned off) into a bathroom and lavatory, so that the whole ground floor premises were made separate and self-contained. He let the altered ground floor to a tenant, charging a premium of £150 on the assumption that the Rent Restrictions Acts did not apply to it as being converted premises, viz., " separate and self-contained premises produced by conversion . . . of other premises ", within s. 35 (1) of the Housing Repairs and Rents Act, 1954. The tenant brought an action for recovery of the sum as a premium prohibited by s. 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949.

Held: the Rent Restrictions Acts were not excluded by s. 35 (1) of the Act of 1954 from applying to the altered ground floor premises and the tenant was entitled to recover the premium paid, since the ground floor remained the same premises after the alterations and, though made separate and self-contained, was not produced by " conversion . . . of other premises " within s. 35 (1) (a), which meant a conversion so substantial as to change the identity of the premises.

Appeal dismissed.

[For the Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1), (5), see 13 HALSBURY'S STATUTES (2nd Edn.) 1097; and for the Housing Repairs and Rents Act, 1954, s. 35 (1), see 34 HALSBURY'S STATUTES (2nd Edn.) 361, 362.]

Cases referred to:

(1) *Langford Property Co., Ltd.* v. *Batten*, [1950] 2 All E.R. 1079; [1951] A.C. 223; 31 Digest (Repl.) 645, *7503*.

(2) *Capital & Provincial Property Trust, Ltd.* v. *Rice*, [1951] 2 All E.R. 600; [1952] A.C. 142; 3rd Digest Supp.

(3) *Mitchell* v. *Barnes, Mitchell* v. *Allen*, [1949] 2 All E.R. 719; [1950] 1 K.B. 448; 31 Digest (Repl.) 672, *7684*.

Appeal.

The appellant landlord was the owner of a house at 47, High Road, Chiswick, of which the first and second floors were let to tenants and the ground floor had been converted into self-contained premises by extensive structural alterations in 1955. Before the conversion the ground floor had been assessed at a rateable value which would have brought it within the Rent Restrictions Acts. He let the altered ground floor to a tenant on payment of a premium of £150. The tenant brought an action for recovery of the £150 as being a premium prohibited by s. 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949. The landlord contended that the section did not apply since the ground floor was converted premises excluded from the operation of the Rent Restrictions Acts by s. 35 (1) (a) of the Housing Repairs and Rents Act, 1954. A

On May 2, 1956, His Honour JUDGE BAXTER sitting at Brentford County Court held that the ground floor was fundamentally the same as before and gave judgment for the tenant. The landlord appealed.

R. E. Megarry, Q.C., and *F. M. Drake* for the landlord. B
D. Tolstoy for the tenant.

Cur. adv. vult.

July 4. **DENNING, L.J.**, read the following judgment of the court: There is a house, No. 47, High Road, Chiswick, which has three floors. Before 1955 the then owner lived on the ground floor and let off the first and second floors to two tenants. There was an outside lavatory on the ground floor and a bathroom and lavatory on the first floor. The owner (who lived on the ground floor) used the bathroom and lavatory on the first floor in common with the tenant on the first floor. In 1955 the then owner sold the house to a new owner, the landlord, who did extensive work to the ground floor. It previously consisted of a living room, bedroom, kitchen, scullery and outside w.c., and the occupiers had to go out into the passage to get from one room to the other (except from kitchen to scullery). The landlord divided the bedroom into two parts by putting in a partition and made one part into a new bathroom and lavatory. He made an entrance lobby by putting a door across the passage: and he made inside doors so that the occupiers could get from one room to the other without going out into the passage. He also put in some new floors and fireplaces. The result is that the premises on the ground floor are now separate and self-contained. C D E

Having done that work, the landlord thought that the ground floor was thereby taken out of the control of the Rent Restrictions Acts altogether, and on that footing he let it to a tenant, Mrs. Higgins, a widow, and charged her a premium of £150. She has since been advised that the work was not such as to take the case out of the Rent Restrictions Acts, and claims back the £150 she paid. She does this by virtue of s. 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949, which makes it illegal to take a premium on a controlled house. F

The question depends on whether the ground floor has been taken out of the Acts, and this in turn depends on the true construction of s. 35 (1) of the Housing Repairs and Rents Act, 1954, which now comes before this court for the first time. It says: G

> " The [Increase of Rent and Mortgage Interest (Restrictions) Act, 1920] shall not apply to a dwelling-house which consists, and consists only, of premises falling within either of the following paragraphs, that is to say,— (a) separate and self-contained premises produced by conversion, after [Aug. 30, 1954] of other premises, with or without the addition of premises erected after [Aug. 30, 1954]; (b) premises erected after [Aug. 30, 1954]." H

We take the object of the section to be to encourage the building of new houses or the conversion of old ones by taking them out of the Acts altogether. No difficulty arises about new houses. The difficulty is the conversion of old ones. Here Parliament has been very careful not to allow a landlord to escape too easily from the Acts. It must be remembered that, when the landlord incurs expenditure on the improvement or structural alteration of a dwelling-house, he can increase the rent by eight per cent. of the amount expended (see s. 2 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920), but the house still remains within the Acts. In order to take the house out of the Acts, there must, therefore, be something more than the improvement or structural alteration of a dwelling-house. The question is: What is that something more? I

Under s. 35 (1) (a) of the Act of 1954, the first thing to ask is whether the premises as they now exist are " separate and self-contained premises ". The answer is that this ground floor is now certainly separate and self-contained. The second question is whether the premises as they now exist have been " produced by conversion . . . of other premises ".

Counsel for the landlord urges us to hold that the words " other premises " mean " premises which were not previously separate and self-contained ". It is, he says, the quality of being " separate and self-contained " which must be produced by conversion. He recognises that this interpretation may enable a landlord in some cases to escape the Acts by a trifling amount of work. For instance, in order to make a floor separate and self-contained, he might only need to put in an outer door, or a sink, or a bathroom, and it would take the premises out of the Acts.

We do not agree with counsel's interpretation. It fails to distinguish adequately between the improvement of *the same* premises (which entitles the landlord to an eight per cent. increase in rent) and the conversion of *other* premises (which takes them out of the Act altogether). By using the word " other " Parliament makes it clear that it is not sufficient to convert the *same* premises. It is, therefore, not sufficient for the landlord to make the *same* premises self-contained where they were not self-contained before. There must be the conversion of *other* premises.

What, then, do the words " other premises " mean? It is, we think, best shown by taking some cases which clearly fall within the section. The first is the case of a coach-house in a mews which, by much work, is turned into a dwelling-house with all the necessaries of life. The dwelling-house is then " separate and self-contained premises produced by conversion of other premises ". The coach-house was " other premises ". It was a different thing altogether. There was complete change of identity. The new house was produced by conversion of " other premises ", namely, a coach-house. The second is the case of a dwelling-house which was previously capable of being used only for one family, and then substantial structural alterations are made so as to turn it into two separate and self-contained flats with all the necessaries of life in each. There is again a complete change of identity. The original house was " other premises ". The two new flats were produced by conversion of those other premises.

There is a whole body of law under the Rent Restrictions Acts on this point of " change of identity ". It is effectual to prevent a landlord from escaping the Acts by making a small physical change. There must be structural changes which alter substantially the character of the premises. Mere improvement or structural alteration by itself does not effect a change of identity. Something more radical must take place: see *Langford Property Co., Ltd.* v. *Batten* (1) ([1950] 2 All E.R. 1079 at p. 1088) per Lord Radcliffe. Any other view would play havoc with the Acts and defeat their object: see *Capital & Provincial Property Trust, Ltd.* v. *Rice* (2) ([1951] 2 All E.R. 600 per Lord Porter at p. 603, and per Lord Reid at p. 610). We cannot help thinking that Parliament had that body of law in mind when it used the words " other premises ". When the work of conversion is so substantial as to change the identity of the premises, you can properly say that there is the conversion of " other premises ": but when it is not so radical as to change the identity, it is not the conversion of " other premises " but only improvement of the same premises.

We are confirmed in this view by the concluding words in s. 35 (1) (a), " with or without the addition of premises erected after [Aug. 30, 1954] ". Those words hark back to *Langford Property Co., Ltd.* v. *Batten* (1), where it was held that the addition of a garage might change the identity of a house. The concluding words of s. 35 (1) (a), make it clear that the landlord is not bound to erect a new garage or a new room. He can convert the old premises as they stand without any new building. Nevertheless the conversion must be such that it can properly be described as the conversion of " other premises ", not of the same premises. That is, there must be a change of identity.

The county court judge decided in this case that there was not sufficient change of identity. The flat looks different, he said, but fundamentally it is the same as before. He directed himself quite properly and his findings on it cannot be disturbed: see *Mitchell* v. *Barnes* (3) ([1949] 2 All E.R. 719). This means, we think, that the flat is produced, not by conversion of other premises, but by improvement of the same premises. The landlord qualifies for an eight per cent. increase in rent but the flat is not taken out of the Acts.

There was much discussion before us whether the ground floor *before* the alterations was " separate and self-contained ", and several authorities were cited: but we do not think that question arises. Since the alterations, the ground floor is certainly " separate and self-contained premises ". The only question is whether that result is " produced by conversion of other premises ", that is, whether the ground floor before the alterations was " other premises ", not whether it was " separate and self-contained ". The county court judge did find, however, that even before the alteration it was " separate and self-contained ", and if this was a correct finding, it would mean that, even on the interpretation of " other premises " of counsel for the landlord, the landlord would fail. We express no opinion on this point, because on our interpretation of the section, it does not arise.

We would like to say, however, that, if counsel's interpretation were right, it would involve great difficulties in saying whether the premises were *previously* " separate and self-contained ". Must the premises for this purpose contain a bathroom? If so, a country cottage could be taken outside the Acts by merely putting in a bathroom. Must the premises have an outer door? If so, a top floor set of rooms could be taken outside the Acts merely by putting in an outer door. We are not prepared to subscribe to an interpretation which would enable landlords so easily to avoid the Acts altogether, when plainly their proper remedy is to increase the rent by the permitted amount.

The result is that the ground floor is still within the Acts, the landlord was not entitled to charge a premium, and he must pay it back. The appeal is dismissed.

Appeal dismissed.

Solicitors: *A. Kramer & Co.* (for the landlord); *John E. Peake,* Hounslow (for the tenant).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

BRITISH SYPHON CO., LTD. *v.* HOMEWOOD.

[CHANCERY DIVISION (Roxburgh, J.), June 22, 25, 26, 27, 1956.]

Master and Servant—Invention of servant—Right of master to benefit of invention—No agreement relating to inventions—Technician employed to advise on all technical matters relating to master's business—Not specifically called on for advice as to design—Invention relating to master's business—Duty of servant.

Patent—Employee's inventions—Technical adviser in charge of design and development—Not specifically called on for advice as to design—Invention relating to employer's business—Duty of employee.

Until May 3, 1955, the plaintiffs employed the defendant as their chief technician to advise them on all technical matters relating to their business, which included the manufacture of soda water syphons, and he was in charge of design and development. From May 3, 1955, until Sept. 30, 1955, when he left the plaintiffs' employment, the defendant was employed by the plaintiffs in a different capacity. Prior to May 3, 1955, the defendant designed, and formed the intention of applying for letters patent relating to, an improved form of soda water syphon. The plaintiffs had not asked the defendant to design a new method of dispensing soda water, and he had not been asked to give any advice in relation to such a problem. On Aug. 30, 1955, the defendant applied for letters patent relating to the invention. The plaintiffs claimed an order that the defendant should assign to them his interest in the application.

Held: the plaintiffs were entitled to the order which they claimed because it was not consistent with good faith, as between master and servant, that the defendant, as technical adviser to the plaintiffs, should be entitled to make an invention in relation to a matter concerning part of the plaintiffs' business and dispose of it as he thought fit; it was the defendant's duty not to put himself in a position in which he would have personal reasons for not giving to the plaintiffs the best possible advice, and, therefore, the invention must in equity be the property of the plaintiffs.

[As to the duties of servant to master, see 22 HALSBURY'S LAWS (2nd Edn.) 183-185, paras. 307-309; and for cases on the subject, see 34 DIGEST 121, 122, *923-935*.]

Action.

The plaintiffs, British Syphon Co., Ltd., claimed against the defendant, George Sidney Homewood, (i) an order that the defendant should assign to the plaintiffs all his interest in application for letters patent No. 24870/55 entitled "liquid-dispensing device"; (ii) an order that the defendant should forthwith disclose to the plaintiffs full information of and concerning the said invention and application; (iii) an injunction to restrain the defendant from disclosing any information relating to the said invention to any person without the plaintiffs' consent prior to the publication of the complete specification of letters patent on the said application; (iv) an inquiry as to damages suffered; (v) delivery up of all documents relating to the said invention.

The defendant by his defence averred that the plaintiffs were not entitled to any benefit of the said invention or patent application and that he had never been under any obligation to disclose the invention to them.

The plaintiffs were manufacturers of, among other things, soda water syphons. The defendant was at all material times until May 3, 1955, employed (under the terms of a letter dated June 12, 1953) as the plaintiffs' chief technician to advise them on all technical matters relating to their business and in charge of design and development. On May 3, 1955, the defendant was employed (under the terms of a letter dated May 3, 1955) for a further period in a different capacity and for the express purpose of supervising "the final development of two prototype fillers now at work one at Folkestone the other at Norwood". The terms of employment were of a very different nature and were such as would entitle the defendant to keep for himself anything that he invented after that date. On Sept. 30, 1955, the defendant ceased to be employed by the plaintiffs and was employed by another company. In 1953 the defendant, in pursuance of his duties, was fully and completely involved, on behalf of the plaintiffs, in the process of evolving a nylon top in substitution for a metal top for soda water syphons. About the middle of 1953, the defendant completed a nylon top for which he was rewarded and it became the undisputed property of the plaintiffs. Thereafter no technical problem arose in connection with the nylon tops and the defendant was never specifically asked to give any further advice in relation to them. The defendant designed a new "pourer" for soda water syphons. The court did not find the precise date on which the invention of the new pourer was made but held that it was before Easter, 1955 (viz., Apr. 10, 1955). On Aug. 30, 1955, the defendant made application for letters patent No. 24870/55, entitled "liquid-dispensing device".

G. T. Aldous, Q.C., and *D. W. Falconer* for the plaintiffs.
G. D. Everington for the defendant.

ROXBURGH, J., having reviewed the evidence and stated the facts, continued: I am satisfied that the invention was so far advanced before Easter, 1955, that the defendant felt able to say confidently that he intended to take out a patent on an improved syphon. That, to my mind, leads to a difficult and unexplored point of law. It is common ground that the defendant had not been expressly asked to design any new method of dispensing soda water by a low-pressure system or any other system and that he had not been asked to give any advice in relation to any such problem. This is the circumstance which, as far as I can see, differentiates this case from all that have gone before. I cannot find even an oblique discussion of this problem anywhere in the many authorities which the industry of counsel has disclosed. I revert, then, to the defendant's position. He was employed to give the plaintiffs technical advice in relation to the design or development of anything connected with any part of the plaintiffs' business. No particular problem had been put before him, but if, and as often as, any problem of that kind was put before him, it was his duty to be ready to tender his advice and to assist in any matter of design or development. He was paid to stand by in that respect. He had other functions, but those are not material to the present case.

Would it be consistent with good faith, as between master and servant, that he should in that position be entitled to make some invention in relation to a matter concerning a part of the plaintiffs' business and either keep it from his employer, if and when asked about the problem, or even sell it to a rival and say: "Well, yes, I know the answer to your problem, but I have already sold it to your rival"? In my judgment, that cannot be consistent with a relationship of good faith between a master and a technical adviser. It seems to me that he has a duty not to put himself in a position in which he may have personal reasons for not giving his employer the best advice which it is his duty to give if and when asked to give it. What I am saying only relates to matters concerning the business of his employer. That, of course, is quite clear; but, in matters of that type, it seems to me that he has a duty to be free from any personal reason for not giving his employer the best possible advice. A fortiori, it seems to me that he is not entitled to put himself into the position of being able to say: "You retained me to advise you, and I will tell you what I advise. Do it this way, but you will have to buy the method from your rival, because I have just sold it to him, having invented it yesterday". That seems to me to be reasoning which, in the absence of authority, makes it right and proper for me to decide that this invention (which, in my judgment, plainly relates to and concerns the business of the plaintiffs, viz., the distribution of soda water to the public in containers of a satisfactory character), if made during a time during which the chief technician is standing by under the terms of his employment, must be held to be in equity the property of the employer. Accordingly, my decision is for the plaintiffs.

Judgment for the plaintiffs.

Solicitors: *Hopwood, Mote & Leedham-Green* (for the plaintiffs); *Parlett & Co.* (for the defendant).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

BASSETT *v.* EVANS.

[Queen's Bench Division (Lord Goddard, C.J., Ormerod and Donovan, JJ.), June 28, 1956.]

Coal Mining—Statutory regulation of mines—Provisions as to safety—Breach—Liability of absent manager—Under-manager appointed as manager—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5 *c.* 50), *s.* 3 (2), *s.* 75.

The appellant was the manager of a coal mine. Before going on leave he appointed under s. 3 (2) of the Coal Mines Act, 1911, a duly qualified person to carry out his duties as manager. A few days before his leave began the appellant gave instructions for certain work to be carried out at the entrance of the mine, saying, inter alia: " We will pull these half rings out and then those that are in the cement I will have burnt out ". While the appellant was on leave the rings were burnt out, an oxyacetylene burner being used for the purpose some ten yards inside the entrance to the mine. The authority of the divisional inspector for the use of this burner had not been obtained, and its use in the mine contravened s. 35 of the Act. The appellant was charged with an offence against s. 75 of the Act, arising out of this contravention, on the ground that he was manager of the mine. Under s. 75 it was a defence for the appellant to prove " that he had taken all reasonable means by publishing and to the best of his power enforcing " the provisions of s. 35. On appeal against conviction,

Held: the appellant was not guilty of any offence since (i) by appointing a duly qualified person to act as manager in his absence, the appellant had ceased for the time being to be the manager and the responsibilities under the Act were assumed by the person appointed in his place; and (ii) on the facts he had discharged the burden of proof of establishing the defence open to him under s. 75.

Appeal allowed.

[**Editorial Note.** The Coal Mines Act, 1911, is prospectively repealed by the Mines and Quarries Act, 1954, from a day to be appointed. The provisions of that Act corresponding to s. 3 (2) and s. 75 of the Act of 1911 are s. 8 (2) and s. 152 (1), a defence to liability under the latter enactment being provided by s. 156 of the Act of 1954.

For the Mines and Quarries Act, 1954, s. 8 (2), s. 152 (1) and s. 156, see 34 Halsbury's Statutes (2nd Edn.) 527, 623, 626.

For the Coal Mines Act, 1911, s. 3 (2), s. 35 (1) (as amended by S.I. 1949 No. 924, art. 2), s. 75, see 16 Halsbury's Statutes (2nd Edn.) 101, 123, 144.]

Case Stated.

This was a Case Stated by justices for the borough of Port Talbot in respect of their adjudication as a magistrates' court sitting at Port Talbot on Jan. 5, 1956. On Nov. 29, 1955, an information was preferred by the respondent against the appellant charging the appellant with an offence contrary to s. 35 (1), s. 75 and s. 101 of the Coal Mines Act, 1911, and alleging that on June 27, 1955, he was manager of Glenhafod Mine in the County of Glamorgan in which there was on that day a contravention of s. 35 (1) of the Coal Mines Act, 1911, as amended by art. 2 of the Coal Mines (Lighting and Contraband) General Regulations, 1949 (S.I. 1949 No. 924), in that in the said mine in which safety lamps were required, a person had in his possession an article prohibited under that section, to wit, an article that was capable of producing a flame, to wit, an oxyacetylene burner, such burner not having been authorised to be taken below ground by that Act or by the Minister of Fuel and Power or by the divisional inspector. The following facts were found. On the morning of June 27, 1955, an oxyacetylene burner was used at a point ten or twelve yards inside the entrance of the mine, a cutting into a hillside, by two persons employed there, for the purpose of burning out "rings". Glenhafod was then a mine in which safety lamps were required to be used. No application had been made for permission to use the oxyacetylene burner and the respondent was the person competent to grant such authority. No safety precautions were carried out during the burning operation, and when the burning operation was performed eighty-eight workmen were at work in the mine. The appellant was the manager of Glenhafod colliery; he was, with permission, away on leave from the colliery when the operation was performed. By letter dated June 22, 1955, the under-manager, a Mr. Clarke, had been duly appointed to act as manager of Glenhafod colliery for the period of the appellant's absence on leave. On June 24, 1955, the appellant gave oral instructions for certain work to be carried out at the entrance to the colliery, and in the course of his instructions said, inter alia, "We will pull these half rings out and then those that are in the cement I will have burnt out". The evidence before the magistrates' court included the evidence of the respondent, who was senior district inspector of mines and gave evidence that, among other matters, on Aug. 3, 1955, he saw the appellant who made the following statement:

> "In the company of Evan Jones, repairer, David Jones, repairer, Allan Derrick, mason and Caradock Watkins, mason, I inspected the place on Thursday, June 23 and told them I would not be here next week and was not happy about leaving the job. I instructed them to get sidewalls in the side here and get girders in and a layer of cement about four inches thick on the girders as a roof. I would like this done before the week end. This was done by Friday, June 24. Then I went to the place and told David Jones 'On Sunday knock the cement out to form a refuge hole, and next week pull all the tangers and timbers out which are holding the top back, and then pull muck on top of the layer of cement forming a new roof.'
>
> "In the general conversation I said 'We will pull these half rings out and then those that are in the cement I will have burnt out.'
>
> "I thought I had given them sufficient work for the week I was away without taking any arches out.
>
> "It was my intention to apply for an exemption to allow arches to be burnt out during a week-end.
>
> "The first I knew that arches had been burnt out was on Sunday, July 3 when Mr. Clarke came to see me at my home."

The appellant gave evidence stating (i) that he had set to work to improve the entrance to the colliery and had in fact carried out certain alterations; (ii) that before he went on leave he gave instructions for certain additional work to be done; (iii) that he had not given instruction to burn out the rings and that it was not his intention that burning should be carried out until he came back from leave; (iv) that he would not have carried out the burning without permission, and that such burning was carried out without his authority, and (v) that he did not warn the workmen or Mr. Clarke (the under-manager appointed to act in the appellant's absence) not to carry out the burning without permission.

It was contended on the part of the appellant that there was no sufficient evidence to support a conviction; that the prosecution had adduced no proof that the work executed at the colliery on June 27, 1955, was done by the order or direction of the appellant; that the appellant had no knowledge that the work complained of by the respondent was being carried out or contemplated on June 27, 1955; that the appellant proved that the provisions mentioned in s. 75 of the Coal Mines Act, 1911, were published and enforced by the appellant to the best of his power and that the work was done while the appellant was away on leave, and that he was exempted from carrying out the duties of manager by reason of s. 3 (2) of the Act. The respondent contended that the appellant was at all material times the manager of the mine; that there had been a contravention of s. 35 of the Act; and that the appellant had not proved that he had taken all reasonable means by publishing and to the best of his power enforcing the provisions of Part 2 of the Act to prevent that contravention. The justices were of opinion, among other matters, that when on June 24, 1955, the appellant gave certain instructions to his workmen he failed to give them with sufficient clarity; and that although the appellant was not the de facto manager on June 27, 1955, the initial cause of the contravention was his failure in the respect last mentioned. The justices convicted the appellant and fined him £5. The appellant appealed.

H. Edmund Davies, Q.C., and *A. T. Davies* for the appellant.
Rodger Winn for the respondent.

ORMEROD, J., after stating the offence alleged, the facts found by the justices and the appellant's conviction, continued: The scheme of the Coal Mines Act, 1911, stated very shortly, is this. By s. 2 of the Act there must be a manager in every mine; s. 3 (1) provides that in every mine required to be under the control of the manager daily personal supervision must be exercised by the manager, and, if there is an under-manager, by him also. Section 3 (2) provides:

> "In cases where, on account of the absence of the manager or under-manager on leave or from sickness or any other temporary cause, such daily personal supervision as is required by this section cannot be exercised, arrangements shall be made for the duties of the manager or under-manager, as the case may be, in respect of daily personal supervision being performed—
>
> (a) in the absence of the manager, by the under-manager, if any, or by a person not under the age of twenty-five years and holding a first or second-class certificate of competency under this Act, appointed in writing by the owner or agent;
>
> (b) in the absence of the under-manager, in the case of a mine for which a separate under-manager is required by this Act to be appointed, by a person not under the age of twenty-five years and holding a first or second-class certificate of competency under this Act appointed as aforesaid.
>
> "And any person performing the duties of a manager or under-manager whether under this or under the last preceding section, shall have the same responsibility, and shall be subject to the same liability, as the person whose duties he is performing."

There is no doubt that in the present case the under-manager who was appointed to act as manager in the appellant's absence was a competent person so to be appointed, and all the necessary formalities were complied with so far as his appointment was concerned. The appellant's contention is that during the time of his leave the duties and responsibilities which normally fell on him as manager were taken over by the under-manager by virtue of the appellant's compliance with the provisions of s. 3 (2) of the Act.

Section 75 of the Act says this:

> "Any person who contravenes or does not comply with any of the provisions of this Part of this Act shall be guilty of an offence against this Act,

> and, in the event of any contravention of or non-compliance with any of the provisions of this Part of this Act by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing those provisions to prevent that contravention or non-compliance." A

B There is no doubt that in the present case there was a contravention of or non-compliance with the provisions of the Act. There was an offence against s. 35 (2) of the Act and, in those circumstances, the responsibility is not only on the person who actually contravenes the section of the Act but also on the other persons mentioned in s. 75, viz., the owner, agent and manager, unless the manager can prove that he has taken all reasonable means by publishing and to the best of his power enforcing those provisions to prevent that contravention and non-compliance. C The appellant says: "I did all that was necessary on June 24 before I went on leave. I appointed a competent manager who is qualified in accordance with the Act, and there is nothing else I could have done and, in those circumstances, when I was away on leave I had ceased temporarily to be manager. The man appointed to take my place was manager in my place, and he, if anyone, was responsible. D He was responsible unless he could show that he had taken all reasonable steps to prevent this contravention". Further, the appellant's case is this: Even if that is not a sound contention in law, there is no evidence at all of any lack of care, and on the facts found by the justices and on the facts before the court the justices should have found that the appellant had taken all reasonable means by publishing and to the best of his power enforcing the provisions to prevent contravention or non-compliance. E

Counsel for the respondent, so far as the first point is concerned, argues that this conviction must stand because at the time of the contravention the appellant was in fact the manager of the mine; it is true that he was away on leave, and that he had properly delegated his duties to his under-manager, but nevertheless he was still the manager of the mine and therefore was still liable in the terms of s. 75 unless he could prove that he had taken the reasonable means which are F set out in that section. For my part, I do not accept that contention. I think that the position is that under s. 3 the intention of the legislature is that if a manager is unable to act for any of the reasons in s. 3, that is to say, by reason of leave or sickness, if he properly appoints another person, he does for the time being cease to be the manager. He ceases to be clothed with G the responsibility which a manager has in the terms of the Act; those responsibilities are taken over by the man who is appointed in his place, and that person, who is de facto the manager, having been properly appointed is the person who is liable to be convicted under s. 75 unless he discharges the burden that is on him.

That is the view which I take of the submission of the appellant on the first point, but even if that is wrong, I find it difficult to see how this conviction can H be upheld. The justices appear to have found that when, before he went on leave on June 24, the appellant said: "We will pull these half rings out and then those that are in the cement I will have burnt out", in some way or other he was giving instructions to the workpeople to burn out these rings, and that he had not made those instructions sufficiently clear with the result that he had not taken reasonable steps to prevent a contravention of this kind happening, and I that this particular contravention had happened because of the lack of clarity in his instructions. It is on that finding alone that the justices have come to the conclusion that the appellant is liable. What that finding really means, I think, is that the appellant has not discharged this burden on him because he did not anticipate that some contravention of this kind might happen and did not instruct his substitute that he must not allow this contravention to happen, that is to say, has not said: "It may be that the men will start burning out these

A rings, and of course in no circumstances must you allow them to do that unless you first of all give the proper notice to the inspector ". In my view, the evidence in the present case is abundantly clear that even if in law he is liable as manager —I do not think that he is for the reasons which I have given—he has on the evidence amply discharged the duty which is laid on him by s. 75, and that the justices had no reason for finding otherwise. In those circumstances, this appeal B in my view must be allowed, and the case must be sent back to the justices to have the conviction quashed.

DONOVAN, J.: I agree. I will assume for the purpose of argument that counsel for the respondent is right when he says that the appellant was manager, and that there being a contravention the appellant is made liable under the C drastic provisions of s. 75 despite being on leave unless he proved that he had taken all reasonable means to prevent the contravention. Even so, the appellant had ensured, or helped to ensure, that a properly qualified person was appointed manager in his place for the period of his leave, and by s. 3 (2) that deputy has the same responsibility as the appellant. Prima facie, therefore, it seems to me D that he had taken all reasonable steps to prevent contraventions of the Act during his absence; but the justices now have said: No, because he did not give instructions sufficiently clearly about a particular operation. He said: ". . . I will have [the rings] burnt out ". Apparently he should have said to his deputy: " Do not take a naked light into the mine while I am away ", but why should he have to assume such an act of insanity on the part of anybody, let alone a E properly qualified deputy? He was reasonably entitled to assume that the deputy manager would never do any such thing and, that being so, I think he establishes his defence under s. 75, and I agree with the order proposed.

LORD GODDARD, C.J.: I agree with both judgments, and I need not add anything.

F *Appeal allowed.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *T. D. Windsor Williams*, Neath (for the appellant); *Treasury Solicitor* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

BUCKINGHAM *v.* DAILY NEWS, LTD.

[Court of Appeal (Denning, Birkett and Parker, L.JJ.), June 14, 15, 1956.]

Evidence—Inspection—Inspection by the judge—Allegation of unsafe system of work—No rebutting evidence—Judge taking into consideration own opinion formed on inspection.

Practice—Inspection by the judge—Allegation of unsafe system of work—No rebutting evidence—Judge taking into consideration own opinion formed on inspection.

While cleaning the tucking blades of a rotary press with a swab held in his hand, a workman was injured. He brought an action for damages for negligence against his employers, claiming that they had failed to provide a safe system of work, and at the trial he called witnesses who gave evidence that the use of a swab held in the hand was dangerous. His witnesses were cross-examined, but no rebutting evidence was called by the employers. At the invitation of the parties, the judge of first instance inspected the press and saw a demonstration by the workman showing how it was cleaned. The judge in his judgment reviewed the evidence of the workman's witnesses and held that any adult man using reasonable care would find no difficulty in cleaning the blades and that the workman's injury was due to his own carelessness. The workman appealed on the ground that the judge had substituted his own opinion formed on his view for the evidence of the workman's witnesses.

Held: on an issue, not calling for technical evidence, such as whether in a simple case something was dangerous, a judge was entitled to take into consideration his own impression formed on a view of the subject-matter, which constituted part of the evidence in the same way as an exhibit or demonstration in court (dictum of Denning, L.J., in *Goold* v. *Evans & Co.*, [1951] 2 T.L.R. at p. 1191, adopted); in the present case the judge had not relied on his own opinion to the exclusion of other evidence and had not given undue weight to the impression which he had formed on the view and his decision would be upheld.

London General Omnibus Co., Ltd. v. *Lavell* ([1901] 1 Ch. 135) and *Cole* v. *United Dairies (London), Ltd.* ([1940] 4 All E.R. 318) distinguished; dictum of Lord Alverstone, C.J., in *London General Omnibus Co., Ltd.* v. *Lavell*, [1901] 1 Ch. at p. 138 criticised as too wide.

Notes to C.C.R., Ord. 23, r. 14, in the County Court Practice and to R.S.C., Ord. 50, r. 4, in the Annual Practice criticised as too wide.

Appeal dismissed.

[As to inspection by the judge during trial, see 13 Halsbury's Laws (2nd Edn.) 639, para. 707, and 26 Halsbury's Laws (2nd Edn.) 59, para. 95; and for cases on the subject, see 22 Digest (Repl.) 180-182, *1635-1648*.]

Cases referred to:

(1) *Wilsons & Clyde Coal Co., Ltd.* v. *English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.

(2) *London General Omnibus Co., Ltd.* v. *Lavell*, [1901] 1 Ch. 135; 70 L.J.Ch. 17; 83 L.T. 453; 22 Digest (Repl.) 181, *1641*.

(3) *North Cheshire & Manchester Brewery Co.* v. *Manchester Brewery Co.*, [1899] A.C. 83; 68 L.J.Ch. 74; 79 L.T. 645; 22 Digest (Repl.) 181, *1639*.

(4) *Bourne* v. *Swan & Edgar, Ltd., Re Bourne's Trade-Marks*, [1903] 1 Ch. 211; 72 L.J.Ch. 168; 22 Digest (Repl.) 181, *1642*.

(5) *Goold* v. *Evans & Co.*, [1951] 2 T.L.R. 1189; 2nd Digest Supp.

(6) *Payton & Co.* v. *Snelling, Lampard & Co.*, [1901] A.C. 308; 70 L.J.Ch. 644; 85 L.T. 287; 22 Digest (Repl.) 181, *1640*.

(7) *Cole* v. *United Dairies* (*London*), *Ltd.*, [1940] 4 All E.R. 318; [1941] 1 K.B. 400; 110 L.J.K.B. 88; 164 L.T. 120; 33 B.W.C.C. 332; 2nd Digest Supp.

(8) *Kessowji Issur* v. *Great Indian Peninsula Ry. Co.*, (1907), 96 L.T. 859; 22 Digest (Repl.) 179, *1632*.

Appeal.

The plaintiff appealed against an order of His Honour JUDGE BLOCK at the Mayor's and City of London Court given on Apr. 20, 1956, dismissing an action for damages for negligence brought against the defendants. The judge had held that any adult man using reasonable care would find no difficulty in cleaning the blades of a rotary press by a swab held in the hand and that the injury which had befallen the plaintiff in doing the work was due to his own carelessness. The plaintiff contended that, in arriving at his decision, the judge had substituted his own opinion formed on a view and demonstration of the process of cleaning undertaken at the invitation of the parties for the evidence of the plaintiff's witnesses that the system was dangerous, to which the defendants had offered no rebutting evidence.

C. J. A. Doughty, Q.C., and *M. B. Scholfield* for the plaintiff.
W. H. Griffiths and *R. I. Kidwell* for the defendants.

DENNING, L.J.: I will ask BIRKETT, L.J., to deliver the first judgment.

BIRKETT, L.J.: This appeal raises quite an interesting point. The plaintiff, Thomas Alfred Buckingham, was employed by the defendants, the well-known newspaper proprietors and publishers, the Daily News, Ltd., who either own or produce or print the " News-Chronicle " and the " Star ". The plaintiff had worked for six years with the defendants and he described himself as a rotary machine attendant. For six years he had been dealing with a machine of the type with which we are concerned. That machine was at the premises of the defendants in Bouverie Street, where the papers are printed.

Certain tucking blades are employed in the process of folding the newspapers, which is done at very high speed. From time to time these tucking blades get covered with oil and ink, and become dirty and have to be cleaned. On Jan. 19, 1955, the plaintiff was employed as the rotary press attendant at the defendants' premises and was engaged in cleaning the tucking blades when he met with an accident which required eleven stitches to be put in. It was a cut due to the sharpness of the tucking blade. The evidence was that, when originally put in, the tucking blades are blunt, not sharp, but by use they quickly become much sharper—not so sharp, says the judge, as a razor blade, but sharp enough to cut; and that was an element which the learned judge had in his mind.

The blade was cleaned with a swab, which is something of the nature of a household dish cloth, and is held in the hand like a dish cloth. When engaged on this task the plaintiff was slightly above the blade and looking down on it. His hand contained the dish cloth or swab, and the tucking blades were at rest while being cleaned from the oil, the grease, the dirt and the accumulation on them. While he was so engaged, the corner of one of the plates cut him, apparently when he made a very sharp almost involuntary motion. He brought the action, therefore, against the defendants at common law. The case is not complicated by any regulations about fencing, etc. The plaintiff says merely that the defendants failed in their common law duty to him to provide a reasonably safe system of work.

That phrase has frequently been used since it appeared in the speeches in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (1) ([1937] 3 All E.R. 628), but the common law duty of the master invoked in this case is to take reasonable care for his servants' safety. *Wilsons & Clyde Coal Co., Ltd.* v. *English* (1) only enlarges on the detail of that duty. In particular, LORD WRIGHT (ibid., at p. 640) said it was a threefold duty: the provision of a competent staff of men, adequate material, and a proper system of effective supervision. The decision is not an enlargement of the common law duty of the employer but an illustration of its nature: he must take reasonable steps for the safety of his workmen.

Before the learned judge, His Honour JUDGE BLOCK at the Mayor's and City of London Court on Apr. 20 of this year, the plaintiff contended that he got his injury because of his employers' failure to carry out that common law duty to take reasonable steps for his safety, in that they did not provide a proper and reasonably safe system of work. He was under no duty to go into particulars of the safe system of work suggested; it was enough for him to say, if it were the fact, that the system of work of swab cleaning by hand which was in operation was not reasonably safe. He said that was a defective system and it was in fact suggested that the blades should be cleaned with a long-handled brush, when there would be no possibility of the hand coming into contact with sharpened tucking blades.

When the case started, on an invitation made with the consent of counsel on both sides, as I think wisely and properly, the learned judge decided to go to Bouverie Street himself. He was accompanied by counsel on both sides and by the plaintiff, and they saw the machine on which the plaintiff had been working with the very blades. Counsel for the plaintiff says that there was a great deal of noise, which one can understand in a big printing works when the machines were running, and no doubt it was difficult to hear what was said. Counsel for the defendants said that the plaintiff showed the judge exactly what he was doing with the tucking blades on the day on which the accident took place, and counsel for the plaintiff does not really challenge that, though he says he did not see it.

The first submission of counsel for the plaintiff was that the learned judge made up his mind on this case on the view, and had made up his mind when he returned to court to listen to the evidence. I think that there is no warrant for that submission, and we had clear evidence that that was not the fact. Counsel's main submission is that what the learned judge did in this case is forbidden by law, on the authorities, namely, that he cast to the winds the evidence given for the plaintiff and substituted for that evidence the impression which he had gained from his view. Counsel said that the evidence was all one way, meaning thereby that no evidence was called for the defendants, as was indeed the fact, the only evidence being that called for the plaintiff, though the witnesses were cross-examined by counsel for the defendants.

In support of counsel's main submission he cited *London General Omnibus Co., Ltd.* v. *Lavell* (2) ([1901] 1 Ch. 135), decided by FARWELL, J., at first instance, the report being of the decision of the Court of Appeal. The headnote reads (ibid.):

> "In an action for deceit brought on the ground that a particular article used by the defendant is a colourable imitation of the plaintiff's, the conclusion of the judge, on a view by him of the two articles—such as two rival omnibuses—under the Rules of the Supreme Court, 1883, Ord. 50, r. 4, that the defendant's article is calculated to deceive, is not sufficient by itself to support an injunction. The judge must be satisfied by independent evidence that there is at least a reasonable probability of deception."

(FARWELL, J., said in that case: "I have seen these two omnibuses; the mere sight of them is enough for me" (ibid., at p. 136)):

> ". . . the learned judge gave judgment finding that there was, on the side-panels of the defendant's omnibuses, 'the most undoubted imitation that would deceive the ordinary traveller'; that the defendant had 'intentionally designed' the resemblance with a view to getting hold of passengers intending to use the plaintiffs' omnibuses; and that the casual passenger, though

> not the expert, would very probably be deceived into thinking that the defendant's omnibuses were the plaintiffs '."

He decided on that by saying it was palpable to the view, although it would appear that evidence was given.

Reversing the judgment in the Court of Appeal, Lord Alverstone, C.J., said (ibid., at p. 138):

> " In my opinion, the judgment of the court below cannot stand. It seems to me to have proceeded upon the theory (the deceit being founded upon the suggestion that the defendant had run an omnibus which is likely to divert passengers from the plaintiffs' omnibuses) that the plaintiffs are entitled to succeed on the simple proof of colour and design of their own omnibus, and on the learned judge viewing the defendant's omnibus and the plaintiffs', and comparing them together. In my opinion, that is not sufficient to justify the plaintiffs in obtaining either an injunction or damages. We have no evidence before us as to what is the custom, or practice, or habits of persons who are riders in these omnibuses, nor as to what has grown up to be regarded as the leading features of omnibuses on any particular route . . ."

Then he used the words on which counsel for the plaintiff so strongly relies (ibid., at p. 139):

> " . . . but I have never heard it said, and, speaking for myself, I should be very sorry to endorse the idea, that the judge is entitled to put a view in the place of evidence. A view, as I have always understood, is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence. Of course, it is quite possible there may be cases in which all the circumstances connected with the matter in dispute are of such common knowledge, and are so well known to the tribunal that it may be said no evidence is necessary; as, for instance . . ."

Then he gave illustrations to support that statement and continued subsequently (ibid.):

> " It is said that in *North Cheshire & Manchester Brewery Co.* v. *Manchester Brewery Co.* (3) ([1899] A.C. 83) the Lord Chancellor observed that he himself should not have required any evidence in that case, and he perhaps, in one respect, went further, for in an earlier part of his judgment he said that the particular question whether the resemblance in name was likely to deceive could not have been put to witnesses, because it was the very question which the judge had to decide. But I am satisfied, myself, that the Lord Chancellor did not mean to lay down any general rule that no evidence that a particular thing was calculated to deceive was ever to be required."

The other learned judges supported that view.

It seems clear to me that the Court of Appeal in that case was dealing with very special facts, and to apply a decision on one set of facts as though it applied to every other combination of facts is to run into error. The ground of the decision was that Farwell, J., said in effect that he really did not need evidence, but himself could see the two omnibuses and their colouring, and was satisfied that the case was made out. The Court of Appeal said that that would not do, because he had not the knowledge possessed by the expert witnesses of the character of the people who used these omnibuses, the things that they liked, the things that they disliked, the things that attracted them, the things that repelled them; and so on; and he had no right, therefore, to substitute for evidence A given on all such relevant matters some view of his own founded merely on an ocular demonstration of two omnibuses. I need not trouble about the reference to this matter by FARWELL, J., in a later case [*Bourne* v. *Swan & Edgar, Ltd., Re Bourne's Trade-Marks* (4) ([1903)] 1 Ch. 211)] in which he seemed rather to adhere to the view he had taken. The *London General Omnibus* case (2) was the main case relied on by counsel for the plaintiff. He said that the doctrine B there laid down was that a judge had no right to substitute his own opinion for the evidence, and that that was what the learned judge had done in this case.

Every judge now sitting in the Court of Appeal has at one time been a judge of first instance and must know the kind of cases he has been called on to try. I personally can recall many views. In one case it was alleged that an accident had been caused by a defective stairway, and I was invited by the parties to C see it in order to form my own view. I went to see the stairway. I had in mind what was said on the one side and the other, and could make up my own mind, every relevant fact being before me, whether it was reasonable to say it was a dangerous stairway. As a judge of first instance, I visited factories, workshops, shops, cinemas, all for the purpose of seeing for myself the very nature of the place where the accident took place—the very material on which the accident D was itself founded.

In addition, exhibits are brought into court. I have seen the model of the side of a house, with all the elaborate modern scaffolding, in order to save me and the parties making a journey to where the house was, the parties having agreed that the model was a faithful representation of the scaffolding and the house. I have seen models of aeroplanes in which it was alleged that accidents E had occurred, such models being brought into court by the wish of the parties, so that I could see for myself and form my own opinion.

My own view in that respect is supported by what was said by DENNING, L.J., in *Goold* v. *Evans & Co.* (5) ([1951] 2 T.L.R. 1189). The point there was different because one of the parties was absent when the view was taken. The headnote reads: F

> " A county court judge, in the course of the hearing of an action for damages for injury to a workman alleged to have been due to the negligence of his employers, and in which he gave judgment for the employers, viewed the premises and saw an operation which purported to be the same as that which the workman had been engaged in at the time of the accident. Owing G to a mistake, the workman was not notified of the date of the inspection and was not present at the view. Held, that a view in the absence of one party, whether it is to be regarded as evidence in the technical sense or not, must be in the same position as other evidence; that the view in the absence of the workman was an inadmissible view, and one on which, prima facie, the judgment was based; and that accordingly there must be a new trial before another judge." H

DENNING, L.J., said (ibid., at p. 1191):

> " It is a fundamental principle of our law that a judge must act on the evidence before him and not on outside information; and, further, the evidence on which he acts must be given in the presence of both parties, I or, at any rate, each party must be given an opportunity of being present. Speaking for myself, I think that a view is part of the evidence, just as much as an exhibit. It is real evidence. The tribunal sees the real thing instead of having a drawing or a photograph of it. But, even if a view is not evidence, the same principles apply."

I would respectfully adopt that language. If a judge sees machinery in operation, and the parties are present and everything is done regularly and in order, it is the same as if the machine were brought into court and the demonstration was made in the well of the court, for the judge to see it there.

In *Payton & Co.* v. *Snelling, Lampard & Co.* (6) ([1901] A.C. 308) (a passing-off action for branded coffee, which is reported merely for the observations of LORD MACNAGHTEN and LORD DAVEY, the facts not being reported) LORD MACNAGHTEN said (ibid., at p. 311):

> " One word with regard to the evidence I should like to say. I think, as I have said before, that a great deal of the evidence is absolutely irrelevant, and I do not myself altogether approve of the way in which the questions were put to the witnesses. They were put in the form of leading questions, and the witnesses were asked whether a person going into a shop as a customer would be likely to be deceived, and they said they thought he would. But that is not a matter for the witness; it is for the judge. The judge, looking at the exhibits before him and also paying due attention to the evidence adduced, must not surrender his own independent judgment to any witness."

That is very high authority, coming from LORD MACNAGHTEN. Looking at the exhibits, whether they are in the court or the judge goes to see them, paying due attention to the evidence adduced—in this case the evidence of the witnesses for the plaintiff—he must not surrender his own independent judgment to any witness.

I have already said that I think there is no support for the submission that the judge had made up his mind when he came back from the view and before the evidence was called. The notes of the evidence are full, examination-in-chief, cross-examination and re-examination. All the major points made by counsel for the plaintiff are recorded here. The submissions made by the learned counsel on both sides are perfectly set out. And when the learned judge came to deliver his judgment, he referred back to each one of the witnesses that he had heard. The plaintiff gave evidence about what actually happened. He explained to the judge that he had been doing this job for about six years—not an unimportant fact. He told the judge: " I thought it was a hazard, cleaning these tucking blades with a swab ". He said he did not think the method of putting the hands near the blades was a safe one. All that was before the judge.

The judge refers to Mr. Satchell in his judgment. He was the man who had one day with the " Star " newspaper, though his main work was with the magazines. He said to the judge: " I think this method of a swab cleaning these blades is utterly out of date ". In fact, he speaks of the " Star-method ", meaning the method used with the machines printing the " Star ", which he says was entirely out of date. He suggested a long brush made specially for the job and soaked in paraffin.

Mr. Poet said that, after the plaintiff's accident, the suggestion was made by the union that brooms or brushes should be supplied instead of swabs. Mr. Walters, the assistant secretary of N.A.T.S.O.P.A., the printers' union, apparently was present at that meeting. His cross-examination is all duly set out. He gave evidence of accidents which had taken place, and said he was rather surprised still to find this, as he suggested, rather antiquated cleaning method going on at Bouverie Street. He expressed his view about the risk of accidents happening. All that is faithfully recorded by the judge.

An expert said: " The blades become sharp in use ". Everybody knew that, and it did not need an expert witness for that. He said he was told about the swab method of cleaning. " Spaced blades particularly make it dangerous ". There was little space between the blades. He said:

> " You can catch on corners. You are not wiping plain surface. I used

> brush. I found no difficulty with a brush. I consider it safe and I found it effective." A

That is what he said in chief. I should have thought it clearly did not require any expert witness to give that evidence. If I may use the phrase that we always use in the court, it is plainly a matter of common sense that, if you have spaced blades which have got sharp, there is a risk of cutting. He was cross- B examined and appeared to suggest that where the plaintiff was standing rather aggravated the situation; but he withdrew that. He said " I am not suggesting that light has any bearing on accident. Position in which he was standing has nothing to do with the danger ". Then he went on dealing with the question of the swab versus the brush.

That was the evidence. Counsel for the plaintiff made his submissions, C counsel for the defendants replied, and the judge gave his judgment, in the course of which he reviewed the evidence showing that he had it all clearly in his mind. He said that he was invited by learned counsel to go and see the place; that he was glad that he did, because it enabled him to understand fairly easily what happened on that day, which might otherwise have been rather difficult to comprehend. He gave a resumé of what the plaintiff had told him, and all D about the swab. He referred to the evidence of Mr. Satchell, and said:

> " The brushes have longish handles and bristles, fairly hard bristles he tells me, running as an extension of the handle, but he really, beyond this one unfortunate day, has, I think, no knowledge of what goes on in the newspaper-producing industry as a whole."

E

So the judge was considering that evidence.

He dealt with the evidence given by the father of the chapel, Mr. Poet. Mr. Poet was the first-aid man at the time and he had made some extracts from an accident book.

> " That apparently was the only case to which his attention was called F and he was in this official position with the trade union from 1953 to 1955 and [the plaintiff's] unfortunate accident was the only one to which his attention was drawn on behalf of the legal department of the trade union. He thought there was great danger in using the swab and I think that he thought that it was an antiquated proceeding."

That is the record of the learned judge, stating fully the weight given to the G evidence. He goes on to deal with Mr. Smith, who was called as an expert witness. He had inspected the machine. " He thought it was not a safe method and that a brush was more satisfactory ". He dealt with the evidence and with the authorities and gave his judgment in these terms:

> " I think this case falls to be decided on really simpler issues. As I H understand the law, it is the duty of the employers to provide a reasonably safe system of working, not a foolproof system or one which involves an enormous expenditure of money in providing it."

The learned judge is saying it is the duty of the employers to provide a reasonably safe method of working. So the law is quite accurately stated. He continues:

I

> " I have looked at this machine and in my view when the blades are put in a convenient position at the discretion of the gentleman who is about to clean them, he has good light on the subject of his work."

That was obviously to be seen by the judge when he was there. He saw the plaintiff stand in the place in which he said he was standing. He saw the light, and said " He has good light on the subject of his work ". One of the witnesses, as I have pointed out, had rather suggested at one time that light might have had something to do with the accident. Having considered the evidence, the learned judge said that the blades

> "are easily accessible. Any adult man using reasonable care in cleaning off sharpish blades, but by no means of razor blade sharpness, should find no difficulty whatever in doing this work of cleaning the blades of this tucking machine."

Counsel for the plaintiff has said the judge had no right to say that, because it was his own opinion, and was contrary to the evidence given by the plaintiff. It plainly was. The learned judge was saying implicitly, though he did not say it in terms, "I reject the whole of that evidence". He had reviewed it, pointed out certain features about it, and then said that he had seen the machine, and stated the conclusion to which he had come on seeing it. He added:

> "And in my view the only possible explanation of this accident, unfortunate though it was, is that the plaintiff was careless in what he was doing and that in those circumstances he was the author of his own misfortune. Accordingly there must be judgment for the defendants."

Therefore, on the first submission of counsel for the plaintiff, in my opinion the learned judge was perfectly entitled to do what he did. It is not a proper description of what occurred to say that he cast to the winds the evidence that was given and substituted his own opinion therefor. In this judgment the learned judge was manifestly saying that he had in mind the evidence given by the plaintiff—he had taken each witness in turn and stated the substance of what he had said—but that he (the judge) must also bear in mind that he was invited to see the particular operation going on and did see it. He expressed his view with regard to it. His own view was contrary to the view of the witnesses which had been given before him, and, to that extent, impliedly and implicitly, he rejected their evidence.

Counsel for the plaintiff laid stress on *Cole* v. *United Dairies* (*London*), *Ltd.* (7) ([1940] 4 All E.R. 318), in which a workman permanently disfigured by an accident, brought proceedings under the Workmen's Compensation Act, 1925, for a declaration of liability. There was uncontradicted evidence that the disfigurement would prejudice his chance of obtaining work in that employment. The court said that the arbitrator was bound to act on that evidence and was not entitled to set against it the court's own observation of the nature of the injury. The plaintiff was a milk roundsman, and the important evidence was that the manager of the milk-producing firm had said that the disfigurement would be a handicap to a man as a milk roundsman. SIR WILFRID GREENE, M.R., said the arbitrator had no right to adopt his own opinion that it was not a handicap, formed after seeing the disfigurement, because the manager gave evidence as an expert knowing the idiosyncrasies of customers and matters of that kind, which the judge did not know. The Master of the Rolls based his decision on the ground that the arbitrator was substituting his own view for the evidence which had been given. In my opinion that is not the present case. Here the learned judge is not in that sense substituting his own view for the expert evidence given. He is saying that he had considered the expert evidence and was not prepared to accept it; that he was invited to see this place and had seen it; and that this was a common-sense matter, with no subtlety about it. There were the blades to be seen; there was the method by which the cleaning was done; he had seen it with his own eyes, and was in as good a position as anybody else to determine whether that was or was not a reasonably safe thing to do. Therefore, the submission of counsel for the plaintiff on this point fails.

With regard to the system of work, counsel for the plaintiff says that, on the facts and principally on the evidence given of the previous tucking blades accidents, the judge was not entitled to hold that there was a reasonably safe system of work, and that he ought to have paid attention to the evidence of the witnesses who said that they did not think this system was safe, and was not entitled to substitute his own view for it, particularly in view of the nature of the accidents.

At one stage in the argument I was impressed by this list of accidents (I applied the word " formidable " to it); on examination it appears that they extend from 1950 to 1955. They do not seem, however, to have been of a serious nature. They comprised: " Cut left index finger. Cut left thumb. Cut right little finger. Cut third right finger. Cut left index finger. Cut left thumb. Cut right middle finger " and so on. Moreover, in 1950 there were two accidents: " Cut left index finger. Cut left thumb "—two minor injuries over the whole of one year—not very strong evidence of a system that was properly to be criticised as dangerous. In 1951 there were five, spread over a year: " Cut right little finger. Cut right third finger. Cut left index finger. Cut left thumb. Cut right middle finger ". In 1952 there was no accident at all. In 1953 there were two accidents, including one to the plaintiff, " Cut third finger, right hand "; and then the word " hospital ", indicating that he went to hospital; and then Mr. Sclater " Cut finger ". In 1955 there is the one we are dealing with, on Jan. 19: " Cut severely little finger right hand ", for which the plaintiff went to hospital; and then one in February to Mr. Gregory. In 1953, therefore, there were two, the plaintiff and Mr. Sclater. In 1955 there were two, the plaintiff and Mr. Gregory. In 1954 there were none at all. So, when the list of accidents at Bouverie Street is analysed in that way, I do not think it was evidence that this was in any sense a dangerous system of work.

A list of accidents at Commercial Wharf in 1955 and 1956 was put in, but it was unsatisfactory because there was no analysis of them. It is Bouverie Street with which we are concerned.

Finally, counsel for the plaintiff says that the thing that covers this case is really that the defendants called no evidence at all. All the evidence was one way, the evidence for the plaintiff that the system of work was dangerous. The defendants cross-examined to show that it was not, but they called no evidence for that purpose. All that was really put against it was what the judge saw, and counsel says the judge was not entitled to prefer that because it was not evidence. The conclusion to which I come on this second point is that it was a question of fact for the learned judge to determine on the facts of the case. He directed himself properly as to the main issue which he had to decide: was it made out that this was not a reasonably safe system of work ? He said that he had seen the place; that he had seen the operation; that he had listened to all the evidence; that he had listened to accounts from the witnesses; and that the conclusion to which he had come was, in his judgment, that the explanation of the accident was the carelessness of the plaintiff himself and not any fault due to the method of work, and that, therefore, he gave judgment for the defendants. I think that the judgment of the learned judge ought to be upheld, and I would dismiss this appeal.

PARKER, L.J.: I have come to the same conclusion. The short question in this case was whether the defendants had failed in their common law duty to the plaintiff to take reasonable care so to conduct their operations as not to expose him to unnecessary risk. It was said that the operation on which he was engaged, cleaning these tucking blades on the rotary press by means of a swab, was a dangerous operation, and that reasonable care demanded that he should have been supplied with brushes with long handles so as to avoid his fingers having to come close to the tucking blades.

As my Lord has said, the learned judge accepted the invitation of counsel to go to the defendants' premises in Bouverie Street and view the machine in question; and he not only did that, but he saw a demonstration there by the plaintiff himself of the operation on which he was engaged when he injured his

A finger. It was said by counsel for the plaintiff in opening this appeal that the learned judge had formed a fixed view that the system was safe as the result of his inspection, and had paid no regard to any of the evidence thereafter called before him. I see no warrant for any such suggestion. I am sure that the county court judge listened with great care to the evidence, and gave it proper consideration, and indeed his judgment shows that he went through it in detail.

B The important question in the case is the submission that, even so, the learned judge was substituting the impression which he had formed at the view for the evidence in the case, and that this he was not entitled to do. It is contended that the only function of an inspection is to enable the judge to follow the evidence, and that it is, as it were, a mere substitute for a plan or a photograph. I cannot think that it is so limited. A judge may have to decide whether C steps or a staircase are dangerous in their construction or dangerous having regard to the lighting. He may have to decide whether the system of work is safe, or whether an operation is dangerous; and it seems to me that on inspecting the premises or the operation or the system he must be entitled to form at least a prima facie view whether they are dangerous or safe. No doubt he will listen carefully and consider any evidence which is put before him. Matters may D come to light which were not obvious at the inspection, but in a simple case where A says that something is dangerous, and B says it is safe, the judge must be entitled to take into consideration what he saw and the impression that he formed at the view. It seems to me that it makes no difference if B calls no evidence and the only evidence before him is that of A. Again, he is entitled to take into consideration the impression which he had formed at the view in E assessing the weight to be given to A's evidence.

Reference, however, was made to the note in the COUNTY COURT PRACTICE under Ord. 23, r. 14 of the County Court Rules, 1936, where this is said:

> "A view is merely for the purpose of enabling the tribunal to understand the questions raised and to follow and apply the evidence, and must not be F used to supply or take the place of evidence."

For that the case of *London General Omnibus Co., Ltd.* v. *Lavell* (2) ([1901] 1 Ch. 135) is cited; and, without referring to the case, a similar note appears in the ANNUAL PRACTICE to R.S.C., Ord. 50, r. 4. That note, read literally, goes much too far. In the examples referred to above the judge is, in a sense, treating G what he saw as part of the evidence, and in my view it was part of the evidence; and I entirely agree with what was said by DENNING, L.J., in *Goold* v. *Evans & Co.* (5) ([1951] 2 T.L.R. 1189)*. Indeed, it is just as much a part of the evidence as if the machine had been brought into the well of the court and the plaintiff had there demonstrated what took place.

My Lord has referred to *London General Omnibus Co., Ltd.* v. *Lavell* (2). It H seems to me that that was decided on very special facts and that there is a great deal to be said for the explanation of the decision given by FARWELL, J., in the later case of *Bourne* v. *Swan & Edgar, Ltd.* (4) ([1903] 1 Ch. 211). The case of *London General Omnibus Co., Ltd.* v. *Lavell* (2) does seem to have been treated as an action for deceit and on the basis that further evidence was needed which was not called. Reference was also made to a Privy Council appeal from I India, *Kessowji Issur* v. *Great Indian Peninsula Ry. Co.* (8) ((1907), 96 L.T. 859). As it seems to me, that was a very different case. There, when the matter got before them on appeal, the appellate court chose themselves to have a view; and LORD ROBERTSON said (ibid., at p. 861):

> "The practical result was that the appeal was allowed and the suit dismissed, the case being decided, not on the testimony given at the trial as to

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* See p. 908, letter I, ante.

> what took place on the night of the accident, but by the judges' observation of what they saw on another night altogether."

It seems to me that that is an entirely different case.

There may be cases in which the matter falls to be decided on technical evidence and where a view will not be of any assistance, except, no doubt, as a substitute for a plan or a photograph, and it seems to me that such a case was *Cole* v. *United Dairies* (*London*), *Ltd.* (7) ([1940] 4 All E.R. 318). Indeed, as I read the judgment of the Master of the Rolls, he was treating it on that basis, because he says (ibid., at p. 321):

> " The proper way to obtain information of that kind is by evidence of persons who are acquainted with the trade."

The information referred to was of idiosyncrasies, tastes and dislikes of customers. In other words, he was treating that as technical evidence which a mere view of the plaintiff's injuries would not assist.

The present case was a simple one. It in no way depended on technical evidence. Indeed, if the experts were asked whether in their view the system of working was reasonably safe, objection might well have been taken to the question because that was the question for the judge. As Lord Macnaghten said in *Payton & Co.* v. *Snelling, Lampard & Co.* (6) ([1901] A.C. 308 at p. 311):

> " The judge, looking at the exhibits before him and also paying due attention to the evidence adduced, must not surrender his own independent judgment to any witness."

Finally, I would like to add that, like my Lord, I was much impressed at one time with what appeared to be a formidable list of previous accidents. On analysis, however, I think—and I think it so appears from the learned judge's judgment and the notes of evidence—that all that was proved by way of previous accidents was some nine in all ranging over the years 1950 to 1955 at Bouverie Street, and accidents which on the face of it were trivial. It is not a case where it could be said that the learned judge was giving undue weight to the impression he had formed at the view, and no weight or too little weight to the previous accidents. These were small in number, they were trivial, and the degree of injury likely to result is, of course, a very material question in deciding whether employers are or are not taking reasonable care.

I think that the learned judge was entitled to come to the conclusion to which he did come and I would dismiss this appeal.

DENNING, L.J.: I entirely agree with the judgments which my Lords have delivered. It follows from our decision today that the observations of Lord Alverstone, C.J., in *London General Omnibus Co., Ltd.* v. *Lavell* (2) ([1901] 1 Ch. 135 at p. 138) unduly restrict the function of a view. Everyday practice in these courts shows that, where the matter for decision is one of ordinary common sense, the judge of fact is entitled to form his own judgment on the real evidence of a view, just as much as on the oral evidence of witnesses. The appeal must be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Shaen, Roscoe & Co.* (for the plaintiff); *Berrymans* (for the defendants).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

THE GUILDFORD.
OWNERS OF S.S. TEMPLE BAR *v.* OWNERS OF M.V. GUILDFORD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), June 12, 13, 14, 15, 18, 19, 27, 1956.]

Negligence—Damages—Novus actus interveniens—Conduct of plaintiff—Collision at sea—Refusal by plaintiffs of defendants' offer to tow—Plaintiffs' ship subsequently sinking and becoming a total loss—Reasonableness of refusal.

Shipping—Collision—Consequential damage—Novus actus interveniens—Refusal by plaintiffs of defendants' offer to tow—Plaintiffs' ship subsequently sinking and becoming a total loss—Reasonableness of refusal.

Admiralty—Practice—Elder Brethren—Advice of Elder Brethren on questions of seamanship.

The Guildford, a motor vessel of eighteen hundred tons gross, collided with the Temple Bar, a single-screw steamship of over seven thousand tons gross. The Guildford was laden with a full cargo of gas coal and the Temple Bar was laden with a cargo of nearly ten thousand tons of manganese ore. The collision occurred at 12.35½ a.m. on Mar. 10, 1954, in a dense fog. The Guildford was badly holed and signalled for a tug and also asked the Temple Bar to stand by. The Temple Bar offered to take the Guildford in tow, but the master of the Guildford replied that he had already signalled for a tug.

Five hours after the collision the Guildford was taken in tow by a tug, but before she could be towed to safety she had to be abandoned and sank and became a total loss.

On the question of liability for the collision the trial judge found both ships to blame and apportioned three-quarters of the blame to the Guildford and one-quarter to the Temple Bar. The question then arose whether or not the damages recoverable, of which a proportion would be recoverable by the Guildford, should include the loss sustained by her sinking and becoming a total loss. The Elder Brethren advised the trial judge that towage of the Guildford by a ship as large and as heavy laden as the Temple Bar in darkness and fog was dangerous and only to be attempted as a last resort.

Held: (i) the advice of the Elder Brethren was expert evidence and admissible on the issue of fact about seamanship (observations of SCOTT, L.J., in *The Clan Lamont* ((1946), 79 Lloyd's Rep. at p. 524 applied); and accordingly,

(ii) the decision of the master of the Guildford to await the tug was in the circumstances reasonable and seamanlike and did not break the chain of causation and the Guildford was entitled to recover her proportion of the consequential damage (*The Oropesa,* [1943] 1 All E.R. 211 and observations of LINDLEY, L.J., in *The City of Lincoln* (1889), 15 P.D. at p. 18 applied).

[As to a negligent act followed by the plaintiff's mistake, see 23 HALSBURY'S LAWS (2nd Edn.) 593, para. 844, note (n); and for a case on the subject, see 36 DIGEST (Repl.) 40, *196.*

As to assistance of the court by nautical assessors, see 13 HALSBURY'S LAWS (2nd Edn.) 601, para. 669, note (s); and for cases on the subject, see 22 DIGEST (Repl.) 506, 507, *5611-5613.*]

Cases referred to:

(1) *Lord* v. *Pacific Steam Navigation Co., Ltd., The Oropesa,* [1943] 1 All E.R. 211; sub nom. *The Oropesa,* [1943] P. 32; 112 L.J.P. 91; 168 L.T. 364; 36 Digest (Repl.) 231, *1231.*

(2) *S.S. Baron Vernon* v. *S.S. Metagama,* 1928 S.C. (H.L.) 21; 29 Lloyd's Rep. 253.

(3) *S.S. Singleton Abbey* v. *S.S. Paludina*, [1927] A.C. 16; 95 L.J.P. 135; *sub nom. The Paludina*, 135 L.T. 707; 36 Digest (Repl.) 192, *1013*.
(4) *The City of Lincoln*, (1889), 15 P.D. 15; 59 L.J.P. 1; 62 L.T. 49; 36 Digest (Repl.) 40, *196*.
(5) *The Clan Lamont*, (1946), 79 Lloyd's Rep. 521.
(6) *Robins* v. *National Trust Co.*, [1927] A.C. 515; 96 L.J.P.C. 84; 137 L.T. 1; Digest Supp.
(7) *Watt* (*or Thomas*) v. *Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484; 1947 S.C. (H.L.) 45; [1947] L.J.R. 515; 176 L.T. 498; 2nd Digest Supp.

Action.

In this action the plaintiffs as the owners of the steamship Temple Bar claimed, and the defendants as the owners of the motor vessel Guildford counterclaimed damages for negligence in respect of a collision between the two vessels as a result of which the Guildford sank and became a total loss.

The Temple Bar was a single-screw steamship of over seven thousand tons gross, four hundred and twenty-four feet in length and fifty-seven feet in beam. On Mar. 10, 1954, she was proceeding inward from Takoradi to Middlesbrough laden with a cargo of nearly ten thousand tons of manganese ore. At 12.25 a.m. on that date she was off Whitby and altered course to 295 degrees. There was a dense fog in the area and visibility was reduced to four to five hundred feet.

At that time the Guildford, a vessel of eighteen hundred tons gross, two hundred and sixty feet in length and thirty-nine feet in beam, was proceeding from the Tyne to London on a course of 134 degrees and at a speed of ten knots. She was laden with a full cargo of gas coal. The Guildford was equipped with radar and when the two ships were about two miles apart the Guildford's radar showed an echo on the port bow which subsequently was found to be the echo of the Temple Bar. The Guildford altered course to starboard but no attempt was made to plot the course of the echo. The ships sighted each other when they were about four hundred feet apart, the Guildford crossing the bow of the Temple Bar from starboard to port, and at 12.35½ a.m. they collided, the bow of the Temple Bar striking the stern of the Guildford.

At 12.50 a.m. the Guildford sent an S.O.S. reporting the collision and requiring a tug to stand by. At 12.59 a.m. the Temple Bar was asked to stand by. At 1.05 a.m. the Temple Bar offered to take the Guildford in tow, but the master of the Guildford replied that he had already signalled for a tug. At 5.40 a.m. the Guildford informed the Temple Bar that the tug had now got her in tow and that the Temple Bar could proceed on her voyage. Shortly after 12 noon an attempt was made to beach the Guildford but she heeled over and sank.

The plaintiffs now claimed damages for the negligence of the Guildford. The defendants counterclaimed and stated that such severe damage was caused

> "that in spite of assistance by the Whitby lifeboat and four tugs the Guildford sank during the early hours of the afternoon of Mar. 10."

By their reply and defence to the counterclaim the plaintiffs alleged that they

> "specifically deny that the sinking of the Guildford was directly caused by the collision. About ten minutes after the collision (which collision occurred about 00.35½ on Mar. 10, 1954) the master of the Temple Bar sent a wireless message to the master of the Guildford offering to take the Guildford in tow. The said offer was refused by the master of the Guildford on the ground that he had sent for tugs. Tugs did not arrive until 05.42 on the same day. The Temple Bar stood by all this time. Had the offer of the Temple Bar to tow the Guildford been accepted the Temple Bar could have towed the Guildford to the mouth of the River Tees a distance of about twenty-five miles",

and it was alleged that in that event the Guildford would have met the tugs fitted with salvage pumps, which had been ordered by the master of the Guildford, and would not have sunk. By their rejoinder the defendants alleged

> " 3. They specifically deny that the master of the Temple Bar offered to take the Guildford in tow as alleged . . . 4. Additionally the defendants say that it would have been impracticable and dangerous for those on board the Temple Bar to attempt towing the Guildford due to the condition of the Guildford as the result of the collision."

On the summons for directions it was ordered that the trial judge should determine liability for consequential damage (if any) arising from the refusal of assistance, and this report deals with that aspect of the case.

Kenneth Carpmael, Q.C., and *P. T. Bucknill* for the plaintiffs.
W. W. Porges, Q.C., and *D. H. Hene* for the defendants.

Cur. adv. vult.

June 27. **LORD MERRIMAN, P.**, read the following judgment in which, having stated the facts, he said: I find as a fact that the Temple Bar was running at not less than eight and a half knots for part of the first watch and the crucial thirty-five minutes of the middle watch after midnight during which times her telegraph was at half speed. I am advised by the Elder Brethren that in the conditions then prevailing immediately before and after midnight, and more particularly in the conditions prevailing between the Whitby High Light and the place of the collision, to run at any speed exceeding six knots was extremely dangerous, and, coupled with the absence of any look-out forward, was not good seamanship. Accordingly, I find that the Temple Bar is to blame for the collision. It may well be that at the speed at which she was travelling a look-out forward would not have made much difference; but had the Temple Bar been travelling at a moderate speed, say between four and five knots, an increase by about a hundred and twenty feet of the range of visibility, as seen from the bridge, might have been important. Save for this, I am satisfied that a good look-out was being kept in the Temple Bar. I have no doubt, however, that her speed, though not so excessive as that of the Guildford, contributed to the collision. On the other hand, the Guildford was gravely at fault in respect of her look-out, which was directly responsible for her reckless starboarding across the Temple Bar's course, at excessive speed. Taking all the circumstances into account, I apportion three-quarters of the blame to the Guildford, and one-quarter to the Temple Bar.

On the summons for directions it was ordered that the trial judge should determine liability for consequential damage (if any) arising from the refusal of assistance. That means in effect that it was left to the judge at the trial to decide, if the Temple Bar should be held liable for the collision, whether the damages recoverable by the Guildford should include her proportion of the loss sustained by her sinking and, as events have proved, becoming a total loss. On behalf of the Temple Bar it is argued that the chain of causation was broken by the admitted refusal by the master of the Guildford of the Temple Bar's offer to take her in tow. I take the material facts from the master's evidence and from the Guildford's radio log. At 12.50 a.m. the Guildford sent an S.O.S. reporting the collision and requiring a tug to stand by. At 12.59 the Temple Bar was asked to stand by and reported that she was doing so. At 1.05 a.m. she offered to take the Guildford in tow, to which the master of the Guildford replied that he had, as was the fact, already signalled for a tug. The Temple Bar continued to stand by, no doubt in case it was necessary to save life. At 1.50 the Guildford signalled to the Temple Bar: " Coal has hole jammed in engine room ". The master said that the coal, meaning the small coal, seemed to be " cementing up " and holding the water. This was reported to Cullercoats six minutes later, and the demand for a tug was repeated. The chief engineer told the master that he did not want to move the engines for fear of shifting the coal. This was reported to Cullercoats at 2.25, and the demand for a tug was again repeated. At 2.29 it was reported that the Euston Cross was on the way. By 5.28, three hours later, the Euston Cross had arrived, and was told to " take it very easy; have slit aft between No. 3 and engine room "; and at 5.40 the Guildford signalled to the Temple Bar that the tug had now got her in tow, and informed the Temple Bar that she might proceed on her voyage. Up to that point the situation had remained unchanged.

According to the master's evidence the Guildford was making between two and three knots in tow of the Euston Cross, but he said that from 7.30 onwards the coal was dislodging from the hole because of the movement of the ship through the water. Up to that time, he said, the pumps had kept the situation well under control in the engine room but not in No. 3 hold, and for about half an hour after the coal was dislodged things were still under control, but the chief engineer then reported that water was making in the engine room bilge. This is confirmed by a signal to Cullercoats reporting her position at 7.58, and adding " Making water engine room ". After that, the master said, it was never possible to get things under control. At 8.9 another tug, the Kings Cross, was proceeding to the scene and ten minutes later Cullercoats reported that two other ships were proceeding to the Guildford's assistance, to which the reply was that the Whitby lifeboat was standing by, and they might be told to proceed. That signal contained the statement " Now got mats in ". No evidence was given from the Guildford about the mats, and counsel for the plaintiffs made it clear that he deliberately asked no questions on that subject because of the burden of proof which lay on the Guildford. From 8.24 to 9.44 there was no towage because the Euston Cross was ordered to come alongside with her pump. This evidently took some time to rig, and eventually proved to be inadequate. By 9.44 the Kings Cross had arrived, and was told just to take the weight, the Euston Cross not having got the pump working yet. At 10.32 the Guildford reported that water was gaining in the engine room. The radio log shows that other pumps were on the way, but by 11.33 the generators were cut off. It was evidently hoped to beach the Guildford on the North Gare or even up river opposite No. 9 buoy. As late as 12.18 the Guildford signalled to the Kings Cross that they were trying to make No. 3 buoy. However, it was necessary to beach her a mile short of the South Gare light. The attempt was only partly successful as the Guildford took the ground with her stern, with her fore end remaining buoyant, and she heeled over to starboard. At 12.45 p.m. the order was given to abandon ship, and all aboard were taken off by the Whitby lifeboat, which had stood by from 2.14 a.m. The master himself finally left the ship at 12.59 p.m., having returned to her meanwhile to let go the anchor to prevent her drifting.

On these facts the argument, shortly stated, is put as follows: The onus of proving each and every head of damage is on the claimant. Five hours elapsed before any tug took the Guildford in tow, and another seven hours having elapsed before the ship was abandoned within a mile or less of safety, it is suggested that the refusal of the Temple Bar's offer to tow, made directly after the collision, was the real cause of the final loss. At the very least, it is suggested, the Temple Bar could have brought the Guildford much nearer to Tees Bay, so that tugs could have taken her in tow at a point closer to safety; and at any rate, that it is for the Guildford to prove that this method would not have been successful, and to put forward all the evidence on which the matter could be determined. In particular it is complained that the intention to call the chief engineer of the Guildford having been announced, with the intimation that his evidence was likely to take some time, the Guildford's case was closed without his going into the witness-box. Thus it is suggested that the details about the jamming of the hole with coal, and the circumstances in which the coal subsequently failed to hold the water, remain unexplained. It is also complained that although the Guildford had leave to call the marine superintendent of the towage company who was actually on board the Guildford for an unspecified period, or, failing him, the master of the first tug, the court was left without any evidence from any person qualified to give it, of the hazards of the actual towage carried out by the Euston Cross and the Kings Cross respectively. Moreover, the chief officer who was sent below to investigate the damage immediately after the collision and who gave what the master described as a very adverse and serious report, must, it is suggested, have been in a position to amplify his signed statement and to throw some light on subsequent events. I appreciate the force of these criticisms on the gaps in the evidence about what actually happened; but I am not convinced that they have much bearing on the question for my determination.

In my opinion, *Lord* v. *Pacific Steam Navigation Co., Ltd., The Oropesa* (1) ([1943] 1 All E.R. 211), amongst other cases, clearly establishes that the failure of the method actually adopted does not show that the decision to adopt that course was not reasonable. I doubt very much whether evidence about the incidents of the unsuccessful towage really throws much light on the reasonableness, or otherwise, of refusing the alternative method preferred. I agree with the argument that the burden of proof lies on the Guildford. Without attempting to resolve a divergence of opinion in the House of Lords between certain observations about the onus in *S.S. Baron Vernon* v. *S.S. Metagama* (2) (1928 S.C. (H.L.) 21), and *S.S. Singleton Abbey* v. *S.S. Paludina* (3) ([1927] A.C. 16), I think that it is evident that the majority in *The Paludina* (3), agreed with the way in which the onus was placed by Bankes and Atkin, L.JJ., in the Court of Appeal. The opening passage of Lord Sumner's opinion makes this clear, and both Lord Carson and Lord Blanesburgh agreed with him. Moreover, Langton, J., in *The Oropesa* (1) ([1942] P. 140), said expressly that he approached the case from that point of view. In the Court of Appeal ([1943] 1 All E.R. at p. 216), Lord Wright expressed his entire agreement with the way in which Langton, J., had dealt with the case, though without particular reference to the question of the burden of proof. Thus, in my opinion, the question for decision is whether it is established that it was reasonable for the Guildford to refuse the offer of towage by the Temple Bar, and not whether the Temple Bar has proved that it was unreasonable for the Guildford to refuse.

That reasonableness or unreasonableness of the refusal is the test is, in my opinion, settled by the judgment of the Court of Appeal in *The Oropesa* (1). Lord Wright said ([1943] 1 All E.R. at p. 213):

> " There are invoked certain well-known formulae, such as that the chain of causation was broken, that there was a novus actus interveniens. These somewhat august phrases, sanctified as they are by standing authority, only mean that there was not such a direct relationship between the act of negligence and the injury that the one could be treated as flowing directly from the other."

Like Lord Haldane in *The Metagama* (2) (1928 S.C. (H.L.) at p. 25), he relied ([1943] 1 All E.R. at p. 214) on the judgment of Lindley, L.J., in *The City of Lincoln* (4) ((1889), 15 P.D. 15), who said (at p. 18):

> " I take it that reasonable human conduct [Lord Wright stressed that expression] is part of the ordinary course of things. So far as I can see my way to any definite proposition I should say that the ordinary course of things does not exclude all human conduct, but includes at least the reasonable conduct of those who have sustained the damage, and who are seeking to save further loss."

Again, referring to Lord Haldane's approval in *The Metagama* (2) of that passage from *The City of Lincoln* (4) Lord Wright thought ([1943] 1 All E.R. at p. 216) that Lord Haldane's words:

> " . . . if they do whatever they think reasonable, although unsuccessful, their mistaken judgment may be a natural consequence for which the offending ship is responsible ",

contained an important statement of principle. Scott, L.J., said ([1943] 1 All E.R. at p. 216) that he was satisfied that the action taken by the master to save the life of those for whom he was responsible was reasonable, " and, therefore, there was no break in the chain of causation." The word " therefore " is the important word.

In my opinion those passages are directly in point in the present case. The Guildford is asserting that her refusal of the towage was " the reasonable conduct of those who have sustained the damage, and who are seeking to save further loss." The master gave as his reasons that the Temple Bar was a large ship, heavily laden; that he did not think that it was practicable for her to come alongside and get a towrope; that there was a chance that a heavy ship like that approaching him in the fog would hit him pretty hard, and put his ship in a worse position. In cross-examination he said that he did not think that the proffered towage was practicable. It had to be a careful towage, with ability to ease up when required, and he did not think that the Temple Bar could have managed it. He added that a big heavy ship like the Temple Bar carries her way quite a distance even when the engines are stopped, much more so than a small ship or a tug would do. He did not agree that the fact that she was on the spot would have made it advisable to make the attempt. He agreed that his ship was lost about half a mile from where she could have been beached, referring presumably to the South Gare, but added that if the Temple Bar had taken him in tow he thought he would have sunk much sooner. He was afraid that any jerk on the towrope, or an excessive speed, would have dislodged the coal. I was favourably impressed by this evidence of the master. He struck me as being a credible witness.

Counsel for the plaintiffs submitted that there was no evidence to support these opinions. When I intimated that the Elder Brethren were of the same opinion as the master of the Guildford, counsel argued that the court was not entitled to take the advice of the Elder Brethren when the state of things aboard the Guildford was deliberately left so vague. I do not agree with that view. On the contrary, in *The Clan Lamont* (5) ((1946), 79 Lloyd's Rep. 521), a case which, like, the present, raised the question of the onus of proof in a matter of seamanship, Scott, L.J., said (at p. 524):

> " Of course in arriving at that conclusion [namely, that there was no bad seamanship] we attach the greatest weight to the expert advice which has been given to us by our assessors—and that advice, it should be remembered, is expert evidence, admissible in Admiralty Courts, on all issues of fact about seamanship."

The advice which I have received is that in the difficult conditions created by the darkness and the fog, towage of a ship the size of the Guildford by a ship as large and as heavily laden as the Temple Bar should only be attempted as a last resort if no other method of towage is available. Having regard to the fog, I am advised that the operation would have been dangerous: first, in the approach to pass the towline; and secondly, if this could be achieved without damage, the towrope would have had to be as long as possible, communication would have been difficult in that state of visibility, and the clumsiness and lack of manoeuvrability of a vessel like the Temple Bar, in comparison with a tug, and the inability of the Temple Bar either to turn or to take her way off quickly, even at her slowest speed, might have caused instant disaster. In this connection, I am advised that it is an important consideration that the Temple Bar is a single-screw steamship of only moderate power. Moreover, if it had become necessary to beach the Guildford while in tow of the Temple Bar the operation would have been almost impossible since the Temple Bar was drawing about ten feet more than the Guildford.

In substance the Elder Brethren agree with the master. In spite of the lapse of time between the decision to refuse the offer of the Temple Bar and the final disaster, it must be remembered that there was no change for the worse in the situation during the five hours before the Euston Cross arrived; if anything, the situation improved for the time being, owing to the jamming of the coal, and meanwhile the Temple Bar was in fact standing by. In my opinion the master's decision to await the tug was a reasonable and seamanlike decision. That being my conclusion, the question of the onus of proof need not be further considered—see per VISCOUNT DUNEDIN in *Robins* v. *National Trust Co.* (6) ([1927] A.C. 515 at p. 520), and *Watt* (*or Thomas*) v. *Thomas* (7) ([1947] 1 All E.R. 582 at p. 587), per LORD THANKERTON. Accordingly, I hold that the Guildford is entitled to recover her proportion of the consequential damage.

Order accordingly.

Solicitors: *Hill, Dickinson & Co.* (for the plaintiffs); *Botterell & Roche* (for the defendants).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

R. *v.* MIDDLESEX COUNTY CONFIRMING AND COMPENSATION COMMITTEE, *Ex parte* FROST.

[QUEEN'S BENCH DIVISION (Pilcher, Ormerod and Donovan, JJ.), July 2, 1956.]

Licensing—Licence—Disqualification of premises—Whether containing two rooms for the accommodation of the public—Licensing Act, 1953 (1 & 2 *Eliz.* 2 *c.* 46), *s.* 32 (1), *s.* 34 (2).

Justices granted an on-licence for the sale of any intoxicating liquor on premises, but, in effect, restricted the licence to serving intoxicating liquor in the restaurant on the first floor. The premises also contained a hall and a café on the ground floor for the accommodation of the public. Confirmation of the grant of the licence was refused on the ground that the licence was void under s. 34 (2)* of the Licensing Act, 1953, because the premises were disqualified under s. 32 (1) (a)† as not containing "two rooms for the accommodation of the public" within that enactment, viz., two rooms where intoxicating liquor could be consumed. On application for mandamus directed to the confirming authority,

Held: the premises were not disqualified under s. 32 (1) (a) because they contained at least "two rooms for the accommodation of the public" within that enactment, which did not require that the two rooms should be licensed for the service of intoxicating liquor; and, therefore, an order of mandamus would be granted.

Per ORMEROD, J.: the question of qualification or disqualification is to be considered [as at the time] when the application is made to the justices and not when the justices have considered the application and made their decision (see p. 924, letter E, post).

[For the Licensing Act, 1953, s. 32 (1), s. 34 (2), see 33 HALSBURY'S STATUTES (2nd Edn.) 179, 181.]

Motion for mandamus.

This was a motion by the applicant, Frederick Frost, on behalf of the Willesden Borough Council, for an order of mandamus that the Middlesex County Confirming and Compensation Committee should hear an application that the grant of a justices' on-licence to the applicant and Miss Amy Heath authorising them to hold an excise licence and to sell any intoxicating liquor by retail for consumption on premises known as Dollis Hill House should be confirmed. The facts appear in the judgment of ORMEROD, J.

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* For the terms of s. 34 (2), see p. 923, letter A, post.

† For the terms of s. 32 (1) (a), see p. 923, letter F, post.

Percy Lamb, Q.C., and *Graham Eyre* for the applicant.

Richard Elwes, Q.C., and *S. H. Lamb* for Harrow, Willesden and District Licensed Victuallers' and Beer Retailers' Trade Protection Society.

J. C. G. Burge for the Middlesex County Confirming and Compensation Committee.

PILCHER, J.: I will ask Ormerod, J., to give the first judgment.

ORMEROD, J.: This is an application by Frederick Frost on behalf of Willesden Borough Council for an order of mandamus that the Middlesex County Confirming and Compensation Committee should hold an adjourned hearing of the confirming committee and hear an application that a grant of a licence to the applicant and Miss Amy Heath authorising them to hold an excise licence to sell any intoxicating liquor by retail for consumption on the premises at Gladstone Park known as Dollis Hill House should be confirmed.

The facts which are before the court are contained in an affidavit by the applicant, and so far as I know there is no conflict of evidence in the case. The circumstances are these: Dollis Hill House is an old house in Gladstone Park, Willesden, which was acquired by the local authority under their compulsory powers early in this century, and it has been used by the local authority over a large number of years as a catering establishment, I suppose for the benefit of people using the park and other persons who wish to hold dinners, and so on, on the premises. Recently, the local authority have been minded to seek a licence for certain parts of the premises and, according to the affidavit of the applicant, an application was made on Feb. 3, 1956, by the applicant, who is the treasurer of Willesden Borough Council, and Miss Amy Heath, who is the catering supervisor of Willesden Borough Council, as nominees of the corporation for a justices' licence to sell intoxicating liquor on the premises of Dollis Hill House. At the hearing of the application a plan was put before the court, a copy of which is before this court. That plan showed the dimensions of the structure and arrangement of the rooms of the house, and also showed, coloured in red, the rooms in which it was desired to sell liquor. Those rooms consisted of a room called the hall on the ground floor and a number of rooms on the first floor which consist of a restaurant, a terrace, a landing and service room, and so on. The whole of the other rooms are indicated on this plan, and quite clearly there are a considerable number of rooms available and open to the public for their accommodation in the building in addition to the rooms which are marked red on the plan, particularly on the ground floor where there is a room which has been used for a number of years as a café.

The matter came before the licensing justices and they acceded to the request of the borough council and granted a licence to those premises subject to certain conditions to which the council readily agreed, and indeed they were conditions which had been specified by the council in their application for a licence. Those conditions are set out in para. 4 of the affidavit, and deal first of all with monopoly value. Condition 2 is that there should be no off-sales, condition 3 is that there shall be no bar on the premises, and the important one is condition 4. Condition 4 is:

> " That intoxicating liquor shall at all times be served only in the upstairs suite of rooms, comprising restaurant, open terrace and service room and only with a bona fide meal, except on the occasion of organised parties or functions and on all occasions such intoxicating liquor to be served by waiters or waitresses."

The result of all that is that the premises were licensed. The justices did not grant the application so far as the council sought to be allowed to sell liquor in the hall downstairs; they granted it only in respect of the premises on the first floor and then subject to the conditions which were specified in para. 4 of the affidavit of the applicant.

The matter then came before the Middlesex County Confirming and Compensation Committee on Apr. 27, 1956, and objection was then taken to the licence on the ground that it was void because the justices had no power to grant it by virtue of s. 32 (1) and s. 34 (2) of the Licensing Act, 1953, viz., that Dollis Hill House did not contain in addition to the rooms occupied by the inmates at least two rooms for the accommodation of the public required by s. 32 (1) (a), and accordingly the grant was void by reason of the provisions of s. 34 (2) of the Act.

It is abundantly clear on looking at the plan of the premises of Dollis Hill House that apart from the portion of the premises limited by condition 4 of the licence granted by the justices as the place where liquor could be sold, the house contains a substantial number of rooms in excess of that room. It certainly contains two rooms in addition to the rooms which are used by the inmates of the house. The affidavit sets out by reference to the plan the rooms which are used by the inmates, and it is clear that after taking into account the specified part of the building where liquor could be sold there were in addition at least the hall downstairs, which is quite a substantial room, and the existing café, which is an even larger room, and it may well be, though it is not relevant to inquire into it, that there were other rooms which were open to the public and available for their accommodation.

The contention of the Licensed Victuallers' Protection Society in this case is that the only room which was available in view of the conditions imposed by the justices for the sale of intoxicating liquor was the restaurant upstairs, and that although the other rooms in the building may have been available for the accommodation of the public, they were not available for the accommodation of the public in the sense required by s. 32 of the Licensing Act, 1953, because they were not available, as counsel first of all put it, for the sale of liquor, and neither were they even available for the consumption of liquor, and that in those circumstances the premises did not comply with the terms of s. 32.

Section 32 of the Licensing Act of 1953, which repeats substantially, although not in precise terms, the provisions of earlier Licensing Acts, particularly the Licensing Act of 1872 and the Licensing (Consolidation) Act, 1910, provides by sub-s. (1) as follows:

> " Subject to the following provisions of this section, premises shall be disqualified for receiving a justices' on-licence—(a) if they do not contain, in addition to the rooms occupied by the inmates, at least two rooms for the accommodation of the public, or (b) if the premises are of an annual value below that set out in Part 1 of Sch. 5 to this Act."

The question of annual value does not arise here, and the only question which we have to consider is whether these premises at the time when the licence was granted by the justices were disqualified from having a licence attached to them by reason of para. (a) in that they did not contain in addition to the rooms occupied by the inmates at least two rooms for the accommodation of the public. It is interesting to note that s. 32 (4) provides that

> " Railway refreshment rooms shall not be disqualified under this section by reason of their annual value ",

and that means, presumably, that railway refreshment rooms are on exactly the same basis of consideration from the point of view of qualification or disqualification for a licence as any other premises except that they are not liable to be disqualified by reason of the fact that their annual value is below the prescribed value set out in the Schedule. So much for s. 32.

Section 34 (2) provides:

> " A justices' licence purporting to be held by a person disqualified for holding a licence, or attached to premises disqualified for receiving the licence, shall be void."

It is on account of the provisions of that section that the Licensed Victuallers' Protection Society in this case claim that this licence was void, and it was that submission which was upheld by the confirming authority.

The submission of counsel for the applicant is that here are premises which contain in addition to the rooms reserved for the inmates or occupied by the inmates, at least two rooms for the accommodation of the public, not necessarily rooms in which liquor is sold but rooms which are there for the accommodation of the public; that "accommodation of the public" in s. 32 (1) (a) of the Licensing Act, 1953, means what it says, accommodation for the public without qualification and that, as those rooms are available, the premises cannot be said to be disqualified. As part of his argument on that basis he prays in aid s. 32 (4) which relates to railway refreshment rooms. When it comes to the interpretation of s. 32, there is some cogency in the argument that as railway refreshment rooms, which ordinarily contain one room only for the purpose of selling or consuming liquor, are on the same footing so far as disqualification under s. 32 (1) (a) is concerned as any other premises for which a licence is sought, presumably it is because there are other rooms available on a railway station for the accommodation of the public even though they are not rooms in which intoxicating liquor is sold. The contention is, therefore, a very simple one, that if you look at these premises at the time the application was made, there are certainly more than two rooms available for the accommodation of the public and that in those circumstances these premises cannot be said to be disqualified. The view I have formed is that that is the proper view to be taken of this section, particularly having regard to the terms of s. 34 (2) which says that the justices' licence shall be void if it is held by a person disqualified for holding a licence or attached to premises disqualified for receiving a licence. The time when qualification or disqualification is to be considered is when the premises as a whole are being considered by the justices when the application is made and not when the justices have considered the application and made their decision. The justices have here premises in respect of which an application is made, and they have to consider that application. If in considering that application they say that there shall be a licence attached to these premises but it shall be limited by certain conditions which provide for the sale of liquor in one room only, then at that stage (when the result of the application is forthcoming) it is much too late to say that these premises are disqualified by virtue of s. 32 (1) and s. 34 (2) and that the licence must be void. The procedure appears to be this, that when an application is made it is for the justices to decide whether the premises are qualified or not qualified to have a licence attached to them; and if they decide that the premises are properly qualified having regard to the provisions of s. 32, then they will consider whether in the circumstances a licence should be granted and the conditions in which that licence should be granted.

That is not necessarily the whole of the applicant's submission in this case. A licence was granted by the justices not of one room only, the restaurant upstairs; the licence was a licence of Dollis Hill House subject to conditions. One of those conditions, and the important one which we have to consider here is a condition which limited the sale of liquor to one room and one room only and then only under certain conditions. The point was put by PILCHER, J., in the course of argument that if any customer in the restaurant chooses to take his coffee and brandy down into the hall after he has dined, there seems to be no reason why he should not. It may very well be that this is not the intention of the local authority, and it may be he would be discouraged, but, as I see the terms of the licence and the terms of the conditions attached to it, there is nothing in the licence to prevent him from doing that. Therefore, even if the submission of the applicant is wrong that the term "accommodation of the public" in s. 32 (1) (a) is accommodation generally of the public, it would seem that even so the applicant's submission is the correct one, that these rooms are available for the accommodation of the public not only in the general sense of accommodation but in the much more limited sense of accommodation for the public for the purposes of the licensed premises. My own view is that that is taking much too narrow a view and putting a much narrower construction on s. 32 than is demanded by its words. Even if that construction were used, however, it does appear to me that on the construction of the licence which has been granted there would be two rooms available for the public.

The submission of counsel for the Licensed Victuallers' Protection Society, who amongst other people opposed the grant of this licence, raised this point as to the qualification of these premises, viz., as I understand it, that rooms " for the accommodation of the public " in s. 32 (1) (a) of the Licensing Act, 1953, must mean rooms for the accommodation of the public for the purposes of a licensed house, that is to say, for the purpose of purchasing liquor, or if not that, certainly for the purpose of consuming liquor. Counsel stated, as I have no doubt is perfectly true because he has had very great experience of these matters, that for a very long time it has been the practice of persons applying for a licence authorising the sale of spirits* in respect of premises to interpret s. 32 (1) (a) as meaning premises containing at least two rooms which can be used for the purposes of drinking. He says that that is a universal practice which has been adopted and carried on, and the interpretation of the words of the section which has been generally accepted by licensing authorities. I accept from counsel that that has been the common practice, but the real answer to it is that this particular situation may not have arisen. It may well be that the particular circumstances of this case were not in the contemplation of the legislature certainly in 1872 and probably not in 1910, and that in the ordinary way persons applying for a licence to be attached to certain premises are persons applying for the licence for a public house and they are applying for a right to sell, supply and allow people to consume liquor in the rooms they have available. It goes without saying that in those circumstances they are going to apply for the right to sell liquor and allow its consumption in all the rooms which they have available. It is no part of their business and no part of their interest to have rooms available for the accommodation of the public if they are not rooms in which intoxicating liquor can be sold or at least consumed, and that I think is the answer to counsel's argument. Here there is a different situation. The premises are owned by a local authority who have decided that as part of the amenities which it is their duty to offer to the public they should be in a position to sell liquor in a restaurant to persons who wish to have a meal there. They have in addition two other rooms available for the accommodation of the public, but those are not rooms in which necessarily they wish to sell liquor or in which they invite or wish people to consume liquor. Having paid great attention to the argument of counsel and having heard the observations of counsel for the confirming committee, I have no doubt myself in coming to the conclusion that the proper construction of the words " accommodation of the public " in s. 32 (1) (a) is the construction which is put on those words by the applicant, and that in those circumstances this application for mandamus should be granted.

PILCHER, J.: I agree, and my Lord has expressed so fully the reasons which also actuate me in coming to the same conclusion that I do not feel it necessary to add anything.

DONOVAN, J.: This is an application for an order of mandamus addressed to the Middlesex County Confirming and Compensation Committee asking that they shall be directed to hear and determine an application for a licence which was granted by the Willesden licensing justices in respect of premises known as

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* By the proviso to s. 32 (1) premises are not disqualified for receiving a justices' on-licence that does not authorise the sale of spirits if the premises contain in addition to the rooms occupied by the inmates at least one room for the accommodation of the public and are not below a specified annual value.

Dollis Hill House in Gladstone Park. That licence was granted by the justices A
on Feb. 3, 1956, but the confirming committee refused to confirm it on Apr. 27, 1956, on the ground that it was void. They held that it was void because of a restriction contained in the licence, to wit:

> " That intoxicating liquor shall at all times be served only in the upstairs suite of rooms, comprising restaurant, open terrace and service room and B
> only with a bona fide meal . . ."

save at certain functions. It is admitted that this means in effect that liquor shall be served in only one room, the restaurant, because the terrace is not a room and the service room is a room where it would not be served anyway. So, said the confirming committee, the licence is void under s. 32 (1) (a) of the Licensing C
Act, 1953, which provides that premises shall be disqualified from obtaining a licence

> " if they do not contain, in addition to the rooms occupied by the inmates, at least two rooms for the accommodation of the public . . . "

It is admitted, however, that the premises in question, Dollis Hill House, do D
contain more than two rooms or two rooms at least for the accommodation of the public. Why, then, are they disqualified from receiving this licence ? Counsel for the Licensed Victuallers' Protection Society answered at first, that two rooms " for the accommodation of the public " meant on the true construction of those words, two rooms in which alcoholic liquor might be sold and consumed. He later modified that by saying that it meant two rooms in which E
alcoholic liquor might be consumed, and that that was not true of this case. The Licensing Act, 1953, s. 32 (1) (a), however, does not say that it is two rooms in which alcoholic liquor may be consumed, nor is that construction, which I think is so oddly at variance with the words used, to be necessarily implied from the policy of the legislature as we were invited to find. So far as policy can be deduced from the history of this section and the previous enactments, it seems F
to have been the policy to get rid of the one room drinking den at least so far as spirits are concerned; but that object is achieved if there are other rooms in the house into which the public may go. The legislature would not have to go further and say that in one at least of these other rooms drink must be consumed as well. Why should it ? If anything, that would seem to militate against the legislature's policy rather than to advance it. Again, if the objectors are right G
almost every railway refreshment room where alcoholic liquor is served must be operating today under a void licence. The legislature exempted railway refreshment rooms from the rule about minimum annual value for a licence but left them still under the necessity of providing two rooms at least for the accommodation of the public. Everybody knows that there are always two rooms at least available for the accommodation of the public on railway stations, the refreshment room H
and the waiting room. Parliament had this knowledge like everybody else, and it passed the section and must be taken to have known that drink was consumed in the refreshment room only and not in the waiting room, and yet when dealing with railway premises in s. 32 (4)* all that Parliament said in effect was that the rule about minimum annual value shall not apply but, like everywhere else, there shall be two rooms at least for the accommodation of the public.

It is said that there is no authority in favour of the construction of s. 32 which I
is advanced by the objectors. That does not surprise me. It is said, further, that everyone has hitherto assumed that the section meant that there must be at least two rooms in which alcoholic liquor is sold and consumed or at least two rooms in which it is consumed. Frankly, that does surprise me on the language of the section itself, and indeed one asks at once: What about railway refreshment rooms ? And to that question nobody knows the answer. As a matter of plain

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* See p. 923, letter H, ante, for the terms of s. 32 (4).

A English, and we have to put the ordinary everyday meaning on these words unless the contrary appears, the words mean two rooms for the accommodation of the public, that is, where the public may seek and find accommodation. The argument that it means at least two rooms where alcoholic liquor may be served and drunk conflicts not only with the plain meaning to be placed on the words but the inferences to be drawn from the wording of s. 12 and s. 134 of the B Licensing Act, 1953*, and both those sections distinguish in terms between rooms in licensed premises where liquor may be sold and served and other rooms in the same premises. It is probably true in most cases that the rooms in licensed premises available for the accommodation of the public are also those rooms where liquor can be sold, but nothing in the section expressly requires that this must be the state of affairs and no implication to that effect is, in my view, C necessary. In Dollis Hill House there are at least two rooms for the accommodation of the public, interpreting that expression in the sense which I have indicated, and, giving the words of the Act their plain and ordinary meaning, I think that the confirming committee were wrong, and I agree that this rule should be made absolute.

Order for mandamus to issue.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Willesden Borough Council (for the applicants); *J. E. Lickfold & Sons* (for the Harrow, Willesden and District Licensed Victuallers' and Beer Retailers' Trade Protection Society); *Kenneth Goodacre* (for the Middlesex County Confirming and Compensation Committee).

[*Reported by* A. P. PRINGLE, ESQ., *Barrister-at-Law.*]

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* Section 12 reads: "Power to require structural alterations on renewal of on-licence.—(1) On renewing a justices' on-licence the licensing justices may order that, within a time fixed by the order, such structural alterations shall be made in the part of the premises where intoxicating liquor is sold or consumed as they think reasonably necessary to secure the proper conduct of the business." Section 134 reads: "Consent of licensing justices required for certain alterations to licensed premises.—(1) No alteration shall be made to premises for which a justices' on-licence is in force if the alteration—(a) gives increased facilities for drinking, or (b) conceals from observation any part of the premises used for drinking, or (c) affects the communication between the part of the premises where intoxicating liquor is sold and any other part of the premises or any street or other public way, unless the licensing justices have consented to the alteration at their general annual licensing meeting or at a transfer sessions, or the alteration is required by order of some lawful authority."

PRACTICE DIRECTION.

Bankruptcy—Judgment summons—High Court—Applications for leave to issue judgment summons in High Court must show cause why summons should not issue in county court—Default summonses under Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5, *unaffected—Bankruptcy Rules,* 1952 (*S.I.* 1952 *No.* 2113), *r.* 378.

Section 5 of the Debtors Act, 1869, enables any court to issue committal orders in respect of any debt or instalment of any debt due from the debtor in pursuance of any order of that or any other competent court.

The High Court and county court can thus exercise concurrent jurisdiction.

In the High Court, save in respect of any order or judgment made or given in a matrimonial cause, this jurisdiction is exercised by any one of the judges to whom bankruptcy business is assigned (at present HARMAN, J., DANCKWERTS, J., and UPJOHN, J.).

Rule 378 of the Bankruptcy Rules, 1952, provides that (save as aforesaid) no judgment summons shall be issued without leave of the judge. The practice has been to give leave ex parte without any affidavit in support of the application where the amount due exceeds £50.

In the Final Report of the Committee on Supreme Court Practice and Procedure (1953 Cmd. 8878) it was recommended that all judgment summonses whether on High Court or county court judgments should be issued and heard in the county court unless a judge of the High Court should otherwise direct on an application to proceed in the High Court.

It is now proposed to give effect to this recommendation.

The judges of the High Court exercising bankruptcy jurisdiction have therefore decided that in future all applications for leave to issue a judgment summons in the High Court made after July 31, 1956 (subject as provided below), must be accompanied by an affidavit showing cause why the summons should issue in the High Court rather than the county court.

Such application will in the first place be considered by the judge alone but he may require the applicant or his solicitors or counsel to attend to support his application.

Notwithstanding this direction default summonses on orders made under s. 5 of the Debtors Act in the High Court before Aug. 1, 1956, will be issued as heretofore.

Nothing in this Practice Direction is intended to affect the practice and procedure in cases falling within the Matrimonial Causes (Judgment Summonses) Rules, 1952.

By direction of the judges exercising bankruptcy jurisdiction.

J. T. P. WILSON,
Chief Bankruptcy Registrar.

July 11, 1956.

[END OF VOLUME TWO.]

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